

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

BRUCE A. VANCE, <i>et al.</i>)	CASE NO. CV 16 003295
)	
Plaintiffs,)	JUDGE: JENIFER A. FRENCH
)	
v.)	<u>PLAINTIFFS’ MEMORANDUM IN</u>
)	<u>OPPOSITION TO DEFENDANTS’</u>
THE STATE OF OHIO, <i>et al.</i>)	<u>MOTION FOR SUMMARY JUDGMENT</u>
)	<u>(BASED ON JURISDICTION)¹</u>
Defendants.)	
)	

The further, limited discovery of the Ohio Department of Education (“ODE”) and Ohio Office of Budget & Management (“OBM”) allowed by this Court has:

- 1) corroborated Plaintiffs’ claims that there is a known, undisputed, and direct mathematical relationship between increased CAUV valuations by the State Tax Commissioner, and hundreds of millions of dollars kept by the State,
- 2) proven this relationship has long been known to the ODE, OBM, Tax Commissioner, and Governor, and studied in great detail for many years, resulting in a number of reports documenting that relationship, and

¹ This is Plaintiffs’ full response to the Motion for Summary Judgment filed by Defendants in May 2017. Plaintiffs filed their “Initial Brief In Opposition To Motion For Summary Judgment Filed By The Tax Commissioner” on July 23, 2017, pending further discovery, which has now been completed. Plaintiffs also filed a Motion to Continue Limited Discovery and in Opposition to Defendant’s (Second) Motion For Protective Order, and Reply Brief in Support thereof. Plaintiffs reincorporate herein by reference all the Statements of Facts, and Arguments, in these previous filings.

- 3) revealed that total CAUV valuations have risen 1,000% from 2005-2015, from \$1.8 billion to over \$19 billion, as a direct result of which the State has been able to retain hundreds of millions of dollars per year.

STATEMENT OF FACTS

As pointed out in Plaintiffs’ Motion to Continue Limited Discovery and In Opposition to Defendant’s Second Motion for Summary Judgment, the depositions of Stanley Dixon, the Director of the Division of Tax Equalization, and of Shelley Wilson, the Assistant Director, revealed that the mathematical relationship between annual CAUV calculations, and the shifting of the financial burden between farmers and local residents, and between farmers and the State:

- a. Is well-known to the Department of Taxation
- b. Was the topic of no less than two major studies by the Tax Commissioner, one for a Senator and one for the County Auditors Association of Ohio
- c. Is a topic of intense scrutiny by the Legislature, State officials, Departments and Offices, the Ohio Educational Policy Institute,
- d. Was front page headline news, and
- e. Is evidenced by testimony before the Legislature by Director Dixon and presentations by Assistant Director Wilson. (Depo of Stanley Dixon, at pp. 40, 44, 49-55, 64-65, 85; Deposition of Shelley Wilson, at pp. 36-38, 46-48, 51-53, 62).²

And, as previously pointed out to this Court, Dr. Howard Fleeter, the unquestioned expert on Ohio school funding, has testified before committees of the Ohio General Assembly and provided analysis (with which at least one of the tax commissioner’s representatives were familiar) pointing out that the increase in recent years in CAUV values has resulted in reduced

² The transcripts of the depositions of Stanley Dixon and Shelley Wilson have already been filed with the Court.

funding obligations by the state of Ohio to rural districts with more than the average amount of property in the CAUV program. Testifying to the impact that House Bill 64 (legislation substantially similar to the CAUV formula modifications included in the State biennial budget earlier this year), Dr. Fleeter stated that “rural school districts show a 10.8% average increase in property values from FY14... to FY17. These districts also fare the worst under the Governor’s proposed plan. Rural districts experience the second highest increase in values and receive the next smallest increase in state aid.” (Wilson Depo. Ex. 14). Returning to the same set of proposed CAUV formula modifications proposed by two bills last year, House Bill 398 and Senate Bill 246, Dr. Fleeter again stated that “a fourth effect of the proposed CAUV decreases will be on the state’s school funding formula.... Districts with significant CAUV decreases will have lower ratios of value per people to the state average and thus receive more state aid.” (Wilson Depo. Ex. 1).

The patent obviousness of this point is further demonstrated by the fact that as recently as June of last year, the front page of the *Columbus Dispatch* heralded this relationship. (Dixon Depo. Ex.8: Lowering Farmland Values Means Homeowners Will Pay Higher Taxes, June 16, 2017: “Ohio homeowners face more than \$60 million in unvoted property tax increases, while schools could face a loss of \$58 million in state and local tax revenue.”) See also (Dixon Depo. Ex. 9: Cutting Ohio Farmers’ Property Taxes Could Cost Homeowners, Schools Millions, May 4, 2016). Rural schools were rightly concerned that modifications to the CAUV formula, ultimately included in the biennial budget, would result in lower funding levels for rural schools. This is exactly what the Legislative Service Commission (“LSC”, the drafting and research arm of the Ohio General Assembly) predicted. See (Plaintiffs’ Motion to Continue Limited

Discovery, Exhibit 5: Predicting losses of \$60 million over the biennium to school districts and other local governments).

More critically for the purposes of the present motion, the LSC also predicted that this would result in higher payments by the state of Ohio in the form of 10% rollback reimbursements. *Id.* Of course, the obverse is true, that is that by artificially inflating CAUV values for years, the state of Ohio was able to pay *less* to local school district and also pay *less* in rollback reimbursements to local taxing authorities.

Plaintiffs sometimes refer to this as a form of “displacement funding“. This is exactly the same way that Ohio Lottery profits have been used for years. It is indeed true that every single penny of profit made by the Ohio Lottery goes to primary and secondary education. But in doing so, this just displaces monies that the State would otherwise have to invest in education, making those same dollars available for other programs or tax cuts for favored constituencies.

This is also true with respect to artificially inflated CAUV values, because the excess taxes paid by farmers reduces the amount that the state has to pay to these districts.

Plaintiffs’ further, limited discovery of ODE and OBM consisted of document requests, and request for admission, but also the deposition of Daria Shams, the Senior Policy Analyst for ODE, and of Frederick G. Church, the Deputy Budget Director at OBM (who also spent 12 years as Assistant Deputy Commissioner at the Ohio Department of Taxation (“ODT”)).³

The documents produced by ODE and OBM, and these two depositions revealed that:

- a. regardless of which highly complicated local school education funding formula was in effect over the years, higher CAUV values have always resulted in the State spending less and retaining more money,

³ The depositions of Daria Shams and Frederick G. Church have been filed with the Court.

- b. these studies, particularly those performed by Fred Church, the Deputy Budget Director at OBM, show the State of Ohio has saved at least hundreds of millions of dollars by overcharging farmers.

As Plaintiffs have now repeatedly pointed out, the decrease in local education funding in rural districts with high percentages of CAUV property is because the complicated State Share Index (“SSI”) formula the State uses to determine state payments to individual school districts is based, in part, upon the total value of local property. Likewise, the State has steadily cut the Local Government fund at the same time that it has increases local tax collections by excessive CAUV calculations. (See, Plaintiffs’ Initial Brief in Opposition to Defendant’s Motion for Summary Judgment).

Testimony by these high-ranking state officials last month has now provided incontrovertible proof that the State of Ohio saves hundreds of millions of dollars every year if CAUV values are inflated. While the manner in which the State of Ohio allocates school funding and the manner in which CAUV values are calculated involve two of the most complicated formulas in state government, the State officials’ testimony clearly establishes that as CAUV values decrease, the State’s share of education funding experiences a significant net increase. But, to explain this relationship, we need to first address Ohio school funding at a very high level.

Ohio School Funding

The first step in the process in setting amount of school funding in the budget, as mandated by the constitutional requirement that Ohio “thorough and efficient” education, is that the State determine how much funding is required for each district. That undertaking is entrusted to a long-tenured state servant, Daria Shams, the senior policy analyst for the Ohio Department of Education (ODE). Shams has worked for ODE in the same key position since 1995 and earned

his Masters in public administration from the Ohio State University. (Shams Depo. 5,7). Asked to describe what he does, Shams testified that “I’m basically in charge of funding of 612 school districts in Ohio.” (Shams Depo. 6). Throughout various changes to the education funding formula, Shams has been the steward of the formula, taking legislation and expressing that in a complicated mathematical formula. *Id.*

Without getting too wonky, and summarizing Shams’ testimony, over recent years, the state has changed funding formulas. For many years, the funding formula was called the Foundation Formula, which calculated a universal amount of funding, and then subtracted something called the “charge off”, which was a uniform amount of millage that each district was assumed to raise from its own taxpayers. (Shams Depo. 12-14).

The Foundation Formula was followed by the Evidence-Based Model (EBM) for several years under Governor Strickland. The EBM departed from the universal funding amount per person and “looked at the resources that a school district needed for success...”. (Shams Depo. 13-14). The EBM then determined the amount that the district should be able to raise on its own based upon its wealth, (Shams Depo. 15), which was then deducted from the amount needed for success, not unlike the charge-off.

The EBM was followed for a brief time by something called the bridge formula which was used only in 2012 and 2013. (Shams Depo. 19).

In 2014, State introduced the State Share Index (SSI) Formula. *Id.* The SSI looked at property wealth and income to come up with a formula which “resulted in richer school district to have a lower State Share Index and poorer districts to have a higher State Share Index...”. *Id.* 20. The per pupil amount that was calculated by other parts of formula was then multiplied by the SSI to determine the amount of money that the district would receive from the State. (Shams

Depo. 20-21). As a result, if the valuation of properties in a district go up, “theoretically it results in a decrease in the state funding and vice versa.” *Id.* 22.

But no matter how the formula calculated the amount that was necessary for the local community to raise as opposed to the State’s contribution, each of the formulas had as a starting point the calculation of the amount per people that was necessary to provide an adequate education. (Shams Depo. 24). The significance of this is that the calculated number is an ***absolute*** number. It is the State’s determination of how much was necessary to fund education. A wholly-separate question then is the district-by-district division of how much of this cost would be borne by the State versus the local taxpayers. And it was the miscalculation of CAUV for many years that relieved the State of its burden of paying its full share in districts overweighted with CAUV properties.

Farmers Demand a Fix to CAUV

After experiencing average increases of nearly 1000% in CAUV values and corresponding real estate tax burdens, Ohio’s farmers essentially marched on the statehouse and demanded changes. The ODT official figures show that the value of all CAUV lands in Ohio for Tax Year 2005 was just over \$1.8 billion (See Exh. 3 to Plaintiffs’ Initial Brief In Opposition to Defendant’s Motion For Summary Judgment), but rose to \$19,215,231,500.00 for Tax Year 2015, a gain of over 1,000%. (Church Depo. pp.88-89, Church Exh. 31)

Ohio’s last biennial budget bill, passed during summer of 2017, contained significant corrections to the CAUV formula (which directly support the merits of Plaintiffs’ underlying contentions). This required OBM to approximate the impact of the changes on Ohio’s funding obligations.

In October 2016, Fred Church, Deputy Budget Director of the OBM, personally prepared an analysis which demonstrated - mathematically - that as CAUV valuations rose in rural school districts, the State's percentage of education funding dropped. (Church Depo. pp. 82-86, Church Exh. 31). Additional analysis by Church demonstrated - again - that the farmers were right. Districts high in CAUV properties saw significant increases in value, while districts with a more urban "typography" (to use the DOT's term) actually saw decreases in value. (Church Depo. 39-40, Church Exh. 23).

By 2015, the issues of CAUV values had drawn the direct attention of members of the Finance Committee of the House of Representatives of the Ohio General Assembly. (Church Ex. 20, 21 agreed at p. 25 that Church Ex. 21 would substitute for Church Ex. 20); (Church Depo. 17-22). The Governor's office was also interested. (Church Depo. 79-81, Church Exh. 20). (Church Depo. 32-36, Church Exh. 23) includes an e-mail from the Department of Taxation in 2015 which stated, in part:

If you did not see the Columbus Dispatch of Sunday, February 8, it featured as its front page lead story, Shocking Tax Jolt - the farmers' plight with the new 2015 Current Agricultural Use Value taxes. Some farmers were quoted as seeing their CAUV taxes almost double. Their cries should catch Governor Kasich's attention.

....

The "tweak" to the [CAUV] formula, if there is one, should be in the Capitalization Rate. With respect to this last number, it can be argued that the Capitalization Rate is in an artificially depressed state due to a bizarre Federal Reserve policy of extended extremely low interest rates. The result of an artificially depressed Capitalization Rate is much higher land values which in turn hurt the true "operating" farmer but help the land speculator.

Senate President Keith Faber's office took a similar interest in the topic in the same time period. (Church Depo. 48-49, Church Exh. 26). Eventually the Tax Commissioner prepared a memo to send to the entire General Assembly regarding CAUV and proposed changes to the formula. (Church Depo. 80, Church Exh. 30).

Church was as direct as possible about this opaque subject matter, explaining that districts high in CAUV values (typologies 1 and 2) saw significant increases in local property tax funding without any increases in tax rates, while reducing their state aid (and the State's corresponding partial funding obligation) because the SSI made them look richer:

What this means is that Type 1 and Type 2 districts, and to a lesser extent Type 3 districts, have seen notable increases in valuation per pupil and local revenue over the TY 2008-2014 period. While the increase in valuation per pupil makes these districts look richer to the state aid formula, **and thus reduces their state share of funding** 9all [(sic) other factors held constant), these districts have in fact benefitted from these increased valuation amounts through higher tax revenues with no increase in tax rates. (emphasis added) (Church Depo. 76-77, Church Exh. 29).

At the request of the Governor's office, Deputy Budget Director Church personally prepared a simulation of the impact of a 30% reduction in CAUV values statewide on the education funding proposed by the administration, as altered by the General Assembly. (Church Depo. 87-88, 123-127, Church Exh. 34).

Exhibit 34 is his highly detailed mathematical analysis. Church calculated that in just two years, fiscal years 2018 and 2019 changes to the CAUV formula would result in the State paying \$139,544,894.00 more in 2018 than it did in 2017, and \$124,773,760.00 more in 2019 than what it paid in 2018. The total additional cost to the State in 2018 and 2019, due to a 30% reduction in CAUV valuations is therefore \$403,863,548, which is the sum of:

- 1) 2018: \$139,544,894.00
- 2) 2019: \$139,544,894.00 + \$124,773,760.00

(Church Depo.123-128, Church Exh. 34) ⁴ ⁵Church’s highly credible studies and testimony establish beyond dispute the mathematically demonstrable relationship between CAUV valuations and funds kept by the State in the State Treasury per se, just as the studies performed by the Ohio Department of Taxation demonstrate the mathematical relationship between higher CAUV valuations by the Tax Commissioner and higher tax collections by the Tax Commissioners’ “Deputy Assessors,” the County Auditors, at the local level.

LAW & ARGUMENT

Plaintiffs have argued from the outset that the State benefits through increased CAUV values. Yet the State insists upon rewriting Plaintiffs’ complaint, and further arguing that Plaintiffs must prove essentially that the State is holding the very same dollar bills that once belonged to the Plaintiffs. But the caselaw is otherwise, and this Court implicitly rejected this argument by permitting Plaintiffs to conduct additional discovery regarding the manner in which the State has benefited through excessive CAUV valuations.

Plaintiffs will not burden the Court by rewriting the entirety of their legal arguments in opposition to the State’s contention that the facts discovered to date cannot prove

⁴ Church also provided the definitions of a few key terms necessary to understand Exhibit 34. “Calculated state aid” is an unrestrained state aid number as if all of the parameters of the funding formula were applied without any subsequent modifications. (Church Depo. 103). “Estimated final core aid“ is the amount of money that the districts will actually receive. *Id.* 107. The difference between the two is a result of guarantees or “transitional aid” which work to increase the state burden for some districts, and caps, which lower the state burden for other districts. *Id.* 106.

⁵ The Court should bear in mind that if a 30% decrease in CAUV valuations would cost the State over \$400 million in two years, a 1000% increase in CAUV valuations over a period of ten years surely saved the State far more than \$400 million. The exact calculation is not necessary at this time.

an equitable restitution claim against the State. Rather, Plaintiffs reincorporate all their prior legal arguments, including those made in their Initial Brief In Opposition To Motion For Summary Judgment Filed By The Tax Commissioner on July 23, 2017, in their Motion to Continue Limited Discovery and in Opposition to Defendant’s (Second) Motion For Protective Order, and their Reply Brief in Support of their Motion to Continue Limited Discovery and in Opposition to Defendant’s (Second) Motion For Protective Order.

Briefly summarized, Plaintiffs’ arguments are:

I. PLAINTIFFS SEEK ENFORCEMENT OF STATUTORY RIGHTS, AND THEREFORE, THEIR CLAIMS ARE FOR EQUITABLE RESTITUTION OVER WHICH THIS COURT HAS JURISDICTION UNDER O.R.C. SECTION R.C. 2743.03(A)(2).

In *Cristino v. Ohio Bureau of Workers' Comp.*, 118 Ohio St. 3d 151, a years-long case, in which the Ohio Supreme Court took jurisdiction twice, the question before the Supreme Court in the second appeal was the State’s argument that the Court of Common Pleas had no subject matter jurisdiction, because Plaintiffs’ claims were for legal, not equitable restitution. In a 7-0 opinion, the Court resolved the issue by holding that claims against the State seeking to enforce statutory rights are claims for equitable restitution over which Courts of Common Pleas have express jurisdiction under O.R.C. Section 2743.03, while claims for the enforcement of contractual rights were under the jurisdiction of the Court of Claims. *118 Ohio St. 3d at 154.*

II. THIS COURT HAS JURISDICTION BECAUSE THE STATE “COLLECTS” ALL CAUV PROPERTY TAXES

The Tax Commissioner has a mandatory statutory duty to supervise all aspects of property tax collections, statewide with respect to CAUV property taxes, the Tax Commissioner determines the value of all property, and the County Auditors, its agents, and “Deputy

Assessors” collect real property taxes. Plaintiffs’ claims for wrongfully excessive collection(s) are claims for equitable restitution. As the Tax Commissioner points out in his Motion for Summary Judgment, in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, the U.S. Supreme Court held that restitution is an equitable remedy when the Plaintiffs seek monies either wrongfully collected by the state, or wrongfully held by the state. 534 U.S. at 213. This reasoning has been adopted by the Ohio Supreme Court in *Santos v. Ohio Bur. Of Workers’ Comp.*, 101 Ohio St. 3d 74, 2004-Ohio-28, 801 N.E.2d 441.

Where the State’s agents alone possess identifiable funds collected from or not paid to a claimant’s benefit, that claimant may still bring an equitable restitution claim in the Court of Common Pleas: The State’s attorneys lost this battle last December in the 8th District decision *Michael Cirino, et al., v. Ohio Bureau of Worker’s 6 Compensation*, (2016-Ohio-8323 *; 75 N.E.3d 965 **; 2016 Ohio App. LEXIS 5180 ***; 2016 WL 7427407; discretionary appeal allowed *Cirino v. Bureau of Worker's Comp.*)

III. WHEN CAUV OWNERS OVERPAY AS A RESULT OF THE STATE’S OVERAPPRAISAL OF THEIR LANDS, THE STATE HOLDS MONIES WHICH IN GOOD CONSCIENCE BELONG TO THEM

Plaintiffs’ claims are for equitable restitution because the State “holds” monies which in good conscience belong to Plaintiffs. The 1000% increases in CAUV valuations have allowed the State retaining hundreds of millions of dollars in its Treasury. The State’s own Deputy Budget Director proved that reducing those CAUV taxes just 30% would cost the State \$403,863,548 in just two years.

In *Cristino*, supra, Ohio Supreme Court adopted the following definition of claims for equitable restitution, the definition articulated by the U.S. Supreme Court in *Great-West*, quoting

1. *Dobbs, Law of Remedies (2d Ed.1993) 571, Section 4.2(1):*

“an equitable restitution claim was one in which ‘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.’” (emphasis added)

Cristino, 118 Ohio St. 3d 151, at 152, quoting Great-West Life & Annuity Ins. Co. v. Knudson, (2002), 534 U.S. 204, 213, 122 S.Ct. 708, 151 L.Ed.2d 635.

IV. O.R.C. SECTION 2723.01 IS NOT APPLICABLE TO PLAINTIFFS’ CLAIMS

The remedies set forth at O.R.C. Sections 2723.01-05 have no application to Plaintiffs’ claims here.

CONCLUSION

There is no dispute that Plaintiffs’ claims are for violations of the statutory scheme implementing the CAUV tax program, and this Court has jurisdiction of such claims under the holding in *Cristino v. Ohio Bureau of Workers’ Comp., 118 Ohio St. 3d 151.*

There exist genuine disputes of material fact as to whether:

- 1) The State Tax Commissioner **wrongfully collected** excess CAUV taxes statewide, through its “Deputy Assessors,” the County Auditors, and/or
- 2) The State **wrongfully holds** monies, which in “good conscience” belong to the CAUV landowners whose taxes have risen over 1000% since 2005 in ten years.

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, cited and followed in Santos v. Ohio Bur. Of Workers’ Comp., 101 Ohio St. 3d 74.

There can be no dispute that there is a statutorily-mandated, mathematical relationship between CAUV taxes and state monies, and the State's own officials and their studies have proven this to be true. Indeed, for these reasons, the Court should take judicial notice of the fact that, as CAUV valuations increase, by determination and calculations of the Tax Commissioner alone, the amount of money the State retains also increases.

The State's Motion for Summary Judgment should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on January 15, 2018, I caused the foregoing document to be filed in accordance with the Court’s Electronic Filing Guidelines. Notice of this filing will be sent to the recipients below by operation of the Court’s Electronic Filing System. Parties may access the filing through the system.

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