

**IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT**

BRUCE A. VANCE, <i>et al.</i>,)	
)	No. 18AP-484
Plaintiff-Appellants,)	
Individually and on behalf)	(REGULAR CALENDAR)
of all others similarly situ-)	
ated,)	
)	
v.)	
)	
TAX COMMISSIONER)	
OF OHIO,)	
)	
Defendants-Appellees.)	

BRIEF OF APPELLANTS

Joshua R. Cohen (0032368)
jcohen@crklaw.com
Cohen Rosenthal & Kramer
LLP
3208 Clinton Avenue
One Clinton Place
Cleveland, Ohio 44113
(216) 815-9500 (Tel. & Fax)

Kevin T. Roberts (003749)
ktr@kevinrobertslaw.com
The Roberts Law Firm
7622 Columbia Road
Olmsted Falls, Ohio 44138
(440) 793-6255 (Telephone)
(440) 793-6256 (Fax)

Dennis E. Murray, Jr.
(0038509)
dmj@murrayandmurray.com
William H. Bartle (0008795)
whb@murrayandmurray.com
Murray & Murray Co. L.P.A.
111 E. Shoreline Drive
Sandusky, Ohio 44870
(419) 624-3000 (Telephone)

Anthony J. Coyne (0039605)
acoyne@mggmlpa.com
Edward O. Patton (0042004)
epatton@mggmlpa.com
Mansour Gavin LP
North Point Tower
1001 Lakeside Avenue,
Suite 1400
Cleveland, Ohio 44114
(216) 523-1500 (Telephone)

**Counsel for Plaintiffs-
Appellants**

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 6

 A. Parties 6

 B. The CAUV Program 8

 C. Education Funding 13

 D. Local Government Funding 29

 E. Particular Evidence Demonstrates How Funds In
 The State Treasury Can Be Clearly Traced To
 Increased CAUV Valuations 30

ARGUMENT 40

 I. STANDARD OF REVIEW 40

 II. EQUITABLE RESTITUTION LIES FOR
 ENFORCEMENT OF STATUTORY RIGHTS 41

III. THE COURT OF COMMON PLEAS HAD
JURISDICTION BECAUSE THE STATE
“COLLECTS” ALL CAUV PROPERTY TAXES..... 43

IV. WHEN CAUV LANDOWNERS PAY INFLATED
TAXES, THE STATE HOLDS MONIES WHICH IN
GOOD CONSCIENCE BELONG TO THE
TAXPAYER 46

CONCLUSION 51

CERTIFICATE OF SERVICE..... 522

TABLE OF AUTHORITIES

Cases

<i>Adams v. Testa</i> , 152 Ohio St.3d 207, 2017-Ohio-8853.....	43
<i>Cristino v. Ohio Bureau of Workers’ Comp.</i> , 118 Ohio St.3d 151, 2008-Ohio-2013	42, 47
<i>Derolph v. State</i> , 7 Ohio St.3d 193, 199, 1997-Ohio-84, 677 N.E.2d 733, 738 (1997)	15
<i>Great-West Life & Annuity Ins. Co. v. Knudson</i> , 534 U.S. 204, 122 S.Ct. 708 (2002).....	44
<i>Johnston v. State</i> , 2016-Ohio-4761, 69 N.E.3d 5, ¶7 (10th Dist.)	40
<i>Ratonel v. Roetzel & Andress, LPA</i> , 147 Ohio St. 3d 485, 2016-Ohio-8013, 67 N.E.3d 775.....	41
<i>Santos v. Ohio Bur. Of Workers’ Comp.</i> , 101 Ohio St. 3d 74, 2004-Ohio-28, 801 N.E.2d 441.....	44

Statutes

R.C. Ch. 3317	17
R.C. 2721.02(A)	4
R.C. 2743.03	43
R.C. 3317.017	24, 26
R.C. 3317.018	24, 26
R.C. 3317.021	23
R.C. 5713.01	42
R.C. 5713.03	10
R.C. 5713.041	7
R.C. 5713.30 <i>et seq</i>	4, 9
R.C. 5713.31	11, 12
R.C. 5715.01	7
R.C. 5715.39	8
R.C. Ch. 5713	2

Rules

Civ. R. 12(B) 5
Civ. R. 56 5, 41

Regulations

O.A.C. 5703-25-31 - 5703-25-33 3
O.A.C. 5703-25-33 3

Constitutional Provisions

Ohio Const. Article II, §36..... 4, 8

ASSIGNMENTS OF ERROR

1. The trial court erred by granting summary judgment in favor of Appellees.
2. The trial court erred in holding that it lacked subject matter jurisdiction over Appellants' claims.

ISSUES PRESENTED FOR REVIEW

1. Equitable restitution permits recovery of money identified as belonging in good conscience to a claimant when it can clearly be traced to particular funds or property in the defendant's possession. Every dollar in excess CAUV tax collected on behalf of Ohio can be clearly traced to a dollar that Ohio does not pay towards education or local government and therefore retains in its treasury. Does Appellants' claim sound in equitable restitution?

2. Ohio's Current Agricultural Use Value ("CAUV") system of real property taxation was estab-

lished by the Ohio Constitution and statutes as a State tax. Counties serve as agents of the State in the assessment and collection of the tax, which is for the benefit of the State in furtherance of its school funding and local government support obligations. Under these unique circumstances, does a question of fact exist as to whether increased CAUV taxes are “collected” by the State?

3. Equitable restitution is a remedy for the enforcement of statutory violations. Appellants are seeking to enforce statutory rights. Does their claim sound in equitable restitution?

STATEMENT OF THE CASE

The Plaintiffs in this putative class action are the owners of 16,000,000 acres of land devoted to agricultural production, Ohio’s largest industry. They own property subject to taxation under the Current Agricultural Use Value (“CAUV”) program set forth in R.C. Ch. 5713 and

Sections 5703-25-31 to 5703-25-33 of the Ohio Administrative Code. The Tax Commissioner, who is statutorily charged with supervising all collection of real property tax statewide, including the annual production of a table of agricultural land values for use in valuing such land, has increased agricultural land taxes by over 1000% since 2005, by failing to follow nearly every mandated, non-discretionary dictate of the established formula for calculating such values set forth in O.A.C. 5703-25-33.

As a result, the taxable value of CAUV lands in Ohio has risen from \$1.8 billion in 2005 to more than \$19 billion for tax year 2015. (Compare Exh. 3 to Appellants' Initial Brief in Opposition to Defendant's Motion for Summary Judgment to Exh. 31 to the Deposition of Fred Church). Agricultural landowners have been hit with tax bills two, three, four-times and more of their prior bills. CAUV landowners have overpaid taxes by well over one

billion dollars – money which they seek to recoup through this lawsuit.

The action was originally commenced in the Common Pleas Court of Ashtabula County on June 26, 2015 against the State of Ohio through its governor John R. Kasich and the Ohio Department of Taxation through its commissioner Joseph W. Testa.

On July 27, 2015, Plaintiffs filed their Amended Class Action Complaint seeking a declaratory judgment under R.C. 2721.02(A) that the State has overstated CAUV valuations as a result of failing to follow the prescribed formula, an injunction barring continued misapplication of the CAUV formula, equitable restitution for the return of tax payments in excess of what the formula should have yielded, damages for violations of Article II, §36 of the Ohio Constitution and R.C. 5713.30 *et seq.* A Second Amended Class Action Complaint eliminated Ap-

pellants' claims for an injunction and for damages, and removed the Governor of Ohio as a named defendant.

The State moved to transfer venue to Franklin County, and to dismiss pursuant to Civ. R. 12(B)(1), 12(B)(6) and 12(B)(7). On February 24, 2016, the Ashtabula County Common Pleas Court granted the motion to transfer this action to Franklin County, where the State's Motion to Dismiss was denied by a decision and journal entry dated November 2, 2016.

On May 12, 2017, after some discovery had been initiated, Appellee Tax Commissioner moved for summary judgment under Civ. R. 56 arguing that Appellants' claim sounded in legal, rather than equitable restitution, which would deprive the Common Pleas Court of subject matter jurisdiction. According to the Tax Commissioner, a claim against the State for legal restitution could be brought only in the Court of Claims.

Appellants responded to the Motion with both a preliminary opposition, and once some additional discovery was obtained from the State, a supplemental opposition. On May 31, 2018, the lower court granted the State's motion, dismissing the claim for equitable restitution, and finding no jurisdiction over Appellants' additional claim for declaratory judgment.

STATEMENT OF FACTS

A. Parties

Plaintiff-Appellants Bruce Vance, G. Frederick Pierce-Ruhland, Joseph K. Blystone, Bruce Achor, Shane Boysel, Thomas J. Harris, Dan Hutchins, John B. Neuhart, David Reier and Richard Stover each own land subject to taxation under Ohio's CAUV program. The Appellants' properties are located in Ashtabula, Franklin, Highland, Logan, Licking, Union, Guernsey and Athens counties.

Defendant-Appellee Joseph W. Testa is Commissioner of the Ohio Department of Taxation. As such, he directs, supervises and controls all property tax collection in every political subdivision of the State. The Tax Commissioner's absolute power and control over statewide property tax collection, including CAUV tax collection, is found at R.C. 5715.01, which provides:

The tax commissioner shall direct and supervise the assessment for taxation of all real property. The commissioner shall adopt, prescribe, and promulgate rules for the determination of true value and taxable value of real property by uniform rule for such values and for the determination of the current agricultural use value of land devoted exclusively to agricultural use.

The Tax Commissioner's power specifically includes the power to classify all property for purposes of taxation, including the classification of agricultural property. R.C. 5713.041. For example, the Tax Commissioner makes the

final determination of every application for exemption from real property taxation, such as for a church or government body. And the Tax Commissioner alone has the power to remit payment of property taxes. The local auditors and treasurers may only remit penalties, not taxes. R.C. 5715.39.

B. The CAUV Program

The taxation of agricultural lands through the CAUV program depends not at all on its market value, but exclusively upon its agricultural productivity. This method of appraisal is so different from “true value,” or fair market value, that an amendment to the Ohio Constitution was placed on the ballot and passed by an overwhelming majority of Ohio voters in 1974. Since then, Article II, §36 of the Constitution provides that

laws may be passed to provide that land devoted exclusively to agricultural use be valued for real property tax

purposes at the current value such land has for such agricultural use.

The General Assembly then exercised its authority under Article II, §36 to create a system of Current Agricultural Use Valuation property taxation. This system is fundamentally different from the system of “true value” property tax valuation and collection performed at the County level on all other real property.

In particular, every acre continuously devoted to agricultural use, and enrolled in the program, is valued solely by the agricultural productivity of the class and condition of its soil. The actual agricultural activities being performed on those acres is irrelevant to the appraisal value of the soil, so long as the activities being performed meet the State’s definition of “agricultural activity” as set forth in R.C. 5713.30(A)(1)(a).

For any given class or condition of soil, the per acre

appraisal value for real property taxation is the same throughout the state, regardless whether the land is being used to raise soybeans, graze cattle, operate a greenhouse, grow grapes, or manage hardwood trees for timber, and regardless whether that acre is located half a mile off the road, in the most underpopulated area of the State, or near a densely populated commercial center.

With respect to all CAUV acreage, the Legislature expressly departed from the system of allowing the local County Auditors to appraise real property (under rules for determining “true value” prescribed by the Tax Commissioner pursuant to R.C. 5713.03), and delegated the task of ensuring the uniform appraisal of the agricultural productivity of soil class throughout the State solely to the Tax Commissioner. The Tax Commissioner alone conducts the appraisal of and thus sets the taxable value of each and every acre of land in the CAUV program, and pub-

lishes those uniform statewide values in the annual CAUV Soil Tables, which are distributed to the County Auditors. R.C. 5713.31.

The County Auditors have no jurisdiction, power or authority whatsoever to deviate from the Tax Commissioner's appraisal value of even a single acre of CAUV land. With respect to the collection of property taxes on CAUV acreage, all 88 County Auditors are mere functionaries, under the complete control and direction of the State:

If the auditor determines, which determination shall be made as of the first Monday of June, annually, that the land is land devoted exclusively to agricultural use he **shall appraise it for real property tax purposes in accordance with rules adopted by the commissioner for the valuation of land devoted exclusively to agricultural use and such appraised value shall be the value used by the auditor in determining the taxable value of such land**

for the current tax year under section 5713.03 of the Revised Code and as shown on the general tax list compiled under section 391.28 of the Revised Code.

R.C. 5713.31 (emphasis added).

The Ohio Department of Taxation's public website contains annual official CAUV tax reports, including the Commissioner's calculation of CAUV values, the total acreage and number of parcels enrolled in the CAUV program, the total appraisal value of CAUV lands statewide, levels of the State's funding of local governments, and other matters relevant to this case. Those official government documents reveal the following information from 2005 onward:

- The total number of acres enrolled in the CAUV program has remained steady at approximately 16 million acres.
- The total appraised value calculated by the Tax

Commissioner for those acres has risen from \$1.8 billion in 2005 to \$11.5 billion in 2015, an increase of 639%.¹

- The statewide average appraised value per acre of CAUV land rose from \$123 in 2005 to \$1,310 in 2016, according to one ODT publication, and to \$2,081 per acre according to another. This is an increase of 1,065% or 1,692%, depending on which 2016 ODT figure is used.

C. Education Funding

Legal responsibility for funding education is a joint obligation of the State and the local School District, and as between them, is a “zero sum game,” meaning whatev-

¹ However, in connection with the Deposition of Fred Church, Deputy Director of the State Office of Budget and Management, Mr. Church authenticated Ex. 31 marked at his deposition, which revealed an even higher overall value of all CAUV lands for tax year 2015, of exactly \$19,215,231,500.00, which means the overall appraisal value of all Ohio CAUV lands has skyrocketed over 1,000% in just over ten years.

er one does not pay the other must pay. Like a see-saw, however much one goes down, the other goes up.

Since at least the 1850's the State's fundamental obligation to fund public education has been the law:

Section 2, Article VI of the Ohio Constitution requires the state to provide and fund a system of public education and includes an explicit directive to the General Assembly [to] "... make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools through the state***."

According to statute, the revenue available to a school district comes from two primary sources: state revenue, most of which is provided through the School Foundation Program, and local revenue, which consists primarily of locally voted school district property tax levies. Federal funds play a minor role in the financing scheme. Ohio relies more on local revenue than state revenue, contrary to the national trend.

Derolph v. State, 7 Ohio St.3d 193, 199, 1997-Ohio-84, 677

N.E.2d 733, 738 (1997).

And as the Ohio Department of Taxation itself states on its official website:

Since the 1800s, the property tax has been the single most important source of funding for Ohio's schools. In fact, of all property taxes levied in Ohio, approximately two-thirds go to fund schools. The remainder is split among all other local governments in the state. *** School funding in Ohio is a shared responsibility between the state and local school systems. Excluding federal dollars, slightly more than half of all funding statewide is locally generated, with virtually all of the local money coming from the property tax.

http://www.tax.ohio.gov/portals/0/research/property_taxation_school_funding_2012c.pdf.

The first step in the process of setting the amount of school funding in the budget, as mandated by the constitutional requirement that Ohio provide students a “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. According to Shams, he is “basically in charge of funding of 612 school districts in Ohio.” (Shams Deposition Exh. 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.*

Over recent years, the state has changed the 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 tax-

payers. (Shams Dep. pp. 12-14)

Chapter 3317 of the Revised Code sets forth the State Department of Education's local education funding obligations, also known as the "School Foundation Program." In relevant part, Section 3317.01 provides:

This chapter shall be administered by the state board of education. The superintendent of public instruction shall calculate the amounts payable to each school district and shall certify the amounts payable to each eligible district to the treasurer of the district as provided by this chapter... Certification of moneys pursuant to this section shall include the amounts payable to each school building, at a frequency determined by the superintendent, for each subgroup of students, as defined in section 3317.40 of the Revised Code, receiving services, provided for by state funding, from the district or school. No moneys shall be distributed pursuant to this chapter without the approval of the controlling board. **The state board of education shall, in accordance with appropriations made by the general assembly, meet the financial obligations of**

this chapter.

(emphasis added)

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 pupil and “looked at the resources that a school district needed for success...” (Shams Dep. pp.13-14). The EBM then determined the amount that the district should be able to raise on its own based upon its wealth, (Shams Dep. p.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 the so-called bridge formula which was used only in 2012 and 2013. (Shams Dep. p.19)

In 2014, Ohio introduced the SSI Formula. *Id.* The State’s share of local school funding is determined by the State Share Index (“SSI”), and Capacity Measure, two

mathematical formulas. Under the SSI, there is a mathematical correlation between the amount of money the State will provide to any given school district, and the total property tax valuation within the district (as well as local income). The State's share can vary from 5% in a wealthy district, to 95% in a poor district. As the State Board of Education states on its website:

[the] State Share Index of each school district reflects the wealth of the school district as measured by property valuation and the income of the residents of the district calculated for the purposes of the distribution of the state funds through the foundation formula. The state share index is calculated based on a sliding scale that ranges from 5% to 95% with the wealthiest districts having an index of 5% and the least wealthy districts having an index of 95%. The state share index is meant to equalize the distribution of the funds among school districts.²

² See <http://education.ohio.gov/Topics/Finance-and-Funding/School-Payment-Reports/State-Funding-For-Schools/Board-of-DD-Programs-Funding/Explanation-of-the-State-BDD-Funding>.

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.* at 20. The per pupil amount that was calculated by other parts of the formula was then multiplied by the SSI to determine the amount of money that the district would receive from the State. (Shams Dep. pp. 21-21) 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.* at 22.

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 pupil that was necessary to provide an adequate education. (Shams Dep. p. 24) The significance of this is that the cal-

culated 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.

In order for the Department of Education to calculate its obligations, the Tax Commissioner is required to annually file extensive, certified reports with the Department of Education and Office of Budget and Management:

(A) On or before the first day of June of each year, **the tax commissioner shall certify to the department of education and the office of budget and management the information described in divisions (A)(1) to (5) of this section for each city, exempted village, and local school district,** and the information required

by divisions (A)(1) and (2) of this section for each joint vocational school district, and it shall be used, along with the information certified under division (B) of this section, in making the computations for the district under this chapter.

(1) The taxable value of real and public utility real property in the school district subject to taxation in the preceding tax year, by class and by county of location.

(2) The taxable value of tangible personal property, including public utility personal property, subject to taxation by the district for the preceding tax year.

(3)(a) The total property tax rate and total taxes charged and payable for the current expenses for the preceding tax year and the total property tax rate and the total taxes charged and payable to a joint vocational district for the preceding tax year that are limited to or to the extent apportioned to current expenses.

(b) The portion of the amount of taxes charged and payable reported for each city, local, and exempted village school district under division (A)(3)(a) of this section attributable to a joint vocational school district.

(4) The value of all real and public

utility real property in the school district exempted from taxation minus both of the following:

(a) The value of real and public utility real property in the district owned by the United States government and used exclusively for a public purpose;

(b) The value of real and public utility real property in the district exempted from taxation under Chapter 725 or 1728 or section 3735.67, 5709.40, 5709.41, 5709.45, 5709.62, 5709.63, 5709.632, 5709.7, or 5709.78 of the Revised Code.

(5) The total federal adjusted gross income of the residents of the school district, based on tax returns filed by the residents of the district, for the most recent year for which this information is available, and the median Ohio adjusted gross income of the residents of the school district determined on the basis of tax returns filed for the second preceding tax year by the residents of the district.

R.C. 3317.021 (emphasis added).

The Commissioner's reports are used to calculate the SSI and the Capacity Measure for each school district,

both used to calculate the State's share of local education funding. R.C. 3117.017-018.

The SSI formula is set forth at R.C. 3317.017. The total property tax valuation of a school district is an integral part of the formula:

The department of education shall compute a school district's state share index as follows:

(A) Calculate the district's valuation index, which equals the following quotient:

(The district's three-year average valuation / the district's total ADM) / (the statewide three-year average valuation for school districts with a total ADM greater than zero / the statewide total ADM)

The Capacity Measure formula was set forth at R.C. 3317.018, and the district's property was an integral factor in the formula. In fact, for all districts within upper and lower limits of income, the property valuation index is the Capacity Measure. *See* former R.C. 3317.018, which

was repealed effective September 29, 2017.

The Tax Commissioner therefore has a statutorily mandated, non-delegable duty to determine and calculate the exact monetary amount of, and income from, increased property tax valuations, which it provides to both the Department of Education and the Department of Budget and Management. When the Tax Commissioner calculates new and higher CAUV values, it reports higher local property revenue (the “valuation” and “capacity measure”) from which both the Tax Commissioner and the Department of Education can predict, with mathematical certainty, the amount of money the State can retain in its Treasury and that can be clearly traced to the funds shifted from the State to the local school districts through higher CAUV property taxes. The amount retained by the State in its Foundation Program funds are mathematically traceable by application of the statutory formulas set

forth in R.C. 3317.017 and 3317.018. With regard to CAUV taxes only, the local Auditors and Treasurers are the State's agents for collection and assessment.

It is a matter of public record that the Commissioner has increased the overall taxable value of the 16 million acres of Ohio that are in the CAUV program more than 639% from 2005 to 2015, and the per acre value has increased 10-16 times, depending on which ODT publication is relied on. (Compare the 2016 figure in Exhibit 14 to the 2016 Figure in Exhibit 15, both appended to Plaintiff's Initial Brief In Opposition to Defendant's Motion For Summary Judgment).

The State has thereby shifted much of the burden of financing education to the farmers and landowners whom the CAUV program is supposed to serve. There is a causal connection between the State's failure to comply with the mandated formula for calculating CAUV property values,

the enormous rise in property values in rural districts and small towns, and the drastic reductions in state education aid. The March 15, 2015 testimony of Dr. Howard Fleeter of the Ohio Education Policy Institute before the House Finance Primary and Secondary Education Subcommittee of the Ohio Legislature concerning H.B. 64 (Exhibit 29 to Plaintiff's Initial Brief In Opposition to Defendant's Motion For Summary Judgment) demonstrated that:

1) The total taxable value of Ohio CAUV lands rose from over \$1.8 billion per year in Tax Year 2005 to over \$6.8 billion in Tax Year 2013, a nearly four-fold increase. Prior to the current administration, values rose from 14% to 22% per year, but in three years under Governor Kasich, CAUV increases were 31%, 32.6% and 37.6%.

2) In some areas of the State, CAUV values now approach fair market value, undermining the entire purpose of the CAUV program.

3) "Poor Rural Districts" and "Small Towns" were receiving the lowest per-

centages of increases in the State Education Budget for 2015-2017. Even “Wealthy Suburbs” were receiving more. Every other group would receive 3-4 times as much, except “Rural Districts,” the only group whose State funding was reduced. These 3 types of District have seen overall property value increases from 4.9% to 10.8%, while 3 of the 5 other types have seen decreases, and even “Wealthy Suburbs” only saw an increase of only 2.6% in their property values.

4) For Tax Years 2014-2017, the taxable value of property in “Poor Rural [School] Districts” increased \$1.3 billion, in “Rural School Districts” by \$1 billion, and in “Small Towns” by \$800 million. All other groups show losses, except “Wealthy Suburbs,” which show a meager 1.1% increase. These increases are almost all due to the enormous increases in CAUV values.

5) “Rural School Districts” fared the worst under the Governor’s proposed plan; these districts have seen the second highest increase in property values and the only decrease in State Aid.

The State has the money equivalent of what CAUV

landowners were and are forced to overpay; the fact that the farmers did not pay that excess to the State before it went to the School District (or local government fund) is immaterial. The State holds in its treasury – dollar for dollar – every incremental increase in CAUV valuation.

D. Local Government Funding

As the State Department of Education pronounces on its official website, approximately 2/3 of property taxes goes to education funding. The remaining 1/3 goes to local governments: counties, park districts, cities, villages and townships. Like the see-saw of education funding, as local property tax revenues have gone up as a result of the ODT's failure to calculate CAUV soil values according to law, the State has retained hundreds of millions in funds formerly earmarked for local governments. As noted above, the Tax Commissioner's appraisal values of CAUV lands has increased overall by 639% since 2005, rising at

rates over 32% per year under the Kasich Administration.

State funding of local governments averaged around \$670 million per year until 2011, when it dropped from an average of more than \$300 million per year, down to about \$360 million per year. The Commissioner's own "Tax Data Series" demonstrates this in the public record at http://www.tax.ohio.gov/tax_analysis/tax_data_series/local_government_funds/publications_tds_local/LG12CY15.aspx. (See Exhibits 15-28, and Exhibit 16, a graphic summary of Exhibits, to Plaintiff's Initial Brief In Opposition to Defendant's Motion For Summary Judgment).

E. Particular Evidence Demonstrates How Funds In The State Treasury Can Be Clearly Traced To Increased CAUV Valuations

The Depositions of Stanley Dixon, Director of the Division of Tax Equalization, and of Shelley Wilson, Assis-

tant Director, reveal 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:

- Is well-known to the Department of Taxation
- 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
- Is a topic of intense scrutiny by the Legislature, State officials, Departments and Offices, and the Ohio Education Policy Institute
- Was front page headline news, and
- Is evidenced by testimony before the Legislature by Director Dixon and presentations by Assistant Director Wilson.

And, 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 can clearly be traced to reduced funding obligations by the State to rural districts with more than the average amount of property in the CAUV program.

According to Dr. Fleeter, "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 Dep. Ex. 14). Returning to the same set of proposed CAUV formula modifications, 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 pupil to the state average and thus receive more state aid.” (Wilson Dep. 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 Dep. Ex. 8) 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”) predicted. (See Plaintiffs’ Motion to Continue Limited Discovery Exh. 5).

More critically, the LSC also predicted that this would result in higher payments by the State in the form of 10% rollback reimbursements. *Id.* Of course, the obverse is also true, that is, by artificially inflating CAUV

values for years, the State of Ohio was able to pay less to local school districts and also pay less in rollback reimbursements to local taxing authorities.

Appellants consider 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. In other words, money paid by the Lottery, or CAUV, to fund education can be clearly traced to funds in

the State treasury that the State retains when its own funding obligation is satisfied by these sources.

The depositions of Daria Shams, Senior Policy Analyst for ODE, and Frederick G. Church, Deputy Budget Director at OBM also revealed that:

- 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;
- Studies, particularly those performed by Frederick Church at OBM, show the State of Ohio has saved at least hundreds of million of dollars by overcharging farmers.

The decrease in local education funding in rural districts with high percentages of CAUV property is because the complicated SSI formula used 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 increased local tax collections by exces-

sive CAUV calculations.

The testimony of Shams and Church 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 allocates school funding and the manner in which CAUV values are calculated involve two of the most complicated formulas in state government, the testimony of Shams and Church clearly establishes that as CAUV values decrease, the State's share of education funding experiences a significant net increase.

In October 2016, Frederick Church, Deputy 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 Dep. 82-86, Church Dep. Ex. 31). Additional analysis by Church

demonstrated that the farmers were right: districts high in CAUV properties saw significant increases in value, while districts with a more urban “typology” (to use the DOT’s term) actually saw decreases in value. (Church Dep. 39-40, Church Dep. Exh. 23).

By 2015, the issue 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 Dep. pp. 17-22 and Church Dep. Exhs. 20, 21). The Governor’s office also was interested (Church Dep. pp. 32-36; 79-81, Church Dep. Exhs. 20, 23), as was Senate President Keith Faber. (Church Dep. pp. 48-49, Church Dep. 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 Dep. p. 80, Church Dep. Exh. 30).

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

What this 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** (all other factors held constant), these districts have in fact benefited from these increased valuation amounts through higher tax revenues with no increase in tax rates.

(Church Dep. pp. 76-77, Church Dep. Exh. 29) (emphasis added)

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 Dep. pp. 87-88, 123-127, Church Dep. Exh. 34)

Church calculated that reducing CAUV taxes by the proposed changes in the CAUV formula would result in the State paying \$139,544,894 more in 2018 than it did in 2017, and \$124,773,760 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. (Church Dep. pp. 123-128, Dep. Exh. 34).

Church's highly credible studies and testimony established beyond dispute the mathematically demonstrable relationship whereby increased CAUV valuations can

be clearly traced to 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.

ARGUMENT

I. STANDARD OF REVIEW

Appellate courts review the entry of summary judgment *de novo*. *Johnston v. State*, 2016-Ohio-4761, 69 N.E.3d 5, ¶7 (10th Dist.). This Court should, after such *de novo* review, find that there exists a genuine dispute as to a material fact, namely, whether money which “belongs in good conscience” to CAUV landowners “can be traced” to funds held by the State of Ohio. If such a dispute exists, then the Court of Common Pleas has subject matter juris-

diction over this dispute, which must be resolved by a jury.

Summary judgment becomes appropriate under Civ. R. 56 when: (1) there remains no genuine issue of material fact; (2) the moving party deserves judgment in its favor as a matter of law; and (3) reasonable minds can only reach a conclusion adverse to the parties opposing summary judgment, even after construing the evidence in their favor. *Ratonel v. Roetzel & Andress, LPA*, 147 Ohio St. 3d 485, 2016-Ohio-8013, 67 N.E.3d 775, ¶18.

II. EQUITABLE RESTITUTION LIES FOR ENFORCEMENT OF STATUTORY RIGHTS

The essence of Appellants' complaint is the enforcement of the CAUV program, *viz.*, the body of statutes which the legislature has enacted to carry into effect the electoral mandate to amend the Ohio Constitution to allow agricultural property to be valued according to use,

and the recovery of the funds overpaid as a result of violation of that statutory scheme. The statutes include R.C. 5713.01, 5713.03, 5713.30 and 5713.31.

Both the U.S. Supreme Court and the Ohio Supreme Court have held that claims against the government seeking to enforce statutes, and the recovery of funds which were overpaid due to a violation of statute, are claims for equitable, not legal, restitution.

In *Cristino v. Ohio Bureau of Workers' Comp.*, 118 Ohio St.3d 151, 2008-Ohio-2013, the question before the Court 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 the Courts of Common Pleas have express jurisdiction under

R.C. 2743.03, while claims against the State for the enforcement of contractual rights were under the jurisdiction of the Court of Claims. *Id.* at 154.

III. THE COURT OF COMMON PLEAS HAD 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 – not any County official anywhere – determines the value of all property, and the County Auditors, its agents and “Deputy Assessors,” collect real property taxes.³ Plaintiffs’ claims for wrongfully excessive collections are claims for equitable restitution. As the Tax Commissioner himself points out, in *Great-West Life &*

Annuity Ins. Co. v. Knudson, 534 U.S. 204, 122 S.Ct. 708 (2002), the U.S. Supreme Court held that restitution is an equitable remedy when the Plaintiff seeks monies either wrongfully collected by the state, or wrongfully held by the state. *Id.* 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 facts here are absolutely unique. The State has a constitutional duty to fund a thorough and efficient sys-

³ In its own briefing in *Adams v. Testa*, 152 Ohio St.3d 207, 2017-Ohio-8853, the Tax Commissioner refers to the County Auditor as his deputy and further admits that he is "the statewide official charged with overseeing the CAUV program." *See, e.g.*, Merit Br. Of Appellee at p. 9.

tem of public education throughout the State. The State chooses to do that primarily through a property tax. The Tax Commissioner supervises all property tax collection; County Auditors are but Deputy Assessors acting under the supervision and rules of the Tax Commissioner. The Tax Commissioner alone sets the appraisal value of every acre of CAUV land. Whatever money for education funding cannot be raised by local property taxes, must be paid by the State: a “zero sum game.” There is a mathematical formula by which the amount overpaid by local CAUV taxpayers directly benefits the State. The State routinely calculates the amount it will save or spend as CAUV rates rise and fall; the funds overpaid by CAUV landowners can be directly traced to funds held by the State.

Under these unique circumstances, Plaintiff’s claims are for equitable restitution, notwithstanding the Plaintiff’s property tax money was paid to an agent of the State

(the County Treasurer) and not to the State Treasury directly.

IV. WHEN CAUV LANDOWNERS PAY INFLATED TAXES, THE STATE HOLDS MONIES WHICH IN GOOD CONSCIENCE BELONG TO THE TAXPAYER

Appellants' claims are for equitable restitution because the State "holds" monies which in good conscience belong to them. The increase in CAUV valuations have allowed the State to retain hundreds of millions of dollars in its coffers. The State's own Deputy Budget Director proved that reducing those CAUV taxes just 30% would cost the State exactly \$403,863,548 in just two years.

The State takes the position that Appellants cannot claim equitable restitution unless they can identify particular funds directly taken from them by the State and placed into specific, identifiable accounts in which they are held. Neither the U.S. Supreme Court nor the Ohio

Supreme Court has imposed any such burden.

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

“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.’”

Cristino, 118 Ohio St.3d at 152, quoting *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 2013.

Here, there is no dispute that whatever portion of the increases in CAUV property taxes that were in excess of the amounts which would have resulted had the Commissioner and the State complied with the statutory CAUV scheme “belong in good conscience to the” Appellants.

The monies at issue can “clearly be traced” to the State’s Treasury. The Commissioner’s highly detailed

analyses form the basis for the Department of Education's calculations of the State's share of education funding using the SSI and Capacity Measure formulae. There exists a direct, mathematically traceable and predictable relationship between the amount of overpayment of CAUV taxes and education monies the State "holds" at the expense of the Appellants. In "good conscience," it is not the Auditors or Treasurers who calculated and imposed these taxes, or who benefit from their overpayment, but the State alone. The Fleeter Report demonstrates this, and the funds now in the possession of the State can be traced with mathematical precision by application of the SSI and Capacity Measure formulae.

Likewise, one third of CAUV property tax revenue goes to local government entities. There is a direct causal relationship between the huge increases in CAUV tax collections caused by the State's violation of the CAUV stat-

Franklin County Ohio Court of Appeals Clerk of Courts- 2018 Aug 06 11:01 AM-18AP000484

utes and the huge sums of money now in the State Treasury which were otherwise earmarked for Local Government funding. The Tax Commissioner's annual analyses of the tax base, expenses and revenue available to every city, exempted village, school district and joint vocational school in Ohio were and are reported to the Office of Budget and Management, who then knew exactly how much more local revenue is available due to higher CAUV taxation. As CAUV valuations increased, state funds to local governments plummeted. (Plaintiffs' Initial Brief In Opposition To Motion for Summary Judgment at Exhs. 16-28). There is an obvious and direct relationship between the massive increases in CAUV taxation and the nearly 50% decrease in state distribution of Local Government funds, from nearly \$760 million to \$350 million per year.

The testimony and exhibits from Plaintiffs' discovery

of the top officials from the Departments of Taxation, the Department of Education, and the Office of Management and Budget demonstrate that all three of these offices, and the Office of the Governor, have deep silos of data from which they calculate and predict and budget, years in advance, exactly how much revenue the State can keep as the Tax Commissioner raises CAUV taxes.

At the very least, genuine issues of material fact should have precluded summary judgment below when viewing the foregoing facts in the light most favorable to the Appellants.

CONCLUSION

For the foregoing reasons, Appellants request that the judgment of the Common Pleas Court be reversed and this case remanded for a determination on the merits.

Respectfully submitted,

/s/ James B. Rosenthal
Joshua R. Cohen (0032368)
jcohen@crklaw.com
James B. Rosenthal
(0062872)
jbr@crklaw.com
Cohen Rosenthal & Kramer
LLP
3208 Clinton Avenue
One Clinton Place
Cleveland, Ohio 44113
(216) 815-9500 (Tel. & Fax)

Dennis E. Murray, Jr.
(0038509)
dmj@murrayandmurray.com
William H. Bartle (0008795)
whb@murrayandmurray.com
Murray & Murray Co. L.P.A.
111 E. Shoreline Drive
Sandusky, Ohio 44870
(419) 624-3000 (Telephone)

/s/ Kevin T. Roberts
Kevin T. Roberts (003749)
ktr@kevinrobertslaw.com
The Roberts Law Firm
7622 Columbia Road
Olmsted Falls, Ohio 44138
(440) 793-6255 (Telephone)
(440) 793-6256 (Fax)

Anthony J. Coyne (0039605)
acoyme@mggmlpa.com
Edward O. Patton (0042004)
epatton@mggmlpa.com
Mansour Gavin LP
North Point Tower
1001 Lakeside Avenue,
Suite 1400
Cleveland, Ohio 44114
(216) 523-1500 (Telephone)

*Co-counsel for Plaintiffs-
Appellants*

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing BRIEF OF APPELLANTS was filed with the Court's electronic filing system this 6th day of August, 2018. Service will be made by e-mail upon counsel for the Defendants:

Robert A. Hagar
rahagar@bmdllc.com
Justin M. Alaburda
jmalaburda@bmdllc.com
Brennan, Manna & Diamond, LLC
75 East Market Street
Akron, Ohio 44308

Daniel W. Fausey
daniel.fausey@ohioattorneygeneral.gov
Christine Mesirow
christine.mesirow@ohioattorneygeneral.gov
Daniel Kim
daniel.kim@ohioattorneygeneral.gov
Attorney General of Ohio
30 East Broad Street, 25th Floor
Columbus, Ohio 43215

/s/ James B. Rosenthal
James B. Rosenthal