IN THE SUPREME COURT OF OHIO

CASE NO. _____

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

MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFF-APPELLANTS, ANGEL L. SANTOS, *et al*.

W. Craig Bashein, Esq. (#0034591)
BASHEIN & BASHEIN CO. L.P.A.
1200 Illuminating Building
55 Public Square
Cleveland, Ohio 44113-1937
(216) 771-3239
Fax: (216) 589-0764
cbashein@basheinlaw.com

Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS CO., L.P.A.
1200 Illuminating Building
55 Public Square
Cleveland, Ohio 44113-1937
(216) 344-9393
Fax: (216) 589-0764
pwf@pwfco.com

Patrick T. Murphy, Esq. (#0034392)
Patrick J. Perotti (#0005481)
DWORKEN & BERNSTEIN CO., L.P.A.
60 South Park Place
Painesville, Ohio 44077
(440) 352-3391/946-7656

Ronald J. Maurer, Esq. (#0063391)
John Smalley, Esq. (#0029540)
Carmine Garofalo, Esq. (#005818)
DYER, GAROFALO, MANN & SCHULTZ
137 North Main Street
Dayton, Ohio 45402
(937) 824-8630

Attorneys for Plaintiff-Appellants

TABLE OF CONTENTS

STATEMENT OF PUBLIC AND GREAT GENERAL INTEREST

This case presents this Court with the opportunity to resolve a conflict that has arisen between the lower appellate tribunals as to whether common pleas judges may exercise jurisdiction over civil actions seeking purely equitable, injunctive, and declaratory relief against the State of Ohio, even though the relief sought includes disgorgement of improperly collected funds. Plaintiff-Appellants, Angel L. Santos, *et al.*, are seeking the return of the claims totaling approximately Fifty Million Dollars ($50,000,000.00) that were paid to Defendant-Appellees, Administrator, Bureau of Workers' Compensation and State of Ohio (hereinafter collectively "The Bureau"), under the auspice of the Workers' Compensation Subrogation Statute, *R.C. §4123.931*. This legislation was held by this Court to be unconstitutional in *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 2001-Ohio-109, 748 N.E.2d 1111. At that point in time, the instant class action had been pending for over a year. As far as the undersigned attorneys are aware, this proceeding thus had been at the forefront of the effort to force the return of these funds to thousands of Workers' Compensation Claimants.

The Eighth District held in this case that only the Court of Claims has jurisdiction over proceedings that may require the State of Ohio to return funds to the Plaintiffs, regardless of how the claims for relief are styled. See *Exhibit A*, appended hereto. This surprising ruling was directly contrary to the General Assembly's specific decree that the Court of Claims Act does not affect those actions "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)*. A conflict of law was created as the Tenth District had recognized in *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 B*, that a common pleas judge could order the Bureau to

return funds wrongfully withheld under the authority of an invalid regulation. Similarly, the Sixth District had concluded that improperly collected fees could be disgorged from the State through a class action seeking equitable relief in a common pleas court. *Judy v. Bureau of Motor Vehicles*, 6th Dist. No. L-01-1200, 2001-Ohio-2909, 2001 W.L. 1664295, copy appended hereto as *Exhibit C*. A glaring dispute thus exists on this issue between the intermediate appellate courts.

This appeal presents a fundamentally important issue of law that will profoundly affect tens of thousands of Ohio citizens, countless businesses, and every state agency and department. The state government is routinely sued over allegations that funds have been improperly collected or withheld in violation of penal, tax, and numerous other administrative laws and regulations. As matters now stand, such lawsuits can be pursued in the common pleas courts in the Sixth and Tenth Districts, but not in the Eighth District. The validity of such actions in the remaining judicial districts in unclear. This Court should take this opportunity to resolve this dichotomy and establish a fair and uniform interpretation of the exclusive jurisdiction of the Ohio Court of Claims.

STATEMENT OF CASE AND FACTS

A. NATURE OF THE CASE.

In this class action proceeding, Plaintiff is seeking, on behalf of himself and all other Ohio workers who have paid subrogation claims pursuant to *R.C. §4123.931*, to require Defendants 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 in one of the many affirmative defenses, the Bureau did not raise any objections to

jurisdiction for almost two (2) years. Judge Burt W. Griffin then granted class certification while the Bureau's belated Motion to Dismiss was still pending. In the Bureau's ensuing interlocutory appeal, the Eighth District nevertheless 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 A.*

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 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

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

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. 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.

On June 27, 2001, the Ohio Supreme Court issued its ruling in *Holeton*, 92 Ohio St.3d 115, and held that *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 this lawsuit belonged in the Court of Claims. Although the Complaint had been pending for roughly twenty-two (22) months, 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 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 has not refunded any of the subrogation claims collected under the unconstitutional statute. Moreover, the Bureau did not withdraw 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. 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 A, ¶ 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.

Given the substantial issues of public and great general interest at stake in these proceedings, Plaintiffs hereby request that this Court accept jurisdiction over this action.

ARGUMENT

PROPOSITION OF LAW:

> **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, supra*. While the instant action was pending in the trial court, the Sixth District issued the decision in *Judy, supra*, 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 compelling 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.

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 Eighth District's ruling ameliorates 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 D; Barbash vs. Barbash* (Fla. 1952), 58 So.2d 168, 171 (Hobson, J, concurring), copy appended hereto as *Exhibit E.* As in most American jurisdictions, Ohio abolished the division between courts of law

[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.

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 Woods Condo. Unit Owners' Assn.* (August 6, 1986), 1st Dist. No. C-850762, 1986 W.L. 8522, p. 2, copy appended hereto as *Exhibit F*. 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 G*; *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 distinction that has been drawn between legal and equitable actions appears in 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).* For whatever reasons, the legislature has thus maintained the distinction between legal and equitable remedies for purposes of the exclusive jurisdiction of the Court of Claims.

E. RESTITUTION AS AN EQUITABLE REMEDY.

Contrary to the Eighth District's logic, a complaint seeking "restitution" is not the equivalent of an action for money damages that may only be brought in the Court of Claims. 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 H*. 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 has 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 I.* 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 J; Kalasunas vs. Brydle* (June 18, 1987), 8th Dist. No. 52149, 1987 W.L. 13012, copy appended hereto as *Exhibit K.*

In essence, 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 A, ¶ 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 Court forcefully rejected the Eighth District's extreme position that a cause of action that can result in a monetary award can 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).

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)*.

The U.S. Supreme Court's sound analysis is consistent with *Henley Health Care, supra*. In that case, the Tenth District had also recognized that a claim for restitution is equitable when contractual rights are not 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 *Ohio Hosp. Assn.*, 62 Ohio St.3d 97, the common pleas court could exercise jurisdiction over the dispute. Oddly, the Eighth District's contrary ruling contains no reference to either *Henley Health Care, supra* or *Judy, supra*.

F. BASIS FOR THE UNDERLYING RULING.

In the proceedings below, the Bureau relied heavily upon judicial decisions 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 L.* Other rulings cited by the Bureau involved complaints in which the plaintiffs had explicitly raised legal claims for monetary damages. *Ohio Hosp. Assn.* 62 Ohio St.3d at 98, 579 N.E.2d at 696; *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 formed the basis of the Eighth District's decision. *Exhibit A, ¶ 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.

G. STATUS OF OHIO SUPREME COURT RULINGS.

Although no decisions emanating from this Court appear to be directly on point, one post-S.B. 344 ruling lends compelling support for Plaintiffs' position. In *Ohio Hosp. Assn.*, 62 Ohio St.3d at 98, 579 N.E.2d at 696, several hospitals filed a lawsuit 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 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.

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 M*.

H. IMPACT OF REQUEST FOR ATTORNEY FEES.

On a final note, the mere fact that Plaintiffs have requested attorney fees will 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 but would be assessed from 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 N*. Indeed, such recoveries are founded squarely upon principals 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

The government enacts a statute or administrative rule and uses it to collect millions of dollars from taxpayers. The legislation is then declared invalid, and a suit is brought seeking to require the government to disgorge the unlawfully obtained funds to the taxpayers. Suits like this are not infrequent and they affect potentially hundreds of thousands of citizens throughout the State.

But what court has jurisdiction over these claims? May they be brought in the Court of Common Pleas, or are they within the exclusive jurisdiction of the Ohio Court of Claims?

In *Ohio Hosp. Assn.*, 62 Ohio St.3d 97, this Court strongly suggested (but did not decide) that such actions are proceedings in equity, not law, and therefore within the general jurisdiction of the common pleas court. The Franklin and Lucas County Courts of Appeal have held that such suits are not within the Court of Claims exclusive jurisdiction and may be brought in the Common Pleas Court. *Henley Health Care, supra*, and *Judy, supra*.

However, the Court of Appeals for our largest district, Cuyahoga County, has ruled squarely the opposite, holding that they may be brought strictly in the Court of Claims. *Exhibit A.* This direct inconsistency leaves the bench and bar at an unreasonable impasse, not knowing where these cases can be brought. It also constitutionally prejudices our citizens, denying them their right to jury trial by relegating them (in some counties) to bring suit only in a Court of Claims which does not allow a jury.

It is respectively requested that this Court certify this matter and answer these fundamentally important questions.

Respectfully submitted,

W. Craig Bashein, Esq. (#0034591)
BASHEIN & BASHEIN CO. L.P.A.

Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS CO., L.P.A.

Patrick T. Murphy, Esq. (#0034392)
Patrick J. Perotti, Esq. (#0005481)
DWORKEN & BERNSTEIN CO., L.P.A.

Ronald J. Maurer, Esq. (#0063391)
John Smalley, Esq. (#0029540)
Carmine Garofalo, Esq. (#005818)
DYER, GAROFALO, MANN & SCHULTZ

Attorneys for Plaintiff-Appellants,
Angel L. Santos, *et al.*

CERTIFICATE OF SERVICE

A copy of the foregoing **Memorandum** 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 30th day of July, 2002.

W. Craig Bashein, Esq. (#0034591)
BASHEIN & BASHEIN CO.

Attorney for Plaintiff-Appellant,
Angel L. Santos, *et al.*