

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Pietro Cristino,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 12AP-60
v.	:	(Ct. of Cl. No. 2008-10773)
	:	
Administrator, Ohio Bureau of Workers'	:	(REGULAR CALENDAR)
Compensation,	:	
	:	
Defendant-Appellee.	:	
	:	

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D E C I S I O N

Rendered on September 27, 2012

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*Bashein & Bashein Co., L.P.A., and W. Craig Bashein; Plevin & Gallucci Co., L.P.A., and Frank Gallucci, III, for appellant.*

*Michael DeWine, Attorney General, Mark E. Mastrangelo, Randall W. Knutti and Emily M. Simmons, for appellee.*

*Cavitch, Familo & Durkin Co., LPA, Ronald D. Holman, II, Alexander E. Goetsch and Max E. Dehn, for appellee.*

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APPEAL from the Court of Claims of Ohio

KLATT, J.

{¶ 1} Plaintiff-appellant, Pietro Cristino, appeals a judgment of the Court of Claims of Ohio in favor of defendant-appellee, the Administrator of the Ohio Bureau of Workers' Compensation ("Bureau"). For the following reasons, we reverse in part, affirm in part, and remand for further proceedings.

{¶ 2} In 1993, the Bureau found that Cristino had a permanent total disability ("PTD"). As a result, R.C. 4123.58(A) entitled Cristino to receive a biweekly payment of \$708 until his death. According to Cristino, several years after he began receiving PTD

benefits, a Bureau representative called him at his home and offered to send him a lump-sum payment of \$115,000 instead of the biweekly payments. Cristino recalls the representative telling him that the \$115,000 lump-sum payment was a "good deal" and a "fair amount." Cristino deposition, at 62-63. Cristino agreed to the lump-sum payment. On November 2, 1998, the Bureau issued Cristino a check for \$115,000. Cristino cashed the check.

{¶ 3} On June 22, 2001, Cristino filed a class action complaint against the Bureau and the state of Ohio in the Cuyahoga County Court of Common Pleas. In his complaint, Cristino alleged that the defendants had improperly calculated the present value of his PTD claim and, therefore, he had not received the full actual value of his PTD benefits. Cristino asserted claims for breach of fiduciary duty, fraud, unjust enrichment, and violation of constitutional and statutory rights. Cristino sought several forms of relief, including full restitution of the difference between the amount the defendants represented was the present value of his PTD claim and the true present value.

{¶ 4} The defendants moved to dismiss the complaint. They argued that Cristino sought money damages from the state and, consequently, the Court of Claims was the only court that possessed subject-matter jurisdiction over his case. Cristino responded that he sought reimbursement of money wrongfully withheld, which was an equitable remedy. Because equitable claims against the state may be maintained in a court of common pleas, Cristino argued that the Cuyahoga County Court of Common Pleas was the appropriate forum for his action. Ultimately, the trial court granted the defendants' motion. Cristino appealed the trial court's judgment to the Eighth District Court of Appeals, which affirmed. *Cristino v. Admr., Ohio Bur. of Workers' Comp.*, 8th Dist. No. 80619, 2003-Ohio-766. Cristino then appealed to the Supreme Court of Ohio. In a one-sentence decision, that court reversed the appellate court's judgment and remanded the case to the trial court on the authority of the recently decided case of *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28. *Cristino v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 97, 2004-Ohio-201.

{¶ 5} On remand, the defendants again moved to dismiss on the ground that the Court of Claims, not a court of common pleas, had subject-matter jurisdiction over the action. Cristino moved for class certification. The trial court denied the defendants'

motion to dismiss and granted Cristino's motion for class certification. The Eighth District Court of Appeals affirmed both decisions. *Cristino v. Admr., Ohio Bur. of Workers' Comp.*, 8th Dist. No. 87567, 2006-Ohio-5921. The defendants appealed the jurisdictional issue to the Supreme Court of Ohio. Upon its second review of that issue, the court held that Cristino sought legal, not equitable, relief because he pleaded a claim for money due under a contract, not the restitution of funds to which he was statutorily entitled. *Cristino v. Ohio Bur. of Workers' Comp.*, 118 Ohio St.3d 151, 2008-Ohio-2013, ¶ 12-14, 16. The Supreme Court of Ohio thus ruled that the Cuyahoga County Court of Common Pleas lacked subject-matter jurisdiction over the action. *Id.* at ¶ 1.

{¶ 6} On November 10, 2008, Cristino filed the instant action in the Court of Claims. Cristino alleged that the Bureau misled him into accepting \$115,000 as a lump-sum settlement of his PTD claim. Specifically, the complaint stated:

14. Unbeknownst to Cristino, the Bureau had actually discounted the present value of the claim by an additional thirty percent (30%) pursuant to an official policy established by the Administrator. In other words, the Bureau had calculated the present value of the claim based upon Cristino's statistical life expectancy and then further reduced the figure by thirty percent (30%).

15. The Bureau never disclosed the thirty percent (30%) discount to Cristino despite the fact he was statutorily entitled to the PTD payments for the rest of his life.

16. Additionally, the Bureau based these calculations upon unrealistic life expectancy tables that are more favorable to the government. These tables are inconsistent with more reliable data utilized by many other private entities and governmental agencies, including (but not limited to) the United States Department of Labor.

17. The Bureau never disclosed to Cristino that unreliable and outdated life expectancy tables were being utilized in the calculation of the present value of his PTD claim.

{¶ 7} Cristino asserted claims for breach of contract, breach of fiduciary duty, fraud, unjust enrichment, and violation of constitutional and statutory rights. In addition to money damages, Cristino also sought declaratory and injunctive relief.

{¶ 8} The Bureau moved to dismiss Cristino's complaint based on Civ.R. 12(B)(6).<sup>1</sup> The trial court granted the Bureau's motion in part and denied it in part. Although the trial court dismissed Cristino's claims for breach of fiduciary duty, fraud, unjust enrichment, violation of constitutional and statutory rights, and injunctive relief, it denied the motion as it related to Cristino's claims for breach of contract and declaratory relief.

{¶ 9} Shortly after the Bureau moved to dismiss, Cristino filed a motion requesting that the trial court reinstate the class certification order that the Cuyahoga County Court of Common Pleas had entered. The trial court never ruled on that motion.

{¶ 10} Once it had completed discovery, the Bureau moved for summary judgment on Cristino's claim for breach of contract. The trial court granted the Bureau's motion on the basis that the statute of limitations barred the breach-of-contract claim. The Bureau then moved, with leave, for judgment on the pleadings with regard to Cristino's claim for declaratory relief. The trial court also granted that motion. Because that decision disposed of the last remaining claim, the entry granting the Bureau's motion for judgment on the pleadings constituted a final, appealable order.

{¶ 11} Cristino now appeals, and he assigns the following errors:

[1.] THE COURT OF CLAIMS ERRED, AS A MATTER OF LAW, BY DISMISSING THE CLAIMS FOR BREACH OF FIDUCIARY DUTY, UNJUST ENRICHMENT, FRAUD, DECLARATORY RELIEF, AND INJUNCTION UPON THE PLEADINGS AND BY REFUSING TO RECONSIDER THE UNTENABLE RULINGS.

[2.] THE COURT OF CLAIMS JUDGE ERRED, AS A MATTER OF LAW, BY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE UPON THE CLAIM OF BREACH OF CONTRACT.

[3.] AFTER THE COURT OF CLAIMS LOST JURISDICTION OVER THE REMAINING THEORIES OF RELIEF, A FURTHER ERROR WAS COMMITTED WHEN A REMAND WAS NOT ORDERED TO THE CUYAHOGA COUNTY COURT OF COMMON PLEAS.

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<sup>1</sup> The Bureau also moved under Civ.R. 12(B)(1) for dismissal of Cristino's claim for violation of constitutional and statutory rights. Cristino does not appeal the trial court's decision to dismiss that claim. Therefore, we will refer to the Bureau's motion to dismiss as a Civ.R. 12(B)(6) motion throughout this decision.

[4.] THE COURT OF CLAIMS JUDGE ABUSED HIS DISCRETION BY FAILING TO PROMPTLY REINSTATE THE PRIOR CLASS CERTIFICATION ORDER.

[5.] THE TRIAL JUDGE ERRED BY IMPLICITLY OVERRULING PLAINTIFF-APPELLANT'S REMAINING MOTIONS.

{¶ 12} By his first assignment of error, Cristino argues that the trial court erred in dismissing his claims for breach of fiduciary duty, fraud, and unjust enrichment, and in entering judgment on the pleadings with regard to his claim for declaratory relief. We find that the trial court erred in its rulings on Cristino's claims for fraud, unjust enrichment, and declaratory relief. However, we find no error in the trial court's dismissal of Cristino's breach-of-fiduciary-duty claim.

{¶ 13} Before beginning our analysis of Cristino's first assignment of error, we must clarify the extent of our review. The Bureau asserts that this court should overrule the first assignment of error because all the claims subsumed in it are time-barred. The trial court did not rely on the statute of limitations to rule in the Bureau's favor on any of the claims at issue. The trial court eschewed reliance on the statute-of-limitations defense for good reason. First, the Bureau did not raise that defense in its Civ.R. 12(B)(6) motion. In a footnote, the Bureau explicitly acknowledged that the complaint did not contain the dates necessary for the Bureau to craft an argument that Cristino asserted his claims after the statute of limitations had elapsed. Because "courts cannot rely on evidence or allegations outside the complaint to determine a Civ.R. 12(B)(6) motion," the Bureau elected not to pursue the statute-of-limitations defense. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207 (1997). Now, however, the Bureau would have this court ignore the preceding rule of law and review the trial court's ruling on its Civ.R. 12(B)(6) motion in light of evidence adduced in support of its motion for summary judgment. We refuse to do this.<sup>2</sup>

{¶ 14} Second, although the Bureau raised the statute-of-limitations defense in its motion for judgment on the pleadings, the scope of review for a Civ.R. 12(C) motion prohibited the trial court from granting the motion on that ground. "[D]etermination of

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<sup>2</sup> Additionally, in reviewing the Civ.R. 12(B)(6) decision, we ignore Cristino's cites to evidence outside of the complaint and any argument based on that evidence.

[a] motion for judgment on the pleadings is restricted solely to the allegations in the pleadings.' " *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 582 (2001), quoting *Peterson v. Teodosio*, 34 Ohio St.2d 161, 166 (1973). Neither the complaint nor answer provides the dates needed to ascertain when Cristino's claims accrued. Nevertheless, the Bureau urges this court to consider evidence of those dates in our review of the trial court's Civ.R. 12(C) judgment. Again, we refuse to do this.

{¶ 15} We now turn to Cristino's challenge of the trial court's dismissal of his claims for breach of fiduciary duty, fraud, and unjust enrichment. A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint. *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, ¶ 11. In construing a complaint upon a Civ.R. 12(B)(6) motion, a court must presume that all factual allegations in the complaint are true and make all reasonable inferences in the plaintiff's favor. *Id.* at ¶ 12; *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, ¶ 14. " '[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss.' " *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶ 5, quoting *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144 (1991). Appellate court review of a trial court's decision to dismiss a claim pursuant to Civ.R. 12(B)(6) is de novo. *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, ¶ 12.

{¶ 16} To prevail on a claim for breach of fiduciary duty, a plaintiff must show: (1) the existence of a duty arising from a fiduciary relationship, (2) the defendant's failure to observe that duty, and (3) an injury proximately resulting therefrom. *Wells Fargo Bank, N.A. v. Sessley*, 188 Ohio App.3d 213, 2010-Ohio-2902, ¶ 36 (10th Dist.). "When there is no fiduciary relationship between the parties, a breach-of-fiduciary-duty claim necessarily fails." *Id.*

{¶ 17} A fiduciary relationship is a relationship " 'in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.' " *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, ¶ 16, quoting *In re Termination of Emp. of Pratt*, 40 Ohio St.2d 107, 115 (1974). A fiduciary is an entity that has a duty, created by its

undertaking, to act primarily for the benefit of another in matters connected with its undertaking. *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, ¶ 35.

{¶ 18} The Supreme Court of Ohio addressed the scope of the Bureau's fiduciary duty in *State ex rel. Harry Wolsky Stair Builder, Inc. v. Indus. Comm. of Ohio*, 58 Ohio St.3d 222 (1991). There, an employer had overpaid workers' compensation premiums to the Bureau, and it requested a refund. After the Bureau refunded part, but not all, of the overpayment, the employer sought a writ of mandamus compelling full reimbursement. In part, the employer argued that the Bureau owed it a fiduciary duty that required the Bureau to make full restitution. The Supreme Court rejected this argument, holding that the Bureau's "sole fiduciary responsibility is to the State Insurance Fund." *Id.* at 224.

{¶ 19} Despite this unambiguous holding, Cristino argues that the Bureau also has a fiduciary duty to him. To support his argument, Cristino points to precedent that holds that public officials generally owe a fiduciary duty to state citizens. *See State v. McKelvey*, 12 Ohio St.2d 92, 95 (1967); *Crane Twp. ex rel. Stalter v. Secoy*, 103 Ohio St. 258, 259-60 (1921). We do not find this precedent applicable here. Such precedent "was established, and has typically been applied, in the context of public officials who engaged in some sort of financial misconduct, such as using their public office for private gain or misappropriating funds in contravention of express statutory duties." (Citations omitted.) *State ex rel. Cook v. Seneca Cty. Bd. of Commrs.*, 175 Ohio App.3d 721, 2008-Ohio-736, ¶ 32 (3d Dist.) Moreover, adoption of Cristino's proposition that the Bureau owes dual fiduciary duties would subject the Bureau to conflicting responsibilities. The Bureau would have to serve both the disabled employee's interest in maximizing his award and the fund's interest in preserving the fund corpus. However, "[a] fiduciary may not possess an interest of any sort that might conflict with an interest of the person to whom he or she owes a duty." *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 282 (1993); *see also Bell v. McConnell*, 37 Ohio St. 396, 399 (1881) ("In law, as in morals, it may be stated that, as a principle, no servant can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other."). Consequently, we conclude that the unequivocal holding of *Harry Wolsky* controls here and precludes Cristino from establishing that the Bureau owes him a fiduciary duty.

{¶ 20} Cristino additionally argues that the Bureau's fiduciary duty to the fund includes the responsibility to distribute payments to disabled employees as required by law. While we do not disagree with this statement, it is beside the point. Cristino can only state a claim for breach of fiduciary duty if there is a fiduciary relationship between the Bureau and him. *Sessley* at ¶ 36. Thus, the scope of the Bureau's fiduciary duty *to the fund* is irrelevant. The trial court did not err when it dismissed Cristino's claim for breach of fiduciary duty.

{¶ 21} Having addressed Cristino's claim for breach of fiduciary duty, we now turn to his claim for fraud. The trial court found that the state's discretionary immunity prevented Cristino from stating a claim for fraud. Immunity is an affirmative defense. *BCL Ents., Inc. v. Ohio Dept. of Liquor Control*, 77 Ohio St.3d 467, 471 (1997); *Pottenger v. Ohio Dept. of Transp.*, 10th Dist. No. 88AP-832 (Dec. 7, 1989). Because affirmative defenses typically rely on matters outside the complaint, they normally cannot be raised in a Civ.R. 12(B)(6) motion. *Reasoner v. Columbus*, 10th Dist. No. 02AP-831, 2003-Ohio-670, ¶ 12. If, however, the existence of an affirmative defense is obvious from the face of the complaint, a court may grant a Civ.R. 12(B)(6) motion on the basis of the affirmative defense. *Id.*; *Bucey v. Carlisle*, 1st Dist. No. C-090252, 2010-Ohio-2262, ¶ 9 (holding that a complaint must bear " 'conclusive evidence' " that an action is barred by the affirmative defense); *Altier v. Valentic*, 11th Dist. No. 2003-G-2521, 2004-Ohio-5641, ¶ 31, quoting *Loyer v. Turner*, 129 Ohio App.3d 33, 35 (6th Dist.1998) (requiring the affirmative defense to be " 'obvious from the face of the complaint itself' "). In so ruling, a court must exercise caution because " 'complaints need not anticipate and attempt to plead around defenses.' " *Savoy v. Univ. of Akron*, 10th Dist. No. 11AP-183, 2012-Ohio-1962, ¶ 8, quoting *United States v. N. Trust Co.*, 372 F.3d 886, 888 (7th Cir.2004); *see also Owner Operator Indep. Drivers Assn., Inc. v. Comerica Bank*, 540 F.Supp.2d 925, 929 (S.D. Ohio 2008) ("Ordinarily, dismissing claims as untimely under Rule 12(b)(6) is disfavored because plaintiffs have no duty to plead facts negating an affirmative defense \* \* \*."). Thus, unless the face of the complaint obviously or conclusively establishes the affirmative defense, a court may not dismiss the complaint for failure to state a claim.

{¶ 22} The doctrine of discretionary immunity provides that "the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning

function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion." *Reynolds v. State*, 14 Ohio St.3d 68, 70 (1984). Here, the complaint alleges that the Bureau adopted a policy to offer the recipients of PTD benefits lump-sum settlements that: (1) the Bureau calculated using unrealistic life expectancy tables and (2) the Bureau determined by calculating the actual present value of the PTD recipient's claim and discounting that amount by 30 percent. Complaint, at ¶ 14-21. The complaint also alleges that, pursuant to the policy, the Bureau representatives did not disclose the use of unrealistic expectancy tables or the 30 percent discount. *Id.* Thus, the complaint establishes that the parties' dispute is over a Bureau policy decision. However, the complaint contains no allegation that the policy at issue resulted from the exercise of a high degree of official judgment or discretion. The trial court inferred that fact from the nature of the policy at issue. This was error. A court must construe the allegations of the complaint and any reasonable inferences derived therefrom in the favor of the plaintiff, not the defendant. *Volbers-Klarich* at ¶ 12; *LeRoy* at ¶ 14. Without an allegation establishing that the policy arose from a high degree of official judgment or discretion, the complaint does not obviously or conclusively establish the existence of the discretionary-immunity affirmative defense. Consequently, we conclude that the trial court erred in dismissing Cristino's fraud claim based on it.

{¶ 23} The Bureau also argues that Cristino's fraud claim is actually a fraudulent-inducement claim and Cristino failed to allege that he tendered back the consideration received prior to filing suit. The Bureau asserts that without such an allegation, Cristino cannot state a claim for fraudulent inducement. The Bureau did not raise this argument in its briefing before the trial court. Generally, a party waives the right to raise on appeal an argument it could have raised, but did not, in earlier proceedings. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, ¶ 34. We thus conclude that the Bureau waived its tender-back argument, and we decline to address it.

{¶ 24} The last claim at issue that the trial court dismissed under Civ.R. 12(B)(6) is Cristino's claim for unjust enrichment. The trial court dismissed the unjust-enrichment claim because it found that a written contract governed the relationship between Cristino and the Bureau. The trial court did not explain why a contractual relationship would bar Cristino's unjust-enrichment claim. Presumably, the trial court was relying on the rule

that, "[a]bsent bad faith, fraud, or some other illegality, an equitable action for unjust enrichment will not lie when the subject of the claim is governed by an express contract." *Cent. Allied Ents., Inc. v. Adjutant Gen.'s Dept.*, 10th Dist. No. 10AP-701, 2011-Ohio-4920, ¶ 39; *accord Maghie & Savage, Inc. v. P.J. Dick, Inc.*, 10th Dist. No. 08AP-487, 2009-Ohio-2164, ¶ 33; *Morton Bldgs., Inc. v. Correct Custom Drywall, Inc.*, 10th Dist. No. 06AP-851, 2007-Ohio-2788, ¶ 32. This rule, however, does not justify the dismissal of Cristino's unjust-enrichment claim. The existence of an express contract precludes an unjust-enrichment claim only *in the absence of bad faith, fraud, or some other illegality*. In other words, the terms of an express contract determine the extent of a plaintiff's recovery, and prohibit any equitable relief, if the plaintiff cannot show bad faith, fraud, or some other illegality. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 55 (1989); *Weiper v. W.A. Hill & Assoc.*, 104 Ohio App.3d 250, 262 (1st Dist.1995). Here, Cristino alleged fraud. Therefore, his claim for the breach of contract does not prevent him from also pleading a claim for unjust enrichment.

{¶ 25} Secondarily, pursuant to Civ.R. 8(E)(2):

A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. \* \* \* A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds.

Thus, Civ.R. 8(E)(2) "permits alternative or hypothetical pleading, or even the use of inconsistent claims." *Iacono v. Anderson Concrete Corp.*, 42 Ohio St.3d 88, 92 (1975).

{¶ 26} Because alternative pleading is permissible, a party may plead both a breach-of-contract claim and an unjust-enrichment claim without negating the validity of either claim. *Bldg. Indus. Consultants, Inc. v. 3M Parkway, Inc.*, 182 Ohio App.3d 39, 2009-Ohio-1910, ¶ 17 (9th Dist.) ("While it is true that a party may not recover for the same services under both a contractual claim and a claim for [unjust enrichment], a party is not barred from seeking alternative theories and recovering under a[n] [unjust-enrichment] theory if his contractual claim fails."); *accord Advanced Travel Nurses, L.L.C. v. Watson*, 2d Dist. No. 24628, 2012-Ohio-3107, ¶ 28; *Firelands Regional Med. Ctr. v. Jeavons*, 6th Dist. No. E-07-068, 2008-Ohio-5031, ¶ 31. The mere presence of both claims in a complaint does not warrant the dismissal of the unjust-enrichment claim

on a Civ.R. 12(B)(6) motion. *Perrysburg Twp. v. Rossford*, 149 Ohio App.3d 645, 2002-Ohio-5498, ¶ 52 (6th Dist.), *modified*, 2002-Ohio-6364, *aff'd*, 103 Ohio St.3d 79, 2004-Ohio-4362. Thus, the trial court erred in dismissing Cristino's claim for unjust enrichment.

{¶ 27} In sum, we conclude that the trial court properly dismissed Cristino's claim for breach of fiduciary duty, but erred in dismissing Cristino's claims for fraud and unjust enrichment. Given our ruling on the fraud and unjust-enrichment claims, the Bureau would have this court subject those claims to a Civ.R. 56 summary-judgment analysis. The trial court did not conduct such an analysis because it disposed of the fraud and unjust-enrichment claims prior to the summary-judgment stage of the proceedings. If we were to consider the Bureau's Civ.R. 56 arguments, we would, in effect, be sitting as the trial court, rather than conducting a de novo review of the trial court's decision. Civ.R. 56(C) prohibits this court from assuming such a role. That rule "mandates that the trial court make the initial determination whether to award summary judgment; the trial court's function cannot be replaced by an 'independent' review of an appellate court." *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 360 (1992); *accord Schmucker v. Kurzenberger*, 9th Dist. No. 10CA0045, 2011-Ohio-3741, ¶ 14 (expressing unwillingness to consider grounds in support of summary judgment on appeal where the trial court has not engaged in a review of the issue in the first instance); *Stratford Chase Apts. v. Columbus*, 137 Ohio App.3d 29, 33 (10th Dist.2000) (remanding a matter to the trial court for initial consideration of an argument advanced in support of summary judgment). We thus refuse to consider the Bureau's Civ.R. 56 arguments.

{¶ 28} Having reviewed Cristino's challenge to the trial court's ruling on the Civ.R. 12(B)(6) motion, we turn to the trial court's ruling on the Civ.R. 12(C) motion. There, the trial court granted the Bureau a judgment on the pleadings with regard to Cristino's claim for declaratory relief. In so doing, the trial court relied on our opinion in *Schaub v. Div. of State Hwy. Patrol*, 10th Dist. No. 95APE08-1107 (Mar. 5, 1996). The plaintiff in *Schaub* had a cause of action for disability discrimination against the state, but he failed to file it within the two-year statute-of-limitations period set forth in R.C. 2743.16(A). In an attempt to circumvent the statute of limitations, the plaintiff filed a declaratory judgment

action in the Franklin County Court of Common Pleas.<sup>3</sup> The trial court dismissed the action, and this court affirmed that decision. In relevant part, we held that:

In the present case, [the plaintiff] has attempted to do, by means of a declaratory judgment, that which he is barred from doing because of the statute of limitations. \* \* \* [The plaintiff] failed to realize that there is no real controversy or justiciable issue in his case, as there is no present right or duty owed to [the plaintiff] by [the defendants] \* \* \*. Further, a declaratory judgment will not terminate a controversy in the instant case because any possible controversy has already been terminated, in effect, by the statute of limitations of the Court of Claims. \* \* \* As a result, a declaratory judgment in this case, even if decided in [the plaintiff's] favor, would be nothing more than an advisory opinion.

*Schaub.*

{¶ 29} Application of *Schaub* to terminate Cristino's action was appropriate when the trial court ruled on the Civ.R. 12(C) motion. Because the trial court had previously disposed of all the claims underlying the parties' controversy, the controversy was over and no justiciable issue remained for adjudication. However, as we have found that the trial court erred in dismissing Cristino's fraud and unjust-enrichment claims, the parties' controversy is resurrected. We thus must reverse judgment in favor of the Bureau on Cristino's claim for declaratory relief.

{¶ 30} As a result of the foregoing analysis, we sustain in part and overrule in part Cristino's first assignment of error. We sustain the first assignment of error to the extent that Cristino asserted error with regard to the rulings on his claims for fraud, unjust enrichment, and declaratory relief. We overrule the first assignment of error to the extent that Cristino asserted error with regard to the ruling on his claim for breach of fiduciary duty.

{¶ 31} By his second assignment of error, Cristino argues that the trial court erred in granting the Bureau summary judgment on his claim for breach of contract. We disagree.

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<sup>3</sup> Courts of common pleas possess subject-matter jurisdiction over actions that only seek declaratory relief. *Racing Guild of Ohio, Loc. 304, Serv. Emp. Internatl. Union v. Ohio State Racing Comm.*, 28 Ohio St.3d 317, 320 (1986).

{¶ 32} Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 33} The trial court granted the Bureau summary judgment because it found that Cristino had not filed his claim for breach of contract within the two-year statute of limitations period. Pursuant to R.C. 2743.16(A), "civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." Private parties must bring any action on a written contract within 15 years after the cause of action accrues. R.C. 2305.06. If a contract is not in writing, a party has six years from the date of accrual to bring his action. R.C. 2305.07. As these two statutes of limitation are longer than the two-year statute of limitations set forth in R.C. 2734.16(A), the two-year statute of limitations controls here.

{¶ 34} The trial court found that Cristino's breach-of-contract claim accrued on or about November 2, 1998. The trial court also found that Cristino initiated his original action in the Cuyahoga County Court of Common Pleas on June 22, 2001, well beyond the two-year statute-of-limitations period. Cristino argues that these facts do not justify the grant of summary judgment for four reasons: (1) the application of the saving statute, R.C. 2305.19(A), renders his breach-of-contract claim timely; (2) the discovery rule applies, which would result in his claim accruing in early 2000; (3) judicial estoppel precludes the Bureau from asserting that he missed the statute of limitations; and (4) equitable estoppel precludes the Bureau from asserting that he missed the statute of limitations.

{¶ 35} Pursuant to the saving statute:

In any action that is commenced or attempted to be commenced, \* \* \* if the plaintiff fails otherwise than upon the merits, the plaintiff \* \* \* may commence a new action within one year after the date of \* \* \* the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

R.C. 2305.19(A). The saving statute is applicable to suits against the state in the Court of Claims "[w]here an action was commenced within the time prescribed by R.C. 2743.16 and dismissed without prejudice after the expiration of that time." *Reese v. Ohio State Univ. Hosps.*, 6 Ohio St.3d 162 (1983), syllabus.<sup>4</sup> A plaintiff may rely on the saving statute even if it commenced its action originally in a court of common pleas before recommencing the action in the Court of Claims. *Kinney v. Ohio Dept. of Adm. Servs.*, 30 Ohio App.3d 123, 125 (10th Dist.1986).

{¶ 36} This court has applied the holding of *Reese* in two cases with procedural histories similar to the instant case. In *Rosendale v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-378, 2008-Ohio-4899, the plaintiff initially filed suit in the Stark County Court of Common Pleas against the state. After the common pleas court dismissed the suit for lack of subject-matter jurisdiction, the plaintiff filed suit in the Court of Claims. The Court of Claims granted the state's motion for summary judgment on the ground that the plaintiff had failed to commence his action in accordance with the two-year statute of limitations found in R.C. 2743.16(A). On appeal, the plaintiff argued in part that the saving statute rendered his complaint timely. We disagreed, holding "because [the plaintiff's] first action was not timely commenced pursuant to R.C. 2743.16(A), the savings statute, R.C. 2305.19, cannot be applied." *Id.* at ¶ 11.

{¶ 37} In *Moore v. Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-732, 2011-Ohio-1607, the plaintiff originally filed her action in the United States District Court for the Southern District of Ohio. She voluntarily dismissed that case without prejudice and

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<sup>4</sup> Due to the 2004 amendment to R.C. 2305.19, the dismissal without prejudice may now occur *before or after* the expiration of the applicable statute of limitations. *Eppley v. Tri-Valley Loc. School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 2009-Ohio-1970, ¶ 8-9. If the dismissal occurs before the expiration of the limitations period, the plaintiff has a year or the remainder of the limitations period, whichever is longer, to commence a new action. *Id.* This amendment alters the holding of *Reese* slightly, but not in a way that impacts the application of that holding to this case.

refiled her complaint in the Court of Claims. The Court of Claims granted summary judgment on one of her claims—for racial discrimination—because it concluded that that claim was barred by the two-year statute of limitations contained in R.C. 2743.16(A). On appeal, the plaintiff argued that the saving statute salvaged her racial discrimination claim. We concluded otherwise, reasoning:

[T]he savings statute could only operate to save [the plaintiff's] claims if the initial filing in federal court was timely. In other words, to be considered timely, [the plaintiff's] initial filing would have needed to occur within two years of when her cause of action accrued \* \* \*. Notwithstanding, [the plaintiff] has provided no evidence of the timely filing in federal court \* \* \* [.] [Therefore], the savings statute will not apply to save her claim because [the plaintiff's] first cause of action was not timely commenced pursuant to R.C. 2743.16(A).

*Id.* at ¶ 19.

{¶ 38} Like the plaintiffs in *Rosendale* and *Moore*, Cristino originally commenced his action in a court other than the Court of Claims. Once Cristino filed his action in the Court of Claims, the Bureau moved for summary judgment on his breach-of-contract claim on statute-of-limitations grounds. In such a situation, the saving statute only applies if Cristino filed his original action within R.C. 2743.16(A)'s two-year statute of limitations. Because Cristino waited over two years after the accrual of his claim to file his original complaint, he cannot take advantage of the saving statute.

{¶ 39} In his second argument, Cristino contends that the discovery rule should apply to his claim for breach of contract. Cristino asserts that he did not learn that there was anything amiss with the calculation of the lump-sum settlement amount until he was so advised by his attorney in early 2000. Running the statute of limitations from that date of accrual makes his original complaint, filed June 22, 2001, timely.

{¶ 40} "The 'discovery rule' generally provides that a cause of action accrues for purposes of the governing statute of limitations at the time when the plaintiff discovers or, in the exercise of reasonable care, should have discovered the complained of injury." *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 179 (1989). A court may invoke the discovery rule "in situations where the injury complained of may not manifest itself immediately and, therefore, fairness necessitates allowing the assertion of a claim when

discovery of the injury occurs beyond the statute of limitations." *NCR Corp. v. United States Mineral Prods. Co.*, 72 Ohio St.3d 269, 271 (1995).

{¶ 41} No Ohio court has applied the discovery rule to a claim for breach of contract. *Vitek v. AIG Life Brokerage*, S.D. Ohio No. 06-cv-615 (Sept. 22, 2008); *Settles v. Overpeck Trucking Co.*, 12th Dist. No. CA93-05-083 (Dec. 27, 1993). We are not inclined to be the first court to do so. Moreover, even if we applied the discovery rule here, Cristino could not prevail. "[C]onstructive knowledge of facts, rather than actual knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule." (Emphasis sic.) *Flowers v. Walker*, 63 Ohio St.3d 546, 549 (1992). " 'If a person has knowledge of such facts as would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry, and he fails to do so, he is chargeable with knowledge which by ordinary diligence he would have acquired.' " *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 181 (1984), quoting *Schofield v. Cleveland Trust Co.*, 149 Ohio St. 133, 142 (1948).

{¶ 42} Here, the discovery of the "actual" present value of a PTD claim requires only the application of mathematics. John F. Burke affidavit, at ¶ 3-5 ("Calculating the present value of future is purely a matter of mathematics. \* \* \* Present value is determined from a formula that multiplies the future benefits by the appropriate interest rate and by the remaining life expectancy."). Thus, a prudent person, when receiving an offer to settle his PTD claim for a lump sum, could perform his own calculations to adjudge the present value of his claim. Cristino, himself, belatedly did his own calculations, as he stated in his deposition:

Q: Let me ask you. At some point in time you did some computations and you decided you had been cheated, correct?

A: Yes.

Cristino deposition, at 58. Consequently, reasonable minds could only conclude that Cristino had constructive knowledge of the facts underlying his claim on or about November 2, 1998. Therefore, even with the benefit of the discovery rule, Cristino's claim is still untimely.

{¶ 43} In his third argument, Cristino maintains that the doctrine of judicial estoppel precludes the Bureau from arguing that the statute of limitations bars his claim for breach of contract. We disagree.

{¶ 44} The doctrine of judicial estoppel prohibits a party " 'from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment.' " *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶ 25, quoting *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 380 (6th Cir.1998). The doctrine applies only when a party shows that its opponent: (1) took a contrary position, (2) under oath in a prior proceeding, and (3) the prior position was accepted by the court. *Id.*

{¶ 45} The Bureau now argues that Cristino missed the statute of limitations, and thus, it is entitled to summary judgment on Cristino's claim for breach of contract. Cristino contends that the Bureau took a contrary position during the 2008 oral argument before the Supreme Court of Ohio. Cristino directs this court to the following colloquy:

Justice Pfeiffer: Counsel, there's been this argument advanced that if this case is in the Court of Claims, the people who they argue were cheated won't be able to have their day in court in the Court of Claims.

[Counsel for the Bureau]: That is incorrect, Your Honor. They certainly can have their day in the Court of Claims, and they can seek all that they are seeking here today. The Court of Claims under the statute says that the Court shall have full equity power in all actions within it's [sic] jurisdiction and may award both damages and full equity powers. [Cristino's attorney] was incorrect about the power of the Court of Claims. It could award all of the relief that he's asking for today. We, of course, maintain that no relief is entitled here on the merits. But that's for another day. That's for the Court of Claims, not the Court of Common Pleas.

(Tr. 47-48.)

{¶ 46} This colloquy occurred during the Bureau's rebuttal argument. Justice Pfeiffer's concern arose from a representation that Cristino's attorney had made during his portion of oral argument. Cristino's attorney had stated:

We can't get equitable remedies in the Court of Claims. And if you send this [case to that court], [the Bureau is] going to start arguing that the whole Complaint is based on equity and

must be dismissed. They are not going to lay down once we're in the Court of Claims. If you want equitable remedies, you must be outside of the Court of Claims. Court of Claims can't grant that. So that leaves us in Cuyahoga County.

(Tr. 25.) Reading the Bureau's representation in context, we conclude that the Bureau was simply explaining that the Court of Claims possessed the necessary jurisdiction to award both money damages and equitable remedies. The Bureau took no position on whether the statute of limitations precluded Cristino's claim for breach of contract. The Bureau, thus, has not espoused conflicting positions regarding the statute of limitations. Therefore, the doctrine of judicial estoppel does not apply here.

{¶ 47} We would not come to a different conclusion even if we read the Bureau's representation as broadly as Cristino does. Cristino maintains that, by stating that he "could have his day in court," the Bureau represented that no procedural bar existed to litigation on the merits in the Court of Claims. Accepting this interpretation, we move to the third and last element that a party must satisfy to rely on judicial estoppel. Under that element, the court must accept the prior, conflicting position. *Greer-Burger* at ¶ 25. Here, nothing in the Supreme Court's 2008 decision indicates that it accepted Cristino's broad interpretation of the Bureau's representation in oral argument. *See Cristino*, 118 Ohio St.3d 151, 2008-Ohio-2013. Judicial estoppel, thus, remains inapplicable. *See Kahler v. Eytcheson*, 2d Dist. No. 23523, 2012-Ohio-208, ¶ 20 (refusing to apply the doctrine of judicial estoppel because the proponent failed to show that a court accepted the prior, conflicting position); *Esber Beverage Co. v. Heineken USA, Inc.*, 5th Dist. No. 2011CA00033, 2011-Ohio-5939, ¶ 35 (same).

{¶ 48} In his fourth argument, Cristino asserts that the doctrine of equitable estoppel prevents the Bureau from arguing that the statute of limitations bars his claim for breach of contract. We disagree.

{¶ 49} The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶ 43. A party may invoke the doctrine of equitable estoppel where it has "relied on conduct of an adversary in such a manner as to change his position for the worse and that reliance [was] reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading." *Ohio State Bd. of*

*Pharmacy v. Frantz*, 51 Ohio St.3d 143, 145 (1990). " 'It is \* \* \* fundamental to the application of equitable estoppel for plaintiffs to establish that subsequent and specific actions by defendants somehow kept them from timely bringing suit \* \* \*.' " *Doe* at ¶ 45, quoting *Zumpano v. Quinn*, 6 N.Y.3d 666, 674 (2006).

{¶ 50} Here, nothing about the Bureau's statement kept Cristino from timely bringing his action. By the time the Bureau made the statement at issue, Cristino had already missed filing his complaint within the statute-of-limitations period. Cristino, therefore, cannot show that his reliance on the Bureau's statement resulted in the untimeliness of his action. Cristino alternatively argues that he relied on the Bureau's statement to his detriment when he refiled his action in the Court of Claims and expended money and time to litigate that action. However, we do not interpret the Bureau's representation as a promise that it would not raise the statute-of-limitations defense in the Court of Claims. The Bureau merely represented that the Court of Claims had the jurisdiction necessary to grant both legal and equitable relief. The Bureau, therefore, did not mislead Cristino into believing that the Bureau would not pursue viable affirmative defenses if Cristino refiled his action.

{¶ 51} In sum, we reject each of Cristino's arguments as to why we should find his breach-of-contract claim is timely. Accordingly, we overrule Cristino's second assignment of error.

{¶ 52} In Cristino's third assignment of error, he argues that the trial court erred in not transferring his case to the Cuyahoga County Court of Common Pleas once only his claim for declaratory relief remained pending. Given our resolution of the first assignment of error, we must return three claims (fraud, unjust enrichment, and declaratory relief) to the trial court on remand. As the claim for declaratory relief is no longer the sole claim remaining, this assignment of error is now moot. Accordingly, we decline to address it.

{¶ 53} By Cristino's fourth assignment of error, he argues that the trial court erred in not reinstating the order granting class certification entered by the Cuyahoga County Court of Common Pleas. Soon after filing his complaint, Cristino moved to reinstate the class certification order. The trial court never ruled on this motion, so we consider it denied. *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶ 13 ("A motion not

expressly decided by a trial court when the case is concluded is ordinarily presumed to have been overruled.").

{¶ 54} A judgment rendered by a court without subject-matter jurisdiction is void. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶ 11. The Cuyahoga County Court of Common Pleas lacked subject-matter jurisdiction over this case. *Cristino*, 118 Ohio St.3d 151, 2008-Ohio-2013, ¶ 1. Thus, the class certification order issued by that court is void. We conclude that the trial court did not err in refusing to reinstate a void judgment and, thus, we overrule *Cristino's* fourth assignment of error.

{¶ 55} By *Cristino's* fifth assignment of error, he argues that the trial court erred in overruling multiple motions. Besides identifying the motions, *Cristino* offers no argument as to why each one should be decided in his favor.<sup>5</sup> An appellate court may disregard any assignment of error not separately argued in his brief. App.R. 12(A)(2); *Mtge. Electronic Registrations Sys. v. Mullins*, 161 Ohio App.3d 12, 2005-Ohio-2303, ¶ 22 (4th Dist.) (holding that appellate courts may summarily overrule assignments of error when an appellant fails to separately argue them). We often, nevertheless, decide assignments of error not separately argued in the interest of justice, but we refuse to do so here. *Cristino* seeks a ruling on discovery and procedural matters that the trial court has yet to address. We are disinclined to decide such matters in the first instance. Accordingly, we overrule *Cristino's* fifth assignment of error.

{¶ 56} For the foregoing reasons, we sustain in part and overrule in part *Cristino's* first assignment of error, overrule *Cristino's* second, fourth, and fifth assignments of error, and render moot *Cristino's* third assignment of error. We affirm in part and reverse in part the judgment of the Court of Claims of Ohio, and we remand this matter to that court for further proceedings consistent with law and this decision.

*Judgment affirmed in part and reversed in part;  
cause remanded.*

TYACK and CONNOR, JJ., concur.

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<sup>5</sup> We note that we have already addressed one of the identified motions—for reinstatement of the class certification order—when ruling on the fourth assignment of error.