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

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

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REPLY

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.

The Brief of Appellee Administrator, Ohio Bureau of Workers' Compensation (hereinafter the "Bureau"), that was filed on April 9, 2003 (hereinafter "Appellees' Brief"), begins by proclaiming that "Ohio law unequivocally provides" for immunity in this instance and Plaintiff-Appellants, Angel L. Santos, *et al.*, "cannot seriously contest the Court of Claims' jurisdiction over [their] request for monetary relief". *Id., pp. 1-2.* These are strong words, particularly given that the Bureau litigated this class action in the Cuyahoga County Court of Common Pleas for almost two (2) years before the Motion to Dismiss on the grounds of sovereign immunity was filed on August 10, 2001.[1] As will be developed further herein, the Bureau's initial decision to forego this defense was entirely appropriate under the circumstances.

Contrary to the assertions that are now being made in its Brief, "the same interests of purported members of the *Santos* class" are <u>not</u> being pursued in the Court of Claims action styled *Gabbard v. Ohio Bur. of Workers' Comp.*, Case No. 2001-07459. *Appellees' Brief, p. 2.*

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[1] In an attempt to obfuscate the considerable effort that went into the underlying litigation during its first two (2) years, the Bureau has represented to this Court that: "In *Santos*, there has been no discovery". *Appellees' Brief, p.2.* The truth is that Plaintiffs were able to independently secure the information they needed to support their claims and an agreement was reached during the case management conference of February 8, 2000 to address the preliminary legal issues through summary judgment before conducting any formal discovery. See, *Plaintiffs' Motion for Leave to Join Additional Parties and File First Amended Complaint of November 2, 2001, p. 3.* After Judge Griffin indicated on September 5, 2001 that he was going to grant class certification, Plaintiffs served their First Set of Interrogatories upon the Bureau eight (8) days later. The Bureau is attempting to take advantage of the fact that this discovery request is not part of this Court's record since it could not be filed pursuant to *Civ. R. 5(D).*

More significantly, the theories of relief that Plaintiffs' are pursuing in this action are purely equitable and declaratory and have not been "mislabeled" to avoid sovereign immunity. *Id., p. 7.* Finally, the Bureau's arguments on the merits of this litigation are not only incorrect, but also premature and extraneous to the limited scope of this interlocutory appeal. *Id., pp. 17-19.* Each of these three (3) general topics will be addressed separately herein.

A. IMPLICATIONS OF THE *GABBARD* LITIGATION.

Throughout its Brief, the Bureau continues to assure this Court that the "*Santos* class is already being afforded its day in court through the Court of Claims." *Appellees' Brief, p. 8.* This had been the agency's primary position in its unsuccessful efforts to dissuade this Court from accepting jurisdiction over these proceedings. *Appellees' Administrator, Ohio of Workers' Compensation, Memorandum in Response to Memorandum in Support of Jurisdiction, pp. 1-2, 13-15.* The ruling that was rendered by the Eighth District Court of Appeals in the proceedings below violates Ohio Supreme Court precedents and conflicts with other appellate decisions. This novel opinion is already being cited as authority for dismissing other class actions against the state. *Cristino v. Administrator, Ohio Bur. of Workers' Comp.*, 8th Dist. No. 80619, 2003-Ohio-766, 2003 W.L. 361283, copy appended hereto as *Exhibit A.* Rather than terminate these proceedings and leave the misguided decision intact (as the Bureau seems to be requesting), this Court should proceed to clarify the law in this regard.

The Bureau's representations as to the substance of the *Gabbard* litigation cannot, of course, be confirmed in the limited record before this Court. *McAuley v. Smith,* 82 Ohio St.3d 393, 396, 1998-Ohio-402, 696 N.E.2d 572. Even if this Court is inclined to consider such unsubstantiated and extraneous matters, the litigation that is presently pending in the Court of Claims is <u>not</u> a substitute for the instant class action. This case was filed on October 15, 1999

and is founded upon the theory that equity requires the Bureau to return subrogation funds that had been collected under an unconstitutional statute, *R.C. §4123.91*. When this Court thereafter struck down the statute on June 27, 2001 in *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 2001-Ohio-109, 748 N.E.2d 1111, the *Gabbard* action was filed in the Court of Claims. Legal claims for damages (*i.e.* unconstitutional taking of property and conversion) were alleged therein which were plainly subject to sovereign immunity under *R.C. §2743.03(A)*. The *Gabbard* action was thus commenced solely as a precaution and to permit legal remedies to be pursued in the event the equitable and declaratory claims in *Santos* are unsuccessful. Since they involve different causes of action and theories of relief, the result in *Gabbard* will not be dispositive of the *Santos* litigation and *vice versa.*

The Bureau's manipulation of the *Gabbard* action is a matter of record before this Court and has not been disputed in Appellees' Brief. In the proceedings below, the state's attorneys convinced Judge Burt W. Griffin to postpone his ruling upon the hotly contested Motion for Class Certification without informing him that the Bureau intended to consent to class certification in the Court of Claims in *Gabbard. Brief on the Merits of Plaintiff-Appellants, Angel L. Santos, et al., filed February 18, 2003 (hereinafter "Appellants' Brief"), pp. 3-4.* By means of this ploy, the Bureau is now able to argue to this Court that: "In *Gabbard* **** the Court of Claims certified the class before the Cuyahoga County Common Pleas Court certified the *Santos* class." *Appellees' Brief, p. 2 & 8 (emphasis added).* The state apparently believes that *Gabbard* should take precedence in the Court of Claims even though the *Santos* Class Action Complaint was filed, served, and answered a year and a half earlier. It is the height of hypocrisy for the Bureau to accuse Plaintiffs of "forum shopping" in light of these transparent efforts to force the workers compensation subrogation issue into the friendly confines of the

Court of Claims. *Id., p. 8.*

B. PLAINTIFFS' EQUITABLE CLAIMS.

1. The parties' agree that labels are irrelevant in identifying the substance of the relief sought and determining whether sovereign immunity is applicable.

To its credit, the Bureau seems to be distancing itself from the Eighth District's overly simplified view that any action "seeking the return of money from the state" is subject to a "presumption" in favor of the exclusive jurisdiction of the Court of Claims. *Appellants' Brief, Exhibit C, ¶ 18.* It has been recognized that common pleas courts historically have been permitted to adjudicate claims against the state in appropriate instances notwithstanding their impact upon the treasury. *Henley Health Care v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 94APE08-1216, 1995 W.L. 92101, copy appended to Appellants' Brief as Exhibit D; *Judy v. Ohio Bur. of Motor Veh.*, 6th Dist. No. L-01-1200, 2001-Ohio-2909, 2001 W.L. 1664295, copy appended to Appellants' Brief as Exhibit E. Adoption of the appellate court's position would require *Ohio Hosp. Assn. v. Ohio Dept. of Human Servs.* (1991), 62 Ohio St.3d 97, 104-105, 579 N.E.2d 695, to be overruled. In that action, it was specifically recognized that "sovereign immunity is not applicable" because an "order to reimburse Medicaid providers for the amounts unlawfully withheld is not an award of money damages, but equitable relief." *Id.* The Bureau thus seems to be conceding that a return of "money" can be sought in a common pleas court so long as only injunctive, declaratory, and equitable relief is being pursued within the meaning of *R.C. §2743.03(A)(2).*

The parties' dispute thus boils down to whether Plaintiffs' are seeking any relief traditionally available at law (*i.e.*, "damages") that falls outside the exceptions set forth in *R.C. §2743.03(A)(2).* Plaintiffs fully agree with the Bureau that mere labels cannot serve to transform

a legal remedy into an equitable one. *Ohio v. Madeline Marie Nursing Homes* (6th Cir. 1982), 694 F.2d 449, 459. In recognition of this sound principle, Plaintiffs cited numerous authorities on this issue, all of which hold (in direct conflict with the Eighth District's decision) that the disgorgement of wrongfully withheld funds is in substance an equitable remedy. *Appellants' Brief, pp. 9-15*.

While labels are undoubtedly irrelevant, it must be remembered that Plaintiffs are still the "masters" of their Complaint and can select the claims that are being pursued as they see fit. *Appellant's Brief, p. 7*. In this instance, their intentions could not be more clear. The Class Action Complaint that was filed on October 15, 1999 is devoid - by design – of any references to "damages".[2] Fully appreciating the limited relief sought, the Bureau did not file a motion to dismiss on sovereign immunity in the months that followed.[3] Any doubt that could have possibly remained was eliminated by the Conclusion to Plaintiffs Cross-Motion for Summary Judgment of June 9, 2000 which requested only declaratory and injunctive relief as well as the "return of all funds collected as a result of [the Bureau's] misapplication and improper enforcement of these statutes." *Id., p. 40.* The proposed First Amended Complaint that was filed on November 2, 2001 also sought "full restitution for all subrogation claims paid" in addition to

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[2] Had the Bureau promptly taken issue with the relief sought in the Complaint, Plaintiffs could have amended the pleadings to rectify any concerns. *Civ. R. 15(A).* This Court therefore should reject any suggestion that this pleading is somehow "unclear". Moreover, it must be remembered that plaintiffs are not required to include their "legal theory of recovery" in the complaint. *Illinois Controls v. Langham*, 70 Ohio St.3d 512, 526, 1994-Ohio-99, 639 N.E.2d. 771. For purposes of sovereign immunity, all that matters is that no remedy is expressly requested that exceeds the exceptions set forth in *R.C. §2743.03(A)(2)*.

[3] Indeed, the Bureau's actions in the proceedings below were completely inconsistent with their current position that sovereign immunity applied. In response to the original Class Action Complaint, a counterclaim was interposed on November 18, 1999. The Bureau thereafter moved for summary judgment on the merits on May 11, 2000 and submitted extensive briefing on the issue. Plaintiffs' request for class certification was opposed in a Memorandum that was tendered on August 3, 2000. The Bureau did not begin to earnestly argue that this action belonged in the Court of Claims until after the *Holeton* decision was released.

"any other appropriate injunctive, equitable, or declaratory relief."[4] *Id., p. 7.* In both form and substance, this action has been consciously and scrupulously limited to remedies that common pleas courts are statutorily authorized to impose against the state.

> 2. Given the nature of the relief sought, the causes of action that Plaintiffs are pursuing can only be viewed as "equitable" within the meaning of *R.C. §2743.03(A)(2)*.

Notwithstanding Plaintiffs' unfettered right to chose the causes of action they intend to pursue, the Bureau has gone to great lengths in an effort to establish that legal remedies are really involved. Plaintiffs' theory of relief is much simpler than the Bureau would have this Court believe. The state is presently holding approximately Fifty Million Dollars ($50,000,000.00) in subrogation funds that were collected under the authority of *R.C. §4123.931* before the statute was held to be unconstitutional in *Holeton,* 92 Ohio St.3d 115. The sole objective of this class action proceeding is to return these funds to the injured workers who paid them. No claim is being made that the Bureau committed some "tortious" act, violated a "contract", or caused Plaintiffs to suffer "damages" beyond the unlawful retention of their money. While any examination of the merits of this claim at this time would be premature, it is evident at this stage of the proceedings that Plaintiffs are only seeking equitable and declaratory relief.

The Bureau has remarked that the funds in question were originally paid as damages by the third-party tortfeasors either by settlement or judgment. *Appellees' Brief, p. 18.* While this representation is undoubtedly correct, it is wholly irrelevant. The issue of whether sovereign immunity applies requires an examination of the actual claims that have been raised by Plaintiffs against the Bureau. It hardly matters that Plaintiffs' earlier actions against the tortfeasors sought remedies at law. Those claims have all been adjudicated or settled and no longer exist.

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[4] The First Amended Complaint was appended to Plaintiffs' Motion for Leave to Join Additional Parties and File First Amended Complaint of November 2, 2001. That application is still pending before the trial court.

The Bureau believes it is significant that legal defenses may be asserted such as "the contractual issue of whether the settlement agreements with the BWC remain valid despite *Holeton*" and "the retroactive recoverability of damages obtained by the BWC through a monetary judgment".[5] *Appellees' Brief, pp. 12-13.* No purely "legal" affirmative defenses have been raised, however, in the Answer and Cross-Claim that were served on November 17, 1999. More importantly, these defenses – if valid – will not require the state government to "pay damages". A proper analysis of the Bureau's Motion to Dismiss must focus solely upon the claims that have been brought against the government. See generally *Johnson v. Wilkinson* (4th Dist. 1992), 84 Ohio App.3d 509, 517-518, 617 N.E.2d 707, 713. As a general rule, the defendant's answer is irrelevant when dismissal is requested under *Civ. R. 12*. *Gironda v. Gill* (September 25, 1996), 9th Dist. No. 17710, 1996 W.L. 539173, p. 2, copy appended hereto as *Exhibit B*; *Grant v. Nationwide Mut. Ins. Co*. (May 8, 1997), U.S. Dist. Ct., S.D. Ohio, Case No. C-2-86-502, 1987 W.L. 108971, p. 1, copy appended hereto as *Exhibit C* (recognizing that court must focus solely on the complaint when addressing a motion to dismiss on the pleadings). The intent of the General Assembly would be frustrated if actions that fell with *R.C. §2743.03(A)(2)* could be forced into the Court of Claims simply by pleading a legal defense.

Another argument advanced by the Bureau is that any request for "a declaratory judgment that the sums purportedly withheld from the injured worker must be disgorged" is "purely statutory in nature and is an action at law." *Appellees' Brief, p.19, fn. 18*. Assuming, for the sake of argument, that this position is correct, it is difficult to discern how such reasoning supports the Bureau's cause. *R.C. §2743.03(A)(2)* specifically allows a common pleas judge to

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[5] Also, no authorities have been cited suggesting that these are valid defenses against an equitable claim for disgorgement of wrongfully withheld funds. *Appellees' Brief, pp. 12-13.* It would seem that these "contractual" arguments are appropriate, it at all, only with respect to the legal remedies that have been raised in the *Gabbard* action in the Court of Claims.

enter a "declaratory judgment" against the state even though such proceedings were created by statute.

The Bureau has gone so far as to theorize that while the obligation imposed against injured workers by *R.C. §4123.931* "is called 'subrogation,' the rights under that statute are essentially indemnity rights that are legal in nature." *Appellees' Brief, p. 14* (footnote omitted). It is difficult to believe that the Bureau is serious. It is hornbook law that a "contract of indemnity is an engagement to make good and hold another harmless from loss on some obligation that he has incurred or is about to incur to a third party" while "subrogation is the substitution of one person for another with reference to a lawful claim or right". 18 OHIO JURISPRUDENCE 3D (2002), Contribution, Indemnity, and Subrogation, Section 1. *R.C. §4123.931* would provide "indemnity rights" only if a form of insurance was being imposed between the Bureau and the injured workers, tortfeasors, or some other party. This Court as well as numerous others that have examined this enactment has correctly identified it as a "subrogation" statute. *Holeton*, 92 Ohio St.3d at 116; *Yoh v. Schlachter*, 6th Dist. No. WM-01-017, 2002-Ohio-3431, 2002 W.L. 1436033 ¶ 42, copy appended hereto as *Exhibit D*; *Walton v. Able Drywall Co.*, 2nd Dist. No. 18531, 2001-Ohio-1838, 2001 W.L. 1460928, copy appended hereto as *Exhibit E* (all describing *R.C. §4123.931* as a "subrogation statute"). Moreover, none of Plaintiffs' theories of relief were "created" by *R.C. §4123.931*. The Bureau cannot change the fact that Plaintiffs are only pursuing long-standing injunctive, declaratory and equitable remedies in this action, nothing more and nothing less.

3. The authorities cited by Plaintiffs in support of their Proposition of Law cannot be distinguished from the instant action.

By all appearances, the Bureau has been unable to locate a single case (other than the appellate decision below) holding that an action seeking the return of wrongfully withheld funds

is one of law. Instead, much of the agency's argument to this Court has been devoted to attempting to distinguish *Ohio Hosp. Ass'n*, 62 Ohio St.3d 97, *Henley Health Care*, *supra*, and *Judy*, *supra*. The Bureau has asserted over and over that those cases are different because they involve "simple reimbursement" but the instant class action does not. *Appellees' Brief, pp. 9-10, 12-13 & 15*. No authorities have been cited for the peculiar notion that a cause of action loses its equitable character once it becomes "complex".

As an example of the Bureau's nonsensical reasoning in this regard, it has been urged that:

> The claim at bar, unlike those in *Ohio Hosp. Assn*. and *Henley Health Care*, does not involve a request for reimbursement simply for sums certain wrongfully paid by the plaintiff class on account of the invalidation of an administrative rule.

Appellees' Brief, p. 12. Apart from the fact that an invalid statute is involved instead of "an administrative rule", this is exactly what Plaintiffs are seeking in this case. Fixed and readily calculable subrogation claims which were paid by the class members to the Bureau prior to *Holeton* are now the target of this recovery effort. The situation is exactly the same as was the case in *Henley Health Care* and *Judy*.

The Bureau has further theorized that:

> The amount paid to the BWC was not necessarily money that would have gone to the injured worker, but for the BWC's subrogation right. The unknown fact in such settlements is whether the tortfeasor pays more in the settlement due to the presence of the subrogation interest than in would have paid. If that is the case, then the money paid to the BWC is not out of the injured worker's pocket and, thus, not simple reimbursement.

Appellees' Brief, p.13. This is absurd. Prior to *Holeton, R.C. §4123.931* permitted the Bureau – and only the Bureau – to recover some or all of a third party settlement or judgment that had been secured by the injured worker – and only the injured worker. This Court held that the

statute was unconstitutional precisely because of the improper reduction of the claimant's tort recovery. *Holeton*, 92 Ohio St.3d at 126-127. The "tortfeasor" was never a player in this transfer of funds from the injured worker to the state. The Bureau's concern over "unknown facts" is thus unfounded.

There is no suggestion whatsoever in *Ohio Hosp. Ass'n,* 62 Ohio St.3d 97, *Henley Health Care, supra*, or *Judy, supra* that only "simple reimbursement" can be viewed as equitable. In each instance a claim was examined in which the plaintiff was attempting to force the state to return funds that were, it was alleged, being unjustly withheld. This is precisely the relief that Plaintiffs are seeking in the case at bar. In all three (3) decisions, it was concluded that the remedy sought was strictly "equitable" in nature. *Ohio Hosp. Assn.*, 62 Ohio St.3d at 104-105; *Henley Health Care, supra*, at 3; *Judy, supra* at 2. Apart from one isolated reference to *Ohio Hosp. Assn.*, the Eighth District did not address – let alone distinguish – these on-point decisions. *Appellants' Brief, Exhibit C.* The ruling that was issued in the proceedings below cannot be reconciled with the prior holdings of this Court and the Sixth and Tenth Districts.

In accordance with the precedents, even the Eighth District has held that Plaintiffs are permitted to seek "money" from the state outside the Court of Claims in *Oakar v. Ohio Dept. of Mental Retardation* (8th Dist. 1993), 88 Ohio App.3d 332, 623 N.E.2d 1296; see also, *Bee v. University of Akron*, 9th Dist. No. 21081, 2002-Ohio-5776, 2002 W.L. 31387127, copy appended to Appellant's Brief as Exhibit P. In a footnote, the Bureau maintains that these decisions are distinguishable because "Santos has paid no monies to the State, and is seeking restitution as his measure of damages." *Appellees' Brief, p. 16 fn. 15*. This logic is puzzling, as the class members have certainly "paid" roughly Fifty Million Dollars ($50,000.00) in subrogation claims

to the state.[6] Just as in *Oakar*, 88 Ohio App.3d 332 (as well as *Ohio Hosp. Ass'n.*, 62 Ohio St.3d at 104, and *Judy, supra*), they are now seeking a refund of these improper payments. It makes no difference whether the remedy is described as a refund (a common term) or restitution (a legal term). See *Whitworth Bros. Storage Co. v. Central States Southeast & Southwest Areas Pension Fund* (6th Cir. 1993), 982 F.2d 1006, 1017-1018 (permitting "refund" through equitable principles of "restitution").

As in the Court of Appeals, the Bureau continues to rely heavily upon outdated authorities. For example, no less than four (4) citations have been made to *Friedman v. Johnson* (1985), 18 Ohio St.3d 85, 86, 480 N.E.2d 82. *Appellees' Brief, pp. 6-8.* It has been tacitly conceded, however, that this Court was examining the pre-1988 S.B. 344 version of *R.C. §2743.03* in that case. *Appellants' Brief, p. 15.* The filing of Plaintiffs' equitable claims in the Cuyahoga County Court of Common Pleas was thus in strict accordance with the great weight of all recent authorities on the subject.

4. Plaintiffs' request for legal fees and litigation expenses in this class action proceeding are also equitable in nature.

As previously observed by Plaintiffs, this Court had recognized in an early class action proceeding that a trial judge "exercising equitable jurisdiction" had discretionary authority to

[6] The Bureau's argument in this regard is based upon a half-truth. The original Named Plaintiff, Angel L. Santos, has not actually "paid" anything because the subrogated funds are presently being held in his attorney's trust account pursuant to an agreement with the Bureau. As a matter of record, the Bureau is still pursuing a Counterclaim (improperly designated as a "Cross-Claim") against him for One Hundred Twenty-One Thousand Nine Hundred Forty-One Dollars and Three Cents ($121,941.03) in the proceedings below. Although a Notice of Concession was issued shortly after the *Holeton*, 92 Ohio St.3d 115, decision was published, a notice of dismissal was never submitted in accordance with *Civ. R. 41* and Santos' counsel certainly was not advised that he could release the funds to his client. Santos thus has been deprived of his full third-party recovery and holds a real and substantial stake in these proceedings. At the very least, he is entitled to a declaratory judgment that the funds in escrow rightfully belong to him. *Appellees' Brief, p. 19, fn. 18.* The remaining class members have indeed "paid" millions of dollars to the state and have a right to seek a refund.

award "reasonable attorney fees, technically known as costs between solicitor and client, to be paid out of the fund under the control of the court." *Smith v. Kroeger* (1941), 138 Ohio St. 508, 37 N.E.2d 45, paragraph three of the syllabus. The Bureau has nevertheless cited *Galmish v. Cicchini*, 90 Ohio St.3d 22, 2000-Ohio-7, 734 N.E.2d 782, and *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994-Ohio-461, 644 N.E.2d 397, for the proposition that "the Ohio Supreme Court treated an award of attorney fees as a compensatory damage award." *Appellees' Brief, p. 19*. Those recoveries were "compensatory" because punitive damages were sought. Plaintiffs' Complaint and proposed First Amended Complaint in the case *sub judice* are devoid of any demand for such exemplary relief.

The Bureau's reliance *Tiemann v. University of Cincinnati* (10th Dist. 1998), 127 Ohio App.3d 312, 712 N.E.2d 1258, is also seriously misplaced. As observed in a concurring opinion, the plaintiffs had indeed demanded "attorney fees" in their prayer. *Id.*, at 327 (Lazarus, J., concurring). This was not significant to the majority, however, as they found that the allegations that state had caused harm, references to construction costs of Sixty-Eight Million Dollars ($68,000,000.00), and requests for "any further relief" meant that the action could not be viewed as strictly equitable. *Id.* at 318. In his concurring opinion, Judge Lazarus concluded that the claim was not one for "money damages" at all. *Id. at 327*.

In stark contrast to *Tiemann*, the Complaint and the proposed First Amended Complaint in the instant case do not contain any damage claims or requests for "any further relief".[7] *Class Action Complaint for Declaratory and Injunctive Relief filed October 15, 1999, p. 10; First Amended Complaint for Equitable, Declaratory and Injunctive Relief filed November 2, 2001, p.7. Tiemann*, 127 Ohio App.3d 312, is thus entirely consistent with the view that an award of

[7] The proposed First Amended Complaint concludes by requesting "any other appropriate injunctive, equitable, or declaratory relief" and thus still fits within *R.C. §2743.03(A)(2). Id., p. 7.*

attorney fees and litigation expenses in a class action proceeding is purely equitable. It is safe to assume that if the *Tiemann* majority had felt that such a request in a prayer was sufficient to implicate the court of claim's exclusive jurisdiction, they would have said so. [8]

C. THE BUREAU'S EXTRANEOUS ARGUMENTS.

The Eighth District based its ruling solely on the issue of sovereign immunity, and this Court should confine its review accordingly. *Appellants' Brief, Exhibit C.* A large portion of the Bureau's analysis is nevertheless devoted to extraneous matters that have no bearing upon this issue. For example, they maintain that the original Named Plaintiff, Angel L. Santos is not a proper class representative because "no money was paid to the BWC" by him. *Appellees' Brief, pp. 3 & 17.* This spurious argument was previously rejected by Judge Griffin when he granted class certification to Plaintiffs on September 18, 2001. Despite the Bureau's strenuous argumentation, the Eighth District did not disturb this ruling. Since the Bureau did not seek further review of this determination in this Court, the grant of class certification should not be disturbed.[9]

The Bureau's remaining arguments on the merits address issues that can only be resolved upon summary judgment or through a trial.[10] For example, it has been asserted that: "In many, if not most, of the cases where the BWC asserted its subrogation rights, the injured worker and

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[8] For this reason, the two (2) page decision that was rendered in *Turner v. Ohio Bur. of Workers' Comp.* (September 25, 2001), Franklin C.P. No. 00-CVD-03-2487, copy appended to Appellees' Brief as Exhibit M, p. A-48 is legally flawed.

[9] Even if this Court were inclined to explore this issue and ultimately agreed with the Bureau, a remand would simply be in order to permit the trial judge to exercise his discretionary authority to modify the class to cure any deficiencies. See generally *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 2000-Ohio-397, 727 N.E.2d 1265. It should be noted that Plaintiffs' Motion for Leave to Join Additional Parties and File First Amended Complaint is still pending. The revised pleading will, if approved, join several additional Named Plaintiffs to the class.

[10] Although the parties submitted motions for summary judgment to Judge Griffin, this interlocutory appeal was hurriedly filed on the class certification issue before he could rule on the merits.

the BWC entered into a settlement agreement, a contract." *Appellees' Brief, p. 13*. This issue of fact is not part of the record presently before this Court and is seriously disputed by Plaintiffs.[11] Such dubious contentions pertain solely to the merits of the action and are not germane to the immediate question of whether sovereign immunity bars the claims that Plaintiffs have elected to advance in this action. In accordance with the great weight of authorities on the subject, this lawsuit should be returned to the Cuyahoga County Court of Common Pleas.

[11] Indeed, one of the reasons there was no formal "discovery" during the first year and a half of this litigation was that the Bureau conceded during the initial case management conference that no written settlement agreements had been required with respect to any of the compromised subrogation claims.

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 only 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 **Reply** 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 28th day of April, 2003.

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