

IN THE SUPREME COURT OF OHIO

AMERITECH MOBILE  
COMMUNICATIONS, INC., *et al.*,

Appellants,

v.

DISCOUNT CELLULAR, INC.,

Appellee.

) CASE NO. 05-2302  
)  
) On Appeal from the Eighth District Court of  
) Appeals, Case No. 85618  
)  
)  
)  
)  
)  
)  
)

---

VERIZON WIRELESS, *et al.*,

Appellants,

v.

CLEVELAND MOBILE RADIO SALES, INC.  
*et al.*,

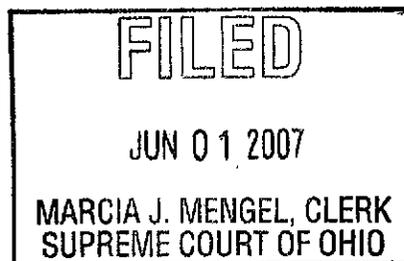
Appellees.

)  
) CASE NO. 05-2299  
)  
) On Appeal from the Eighth District Court of  
) Appeals, Case No. 85620  
)  
)  
)  
)  
)  
)  
)

---

**APPELLEES' JOINT BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION**

---



Randy J. Hart (0046793) Counsel of Record  
Mark Griffin (0064141)  
Carla Tricarichi (0014164)  
614 Superior Avenue, NW, Suite 620  
Cleveland, Ohio 44113  
Phone : (216) 346-7376  
Fax : (216) 861-6679  
Email: RjHart@Hahnlaw.com  
Mark.D.Griffin@Gmail.com  
CTricarichi@aol.com

Mark Wallach (10948) Counsel of Record  
Calfee, Halter & Griswold LLP  
1400 McDonald Investment Center  
800 Superior Avenue  
Cleveland, OH 44114-2688  
Phone : (216) 622-8200  
Fax : (216) 241-0816  
Email: MWallach@Calfee.com  
JLang@Calfee.Com  
WMichael@Calfee.com

Counsel For Appellees, Discount Cellular, Inc.,  
And Cleveland Mobile Radio Sales, Inc., *et al.*

Counsel For Appellants Ameritech Mobile  
Communications. LLC, Cincinnati SMSA  
Limited Partnership and Cingular Wireless

---

John W. Zeiger (0010707)  
Zeiger, Tigges & Little LLP  
3500 Hunting Center  
41 South High Street  
Columbus, Ohio 43215  
Telephone : (614) 365-9900  
Facsimile : (614) 365-7900

Stephen Patton  
Kirkland & Ellis, LLP  
200 East Randolph Street  
Chicago, IL 60601  
Telephone : (312) 861-2000  
Facsimile : (312) 861-2200

Robert R. Gasaway  
Kirkland & Ellis, LLP  
655 Fifteenth Street NW  
Washington, DC 20005  
Telephone : (202) 879-5000  
Facsimile: (202) 879-5200

Attorneys for Appellants Verizon Wireless  
a/k/a New Par, Verizon Wireless (VAW)LLC,  
and Airtouch Eastern Region LLC

## INTRODUCTION

The decision by the Ohio Supreme Court dealt exclusively with the issue of whether a one-year or six-year statute of limitations applies to cases brought pursuant to R.C. 4905.61. However, this Court did not address the issue of when the one-year statute of limitations begins to run. This issue is critical in this case because when this Court reversed the PUCO's January 18, 2001 decision in *Cellnet*, it added causes of action.<sup>1</sup> The question therefore, is whether the one year statute begins to run on the date of the PUCO decision, or, if appealed to this Court, the date of the final adjudication. If the former is true, then some of Appellees' claims could not have expired one year after the PUCO decision, as such claims did not exist until months later when this Court reversed the Public Utilities Commission of Ohio. Clarification is needed to avoid the illogical result that damage claims could expire before they ever existed.

## ANALYSIS

Appellees request that this Court grant reconsideration for the limited purpose of clarifying when the one-year statute of limitations begins to run in cases brought under RC 4905.61. Through this Motion for Reconsideration, Appellees ask this Court to reconsider its opinion in order to address the issue of whether the statute of limitations began to run from the date of the decision of the Public Utilities Commission in January 2001, or whether it began to run from the date of the Supreme Court's 2002 decision which overturned that 2001 PUCO Order. These issues were fully briefed in pleadings to this Court, to the Court of Appeals, and to the Trial Court. *See* Appellees' Supreme Court Merit Brief at 42-48 (July 24, 2006); Appellees'

Eighth District Court of Appeals Brief at 26-29 (May 24, 2005); and Appellees' Brief Contra Motion to Dismiss at 7-9 (May 14, 2004).

This Court's order did not answer the question of when the one-year statute of limitations began to run. In most cases, a cause of action accrues and the statute of limitations begins to run from a particular action taken by the parties such as a breach of contract or a tort. In contrast, because of the bifurcated nature of this action, as dictated by the legislature, a cause of action under RC 4905.61 does not exist until the issuance of an order by an adjudicating body, in this case, the PUCO or this Court. In this case, a one-year limitations period creates a situation in which the statute of limitations can expire before a cause of action ever exists on some of Appellees' claims. The issue is created for two reasons. First, Ohio bifurcates the finding of liability from the finding of damages, and requires that a violation must be determined before an action for damages can be filed in Common Pleas Court. Second, the losing side at the PUCO has a direct right of appeal to this Court.

Here, the Appellees were injured by Ameritech's illegal conduct from 1993 to 1998. A portion of the damages which Appellees are seeking in this case stems from the 1993-1995 time period. The problem here is that the PUCO initially rejected a finding of violation for the 1993-1995 time period.

---

<sup>1</sup> *Westside Cellular, Inc. dba Cellnet of Ohio v. AirTouch Cellular*, PUCO Case No. 93-1758-TP-CSS (January 18, 2001) ("PUCO Order"), reversed in part by *Westside Cellular, Inc. dba Cellnet of Ohio v. Pub. Util. Comm.*, 98 Ohio St.3d 165 ("Cellnet").

The time line for a one-year statute starting from the date of the PUCO Order in this case would yield this result:

1. January 18, 2001 PUCO issued its Finding and Order and refused to find a violation for the 1993-1995 time period. *PUCO Order, supra*.
2. January 18, 2002 Expiration of one-year statute of limitations for filing damage action.
3. December 26, 2002 Ohio Supreme Court reverses the PUCO Order and finds a violation for the 1993-1995 time period which would allow Appellees to bring a damage action. *Westside Cellular*, 98 Ohio St.3d at 168.

The first and only finding of violation in the Cellnet litigation for the 1993-1995 time frame was entered by the Ohio Supreme Court on December 26, 2002 (mandate issued February 19, 2003). Thus, if the one-year statute begins to run on the date of the PUCO Order (January 18, 2001), the limitations period for filing a damage action would have expired on January 18, 2002, before the first finding of a violation is entered. Appellees would be barred under the statute of limitations from filing any damage action under R.C. 4905.61 which this Court has acknowledged is “the only mechanism through which the legislature permits an injured party to obtain damages” after a finding of liability. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203 at ¶18. Appellees would be left with a right, but without a remedy.

Under a one-year statute that commences on the date of the PUCO Order, the Appellees would have been required to file damage actions before there was any finding of violation against the utilities. This is not possible. The Appellees could not have lost their R.C. 4905.61

damage claims for the 1993-1995 time period because those claims did not exist until the Supreme Court's reversal more than one year later.

Even Appellants have recognized that this result is impossible. In contradiction to their position here, in related pending litigation, Appellants conceded that claims against Ameritech for the 1993-1995 time frame are not barred by the statute of limitations because they did not accrue until the date of the Ohio Supreme Court decision:

Satterfield is correct that the statute of limitations governing her claim for the damages for 1993 and 1994 could not have begun to run until the Supreme Court's ruling.

*See, Satterfield et al. v. Ameritech Mobile Communications, Inc.* Cuyahoga County Court of Common Pleas Case No. CV-03-518318 (Villanueva, J.) Ameritech Reply Brief at 4 (relevant excerpts previously attached to Appellees Joint Merit Brief).

Moreover, if the statute is one year from the PUCO decision, this result will require every plaintiff who loses at the PUCO to file a lawsuit in Common Pleas Court to protect their rights, in the event that the Supreme Court ultimately finds in their favor by reversing the PUCO (as happened here). This will create unnecessary lawsuits against Ohio companies. Filing of such a damage action would also subject counsel to Rule 11 sanctions since no violation would exist at the time of the filing of the damage action in Common Pleas Court. To avoid this result, this Court should clarify that, in the event of an appeal to this Court, the one-year statute begins to run on the date of the final adjudication of the Supreme Court Order (or alternatively that the one-year statute is tolled pending appeals).

Consistent with this Court's Order, Judge Gallagher in his concurrence and dissent in the Eighth District Court of Appeals, also found that a one-year statute applied, but recognized that

the limitations period must start from the date that the case is no longer subject to reversal, which Judge Gallagher held to be the date of journalization of this Court's opinion. *Cleveland Mobile Radio Sales Inc. v. Verizon Wireless, et al.*; ¶32-34, 2005-Ohio 5439 (Oct. 13 2005)(Gallagher, J. dissenting in part and concurring in part). Judge Gallagher's opinion regarding when the statute of limitations begins to run is consistent with this Court's opinion that a one-year statute of limitations applies.<sup>2</sup> By adopting Judge Gallagher's reasoning, in the case of an appeal to the Supreme Court the one-year statute of limitations would begin to run on the date the Supreme Court decision upholds a PUCO finding of liability or reverses a PUCO finding of no liability. This is the only way to adhere to the bifurcated process established by the General Assembly.

A similar problem exists for parties who win at the PUCO. If the Court holds that the one-year statute of limitations runs from the date of the PUCO decision, then even when an appeal to this Court is filed, the plaintiffs who receive favorable liability decisions will prematurely file a damage action in the Common Pleas Court while the PUCO decision is still subject to reversal by this Court. This will lead to further unnecessary filings and a waste of judicial resources.<sup>3</sup> In fact, this Court recognized this very problem in the Cellnet litigation. In that case, Cellnet filed its damage action under R.C. 4905.61 on the very day that the PUCO issued its decision. This Court stayed the damage proceeding until it could consider the merits of the direct appeal filed by the Appellants in that case. This Court therefore recognized that the

---

<sup>2</sup> As Judge Gallagher recognized, a holding which tolls the limitations period pending an appeal is also consistent with *Usternal v. GEM Boat Serv. Inc.*, Ottawa App. No. 91-OT-051, 1992 WL 337600 because there was no appeal filed in that case.

<sup>3</sup> It is well established that an Appellee may defend a lower court's decision on grounds or theories that were not relied upon in the underlying opinion. *See Gray v. Grange Mut. Cas. Co.* 2006-Ohio-6370 (10<sup>th</sup> Dist. Ct. App.); *See also*, App. R. 3(c)(2). No cross-appeal is required to preserve this argument. *Id.* In any event, in every single brief, Appellees have raised the issue of when the statute of limitations begins to run.

damage proceeding should take place only after all appeals have been taken from the underlying PUCO decision.

To illustrate the problem even further, consider if the PUCO had ruled against Cellnet on all of its claims. At that time, Cellnet would not have had any claim for damages under R.C. 4905.61. If, as in fact happened, Cellnet appealed to this Court, and this Court had overturned the PUCO, Cellnet should have had the ability to then seek its damages. But if, the statute of limitations had run before the Supreme Court found in Cellnet's favor, Cellnet's claims would have been barred. In essence damage claims would be barred before they were ever established. It is the bifurcated nature of these types of cases, together with the non-discretionary right of appeal from the PUCO to this Court that creates this situation. *Cleveland Mobile Radio Sales Inc. v. Verizon Wireless, et al.*; ¶ 31 2005-Ohio 5439 (Oct. 13 2005)(Gallagher, J. dissenting in part and concurring in part). Only by commencing the statute of limitations on the date of this Court's decision (or tolling it during the pendency of the appeal) can this absurd result be avoided.

**CONCLUSION**

For all the foregoing reasons, this Court should grant limited reconsideration of its decision to clarify that the one-year statute of limitations begins to run on the date of the Ohio Supreme Court decision (or is tolled pending appeals). A statute of limitations cannot expire before a claim even exists.

Respectfully submitted,



OF COUNSEL:

---

Randy J. Hart (0046793)  
Counsel of Record  
3300 BP Tower  
200 Public Square  
Cleveland, Ohio 44114  
Phone: (216) 621-0150  
Fax: (216) 241-2824  
E-mail: rjhart@hahnlaw.com

Mark Griffin (0064141)  
614 Superior Avenue, N.W.  
Suite 620  
Cleveland, Ohio 44113  
Phone : (216) 376-3006  
Fax : (216) 861-6679  
E-mail : Mark.D.Griffin@Gmail.com

Carla Tricarichi (0014164)  
Tricarichi & Carnes, L.L.C.  
614 Superior Ave., NW, Suite 620  
Cleveland, OH 44113  
Phone : (216) 861-6677  
E-mail : Ctricarichi@aol.com

*Attorneys for Appellees*

**CERTIFICATE OF SERVICE**

The foregoing was served via regular U.S. mail this 18<sup>th</sup> day of June, 2007, upon the

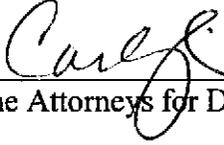
following:

Mark Wallach (10948) Counsel of Record  
Calfee, Halter & Griswold LLP  
1400 McDonald Investment Center  
800 Superior Avenue  
Cleveland, OH 44114-2688  
Phone : (216) 622-8200  
Fax : (21)241-0816  
Email: MWallach@Calfee.com  
JLang@Calfee.Com  
WMichael@Calfee.com

John W. Zeiger (0010707)  
Zeiger, Tigges & Little LLP  
3500 Hunting Center  
41 South High Street  
Columbus, Ohio 43215  
Telephone : (614) 365-9900  
Facsimile : (614) 365-7900

Stephen Patton  
Kirkland & Ellis, LLP  
200 East Randolph Street  
Chicago, IL 60601  
Telephone : (312) 861-2000  
Facsimile : (312) 861-2200

Robert R. Gasaway  
Kirkland & Ellis, LLP  
655 Fifteenth Street NW  
Washington, DC 20005  
Telephone : (202) 879-5000  
Facsimile: (202) 879-5200  
Counsel For Appellants Ameritech Mobile  
Communications. LLC, Cincinnati SMSA  
Limited Partnership and Cingular Wireless

  
\_\_\_\_\_  
One of the Attorneys for Discount Cellular