IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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

REPLY 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

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The State has employed a deliberate strategy, in this case and others, of defending claims by CAUV landowners with a carefully planned jurisdictional "shell game," with the ultimate goal of denying the Appellants any forum to hear the merits of their claims, that is, any open courthouse door, any remedy.

Here, the State has articulated no substantive reason why Appellants' claims are of such a nature that the merits are better determined in the Court of Claims. The underlying facts, claims and remedies will not change, nor the amount demanded. The State's insistent demand that all proceedings be delayed until the Appellants' claims are finally characterized as either legal or equitable, was interposed solely for the purpose of delay.

In the State's shell game, there are four shells: the Court of Common Pleas, the Court of Claims, the Board of Tax Appeals, and a mandamus action in the Ohio Su-

preme Court. The game is to find under which shell there lies jurisdiction for a CAUV taxpayer claim (for which the Legislature inconveniently failed to prescribe any express form of appeal). The State has proven itself adept at moving the shells, and when CAUV landowners choose a forum, they raise up the shell and find the State claiming there is no jurisdiction under any of them.

When Appellants filed in Ashtabula Common Pleas, the State argued that jurisdiction was under the Board of Tax Appeals shell. At the same time, the State filed briefs in a Board of Tax Appeals action by other CAUV landowners absolutely opposing the BTA's jurisdiction. *See* discussion at pp. 20-21 of Appellants Initial Brief In Opposition to Motion For Summary Judgment Filed By the Tax Commissioner. After being caught, the State here then argued that jurisdiction was definitely not under the Court of Common Pleas shell, and filed for the dismissal

now on Appeal. Notwithstanding it successfully argued below that Appellants' claims are legal, not equitable, and relies entirely on cases concluding legal claims against the State can only be brought in the Court of Claims, the State never expressly admits that the Court of Claims, or for that matter any court or forum, has indisputable jurisdiction over Appellants' claims.

So far, the State's strategy has worked: for nearly three years, by filing repeated motions to dismiss, to transfer venue, and for summary judgment, the State has denied 100,000 of its hardest working citizens any hearing or meaningful discovery to explain or be held accountable for raising property taxes on farms 1,000%.

This Court should not tolerate any further delay, but reverse the Trial Court and remand this case for full proceedings on the merits.

I. Questions Of Fact Should Have Precluded Summary Judgment On Appellants' Claim For Equitable Restitution

After reviewing the record below *de novo*, this Court should conclude that the Common Pleas Court erred by failing to recognize numerous genuine disputes of material fact fundamental to the question of subject matter jurisdiction, including:

- Whether the State, through its Tax Commissioner, violated the Ohio Statutes and Rules comprising the CAUV tax program?

- Whether real property taxes based on CAUV land valuations promulgated by the State through its Tax Commissioner are *collected* by the State?

- Whether, the State *holds* monies "belonging in good conscience" to CAUV landowners who overpaid real property taxes based on overvaluations?

- Whether the State's overvaluing CAUV lands, by violating Ohio statutes and regulations governing the method of calculation, results in *gains* to the State Treasury?

- Whether, given the statutory, mathematical formulas by which the State's share of constitutionally re-

quired education funding is calculated, real estate taxes overpaid by CAUV landowners can be directly *traced* to funds held and retained in the State Treasury?

Over the years the Ohio Supreme Court has adopted tests to determine when claims can be characterized as claims for equitable restitution over which a Court of Common Pleas has jurisdiction. There are a variety of factual scenarios which can form the foundation for a claim for equitable restitution, and the Courts must make the determination on a case-by-case basis.

A. <u>The Santos Test: "Collected or Held"</u>

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 plaintiffs seek monies either wrongfully *collected* by the defendant, or wrongfully *held* by the defendant. 534 U.S. at 213. This reasoning was adopted as law 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. This is clearly an either-or test: the money in question must either be *collected* by, or, *held* by, the State. The State argues there is a two-element test: the money must be both collected by *and* held by the State. This is not the plain language adopted in either *Great-West* or *Santos*.

B. The Christino Test: "Money Belonging In Good Conscience to Plaintiffs Can Be Traced To Funds In Defendant's Possession."

In *Cristino v. Ohio Bureau of Workers' Comp.*, 118 Ohio St. 3d 151, 2008-Ohio-2013, the Ohio Supreme Court unanimously held 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 R.C. Section 2743.03, while claims for the enforcement of contractual rights were under the jurisdic-

tion of the Court of Claims. 118 Ohio St. 3d at 154. In addition to that critical distinction, the Court adopted the definition of claims for equitable restitution 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)

Christino, 118 Ohio St. 3d 151, at 152, quoting *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. at 213.

C. The Cirino Test: Did The Defendant Wrongfully Gain?

Less than two months ago, in *Cirino v. Ohio Bureau of Workers' Compensation*, 2018-Ohio-2665, the Ohio Supreme Court boiled the equitable restitution test down to its simplest elements: equitable restitution claims have as

their purpose the prevention of unjust enrichment, whereas legal restitution claims compensate for a loss caused by a Defendant who was not enriched by their misconduct. The Supreme Court specifically adopted the holding of *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 944 (8th Cir. 1999):

> "an award of equitable restitution 'focuses on the defendant's wrongfully obtained gain, while a compensatory award focuses on the plaintiff's loss at the defendant's hands.'"

Cirino, 2018-Ohio-2665, ¶23.

Appellee chastises Appellants for not bringing the recent decision in *Cirino* to this Court's attention, as controlling opposing authority. The Court in *Cirino* ultimately concluded that Plaintiff's claim was not for equitable restitution, because the deductions to plaintiff's Workers' Compensation payments were solely the result of Chase Bank's debit card fees, and the Plaintiff had not demon-

strated either the Bureau's control over Chase's fees, or any gain or enrichment to the Bureau from the fees. Thus, the claims against the Bureau were for compensation for losses caused by the Bureau's negligent lack of oversight over Chase.

These facts are not applicable here, where the State has complete control over the taxes imposed, and sworn depositions and the State's own analyses demonstrate the State gains and holds hundreds of millions of dollars each year when it raises CAUV valuations. In fact, the recent holding in *Cirino* supports Appellants' claims, as it clarifies the prior tests of equitable restitution.

D. Appellants' Claims Meet Ohio's Definition of Equitable Restitution.

Appellants submitted sworn, admissible, and incontrovertible evidence creating, at the very least, genuine issues of material fact as to whether Appellants' claims

are for equitable restitution.

As detailed in Section II below, the State is a single legal entity, whose agents at the County level *collect* CAUV property tax revenue, one of the two ways equitable restitution is proven under the *Santos* test. Even ignoring the indisputable legal conclusion that the Counties have no independent legal status from the State, Appellants demonstrated beyond factual dispute that the State calculates and imposes all tax on CAUV real properties, and collects it through County Auditors and Treasurers statutorily bound to impose the Tax Commissioner's assessments and follow the Commissioner's rules. There is no genuine issue of material fact whether the State collects CAUV property taxes: it does.

There is a genuine issue of material fact whether the State holds money which in good conscience belongs to the Appellants, and can be traced to funds in the State's pos-

session. Appellants' Initial Brief and final Memorandum In Opposition to Defendant's Motion for Summary Judgment, and the voluminous exhibits and depositions submitted therewith, demonstrate that the State holds hundreds of millions of dollars in its Treasury which it gained by unlawfully increasing CAUV taxes. Incredibly, discovery demonstrated that the State itself has repeatedly and accurately calculated – that is "traced" – how much money it can either hold on to, or have to pay, as its Tax Commissioner's valuations of CAUV lands rise and fall, as those funds are mathematically linked in a "zero sum" situation. The depositions of Messrs. Shams and Church, the top analysts in the Office of Management and Budget and the Department of Education, and the exhibits thereto, proved the traceability of funds beyond dispute. Appellants' evidence demonstrates at the very least a genuine issue of material fact whether their claims meet the sec-

ond definition of equitable restitution claims articulated in *Santos* ("the Defendant holds funds"), and the test in *Christino* ("money belonging in good conscience to the Plaintiff can be traced to funds in the Defendant's possession.").

Finally, Appellants' voluminous, admissible evidence demonstrated overwhelmingly that the State alone controls the CAUV taxation process, and all valuations and revenues therefrom, and the State alone gains unjustly when CAUV valuations are increased. There can be no doubt that Appellants created at the very least a genuine issue of material fact that they met the new *Cirino* test of equitable restitution: did the Defendant gain, or enrich itself, by the conduct at issue?

II. The Collins Case Is Distinguishable And Is Not Controlling Precedent: Counties Are Agents Of The State

The State contends that *Ohio Utilities Co. v. Collins*, 48 Ohio St.2d 169, 357 N.E.2d 1077 (1976) settled the question of whether county treasurers are "agents" of the Tax Commissioner for purposes of the CAUV tax and that Appellants were deficient not to cite it as controlling authority. Contrary to the State's reading of the case, it is distinguishable and does not constitute the last word on whether Ohio's statutory scheme of real property taxation considers county officials as agents of the State.

The case generally involved R.C. 5703.05(B) which empowers the Tax Commissioner, among other things, to "remit[] or refund[]taxes or assessments ... illegally or erroneously assessed or collected..." R.C. 5703.05(B). More specifically, Collins addressed a unique proceeding set forth in the statute for the issuance of a "certificate of

abatement."

The Court in *Collins* upheld a decision of the Board of Tax Appeals to the effect that R.C. 5703.05(B) does not authorize the Tax Commissioner to grant a certificate of abatement for the overpayment of an *ad valorem* public utilities tax paid to a county treasurer. The decision rests on particular language in the statute concerning certificates of abatement for overpayments "to the Treasurer of State." The petitioner did not make a payment to the Treasurer of State, but instead overpaid the county treasurer. The Court held it would "not 'expand, extend or improve' R.C. 5703.05(B) to equate payment to a county treasurer with payment to the Treasurer of State" for purposes of issuing a certificate of abatement. *Id.* at 171.

The Court also expressly limited its holding, explaining that the decision "has no bearing on the power of the Tax Commissioner pursuant to R.C. 5703.05(B) and

5715.39 to *remit* or *refund* the overpaid taxes of such taxpayers." *Id.* at 170, fn. 1 (emphasis in original).[1]

The issue in this case is whether principles of equitable restitution require the Court to uphold a formalistic separation between the State's coffers and those of the Counties when there can be no legitimate dispute that in Ohio, counties are organs of the State. "A county is a subdivision of the state, organized for judicial and political purposes. It is not a legal person or a separate political entity." *Schaffer v. Board of Trustees*, 171 Ohio St. 228, 230, 168 N.E.2d 547 (1960). Under this rubric, the "powers and functions of the county organization have a direct and exclusive reference to the general policy of the state

[1] In seeking to recover excessive CAUV taxes from the State treasury, Appellants have invoked the general authority of R.C. 5703.05(B), although without invoking that particular statute. Instead, Appellants noted that under R.C. 5715.39, "local auditors and treasurers may only remit penalties, not taxes." Brief of Appellant at 8.

and are in fact but a branch of the general administration of that policy." *Id.*

Pursuant to this ancient principle, "[c]ounty officers are not local officers, but are a part of the permanent organization of the government of the state." *State ex rel. Guilbert v. Yates*, 66 Ohio St. 546, 551, 64 N.E. 570 (Ohio 1902). As a matter of black letter law,

> County officers are not local officers except in the sense that the legislature has provided for their election by the people of the respective counties and that their duties are to a large extent circumscribed by the county boundaries. Rather, they are state agencies and constituent parts of the scheme of the permanent organization of the state government.

20 Ohio Jur. 3d COUNTIES, ETC. § 51.

In *Hamilton Cty. Comm'rs v. Noyes*, 1874 WL 5369, at 4 (Ohio Super. Mar. 1874), the Court confirmed this essential proposition, but held further that "[b]oards of

county commissioners, county auditors and treasurers . . . and boards of education, are also but mere state agencies, not legal or corporate personages." *Id.* Therefore, because "[a]ll taxes that are levied . . . are levied, collected, and kept in the treasury only by the direct and specific authority of the state," such funds in essence belong to the State. *Id.*

The CAUV taxation scheme is entirely consistent with these principals. It is a State program that enlists county auditors and treasurers as agents for assessing and collecting the tax. Thus, under R.C. 5715.01, "[t]he tax commissioner shall direct and supervise the assessment for taxation of all real property." While county offices are enlisted to assist in this, they do not have authority to deviate from the rules and values that the commissioner "shall adopt, prescribe, and promulgate for the determination ... of the current agricultural use value of land

devoted exclusively to agricultural use." *Id.* To the contrary, under R.C. Ch. 5715, "the commissioner has ... preeminent power in directing the assessment of real property for taxation." *Board of Educ. v. Lucas County Budget Comm'n*, 71 Ohio St.3d 120, 122, 1994-Ohio-453, 642 N.E.2d 362 (1994).

The instant case has nothing to do with a certificate of abatement under Section 5703.05(B), and the *Collins* case had nothing to do with CAUV taxation. To the extent that R.C. 5703.03(B) broadly declares that the tax commissioner has power that includes "remitting or refunding taxes ... illegally or erroneously assessed or collected..." it supports Appellants' position. The specific procedure concerning a certificate of abatement at issue in *Collins* is "in addition" to this general, unlimited authority. *Id.* Under the circumstances, R.C. 5703.05(B) stands for the proposition that the Commissioner has the power to refund a tax,

even if it did not collect it, which is contrary to the State's position in this case.

CONCLUSION

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)
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)

Co-counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

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

Robert A. Hager
rahager@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