

**IN THE
SUPREME COURT OF OHIO**

Cleveland Mobile Radio Sales, Inc., *et al.*)

Plaintiffs-Appellees,)

v.)

Verizon Wireless a/k/a New Par, *et al.*,)

Defendants-Appellants..)

and)

Discount Cellular, Inc.,)

Plaintiff-Appellees,)

v.)

Ameritech Mobile Communications, Inc., *et al.*)

Defendants-Appellants.)

S. Ct. Case No. 05-2299

Appeal From The Cuyahoga
County Court Of Appeals,
Eighth Appellate District
Case No. CA04 08-5620

S. Ct. Case No. 05-2302

Appeal From The Cuyahoga
County Court Of Appeals,
Eighth Appellate District

Case No. CA04 08-5618

FILED
JUN 08 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

**DEFENDANT-APPELLANT VERIZON WIRELESS
RESPONSE TO MOTION FOR RECONSIDERATION**

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INTRODUCTION

Plaintiffs seek “reconsideration” as to a set of case- and fact-specific questions this Court did not even address, let alone decide, in its May 23, 2007 decision — namely, when did Plaintiffs’ respective causes of action under R.C. 4905.61 first accrue? Those issues were *not* decided by the Eighth District Court of Appeals below; were *not* mentioned, much less listed as a proposition of law, in the briefing leading up to this Court’s grant of review; did *not* appear in Verizon Wireless’s principal brief; were *not* addressed at oral argument; and, most importantly, were *not* so much as mentioned in the Court’s decision. For those reasons alone, Plaintiffs’ motion should be denied.

Plaintiffs’ motion also deserves to be denied on its merits. It is based on the completely fabricated — and utterly false — premise that, under defendants’ view of the applicable cause-of-action accrual rules, Plaintiffs’ claims “could expire before they even existed.” Joint Br. in Supp. of Mot. for Recons., at 1. But defendants have consistently taken the position that settled Ohio law, as well as general principles governing the commencement of limitations periods, establish that causes of action accrue, and a limitations period begins to run, only when a plaintiff “could have first maintained” its case in court. *Smith v. Allstate Ins. Co.* (C.A. 6, 2005), 403 F.3d 401, 408-09; *see also e.g., Lynch v. Dial Finance Co.* (1995), 101 Ohio App.3d 742, 747, 656 N.E.2d 714; *Arbor Village Condominium Ass’n v. Astor Village Ltd, L.P.* (1994), 95 Ohio App.3d 499, 506, 642 N.E.2d 575. In the context of suits brought under Section 4905.61, this occurs once there is a finding of a public utility law violation. *See Milligan v. Ohio Bell. Tel. Co.* (1978), 56 Ohio St.2d 191, 194, 383 N.E.2d 575. So long as these settled principles are adhered to there is no possibility — not even a theoretical possibility — that claims ever could “expire” before they “exist.” Contrary to the motion for “reconsideration,” no “clarification” of the Court’s decision is needed, because nothing the Court has said purports to

address, much less to alter, the fundamental rule that claims must accrue before a limitations period begins to run.

Here, the claims supposedly at risk of “expiring” before they “exist” are ones asserted against Ameritech Mobile for damages supposedly incurred in the years 1993 through 1995. Plaintiffs’ motion lays out a chronology that purports to illustrate the risk that plaintiffs’ 1993 through 1995 claims could expire on January 18, 2002, 11 months *before* this Court first found statutory violations for those particular years on December 26, 2002. Joint Br. in Supp. of Mot. for Recons., at 3. But as set forth below, Plaintiffs’ chronology is mistaken. Under Ohio’s cause-of-action accrual rules, the relevant limitations period began to run on plaintiffs’ claims against Ameritech Mobile covering 1993 to 1995 only on December 26, 2002, when this Court rendered the first decision finding an Ameritech Mobile statutory violation for those years. Before that finding of violation, the predicate for bringing a suit for those years did not exist; no cause of action had accrued; and no limitations period had begun.

In this case, the Court granted review to decide, and ultimately did decide, a single question of law — whether a one-year or six-year limitations period applies to actions under R.C. 4905.61. In light of the limited question presented in the briefing leading up to the Court’s grant of review, the absence of any discussion of accrual dates in its opinion, and the longstanding authorities establishing that claims cannot possibly expire before they accrue, Cleveland Mobile’s motion for “reconsideration” should be denied. There is no good reason for the Court to reach out to decide a question not addressed the briefing leading up to its grant of review, in order to defuse a risk that can never materialize, based on arguments that are squarely contrary to settled law.

BACKGROUND

Two consolidated cases are covered by the Court's May 23 decision, but Verizon Wireless is involved only in the one brought by Cleveland Mobile Radio Sales ("Cleveland Mobile" or "CMRS").

In Case No. 05-2299, plaintiff Cleveland Mobile Radio Sales filed suit against both Verizon Wireless and Ameritech Mobile on February 19, 2004. In Case No. 05-2302, plaintiff Discount Cellular filed suit against only defendant Ameritech Mobile on December 26, 2003. Both cases, as to both defendants, seek to piggyback on rulings finding predicate violations of public utility law made on behalf of Westside Cellular d/b/a "Cellnet" in PUCO Case No. 93-1758-RC-CSS, 2001 Ohio PVC Lexis 18 (January 18, 2001) (The "*Cellnet*" case). Neither Cleveland Mobile nor Discount Cellular was a party to any of the *Cellnet* proceedings.

The *Cellnet* proceedings that both plaintiffs invoked as the predicate for these cases involved three different findings of statutory violations covering different defendants and time periods. These findings were (i) a finding of violations by Verizon Wireless covering the period 1991 to 1998; (ii) a finding of violations by Ameritech Mobile covering the period 1995 to 1998; and (iii) a finding of violations by Ameritech Mobile covering the period 1993 to 1995. The first two of these violation rulings were issued by the Public Utilities Commission of Ohio on January 18, 2001, and the third ruling was issued by this Court on December 26, 2002. The one-year statute of limitations periods applicable to the claims presented in the Cleveland Mobile and Discount Cellular cases can therefore be summarized as follows:

January 18, 2001

PUCO issues its order finding regulatory violations against:

- (i) Verizon Wireless (1991 — 1998)
- (ii) Ameritech Mobile (1995 — 1998)

January 18, 2002

One-year limitations period for filing suit based on violations found in the January 18, 2001, PUCO Order expires.

December 26, 2002

Ohio Supreme Court issues decision finding regulatory violations against:

- (iii) Ameritech Mobile (1993 — 1995)

December 26, 2003

One-year limitations period for filing suit based on violations found in the December 26, 2002, Supreme Court decision expires.

ARGUMENT

Cleveland Mobile's reconsideration motion asks the Court to rule that causes of action under R.C. 4905.61 accrue, not as of the date when either the Public Utilities Commission of Ohio or this Court first issues a ruling permitting a party to sue for damages, but rather from some later point when all possible appeals from such a ruling have been exhausted. This question is not properly before the Court and, hence, it need not and should not be resolved in response to a motion for reconsideration. (*See* Section A, *infra*.) Nonetheless, the answer to the question is not at all difficult: the limitations period under R.C. 4905.61 begins to run when a regulatory violation has been found and a plaintiff can first bring a suit for damages. (*See* Section B, *infra*.)

A. Cleveland Mobile's Motion For "Reconsideration" Is Improper Because It Does Not Seek Reconsideration Of Any Issue Decided By The Court.

The Court should deny Cleveland Mobile's motion because it is not seeking "reconsideration" of any issue decided by the Court. The statute-of-limitations accrual issue that Cleveland Mobile asks this Court to "reconsider," although discussed in Cleveland Mobile's merits brief and Verizon Wireless's reply brief, was *not* decided by the Eighth District Court of Appeals below; was *not* mentioned, much less listed as a proposition of law, in the briefing leading up to this Court's grant of review; did *not* appear in Verizon Wireless's principal brief; was *not* addressed at oral argument, and, most importantly, was *not* so much as mentioned in the Court's decision.

Cleveland Mobile's motion "for reconsideration" thus does not seek the revision of the Court's position on any issue actually decided — or even discussed — in its May 23 opinion. The motion is, rather, an attempt to induce the Court to reach out and opine on an issue that, quite properly, was entirely absent from the Court's opinion.

In other cases, where an assignment of error has been preserved on appeal from a trial court, but not decided by the court of appeals, this Court has declined to address those issues in the first instance. *See, e.g., Vance v. Consol. Rail Corp.* (1995), 73 Ohio St.3d 222, 234, 652 N.E.2d 776. Such an approach ensures that the Court does not decide important issues without first having the benefit of a lower court decision, supplemented on appeal by full briefing and oral argument challenging and defending that decision. The Court should deny the motion for "reconsideration" as procedurally improper.

B. The Statute Of Limitations On Cleveland Mobile's Action Began to Run As Of January 18, 2001, When the PUCO Issued the *Cellnet* Decision And Cleveland Mobile's Cause Of Action Accrued.

The Court also should deny the "reconsideration" motion because all of Cleveland Mobile's arguments regarding statute-of-limitations accrual dates are meritless. *See* Appellees' Merits Brief at 42-48 (July 24, 2006). Cleveland Mobile's claims against Verizon Wireless are barred by R.C. 2305.11's one-year limitations period because Cleveland Mobile did not file its action in the Court of Common Pleas until February 19, 2004 — more than *three years* after the Ohio Public Utilities Commission issued its January 18, 2001 decision in *Cellnet*, which is the predicate for Cleveland Mobile's suit for damages under R.C. 4905.61. Cleveland Mobile has nonetheless argued that its suit is not barred because its cause of action supposedly did not accrue until February 19, 2003, when this Court issued the mandate from its December 30, 2002 decision *upholding* the PUCO's findings in *Cellnet*. This position is contrary to settled Ohio law.

1. A Cause Of Action Under R.C. 4905.61 Accrues At The Time A Regulatory Violation Is Determined.

The Court's May 23 decision holds that R.C. 2305.11's one-year statute of limitations governs Cleveland Mobile's claim under R.C. 4905.61. R.C. 2305.11 states that "an action upon a statute for a penalty or forfeiture shall be commenced within one year *after the cause of action accrued.*" R.C. 2305.11 (emphasis added).

The accrual of claims under Ohio statutes occurs when all elements of the relevant cause of action are in place. *See Lynch*, 101 Ohio App.3d at 747; *Arbor Village Condominium Ass'n.*, 95 Ohio App.3d at 506. As courts have recognized, the "true test" for determining "when a cause of action accrues" is to "ascertain the time and place when the person could have first maintained an action to a successful result." *Smith*, 403 F.3d at 408-09; *see also* Black's Law

Dictionary, at 21 (6th ed. 1991) (a “cause of action ‘accrues’ when a suit may be maintained thereon”). Accordingly, a cause of action for treble damages under R.C. 4905.61 accrues once there is a finding of a public utility law violation. *See Milligan*, 56 Ohio St.2d at 194. In this case, that occurred on January 18, 2001 — the date when the Public Utilities Commission issued the liability determination in *Cellnet* on which Cleveland Mobile’s Section 4905.61 claims are premised.

Significantly, there is no requirement in Ohio law that, before proceeding to court, a party with a cause of action that has accrued based on a legal ruling must await the conclusion of all possible appeals. Nor as a “general rule” does “the pendency of an appeal” toll the “relevant limitations period.” *Esselburne v. Ohio Dep’t of Agric.* (1990), 64 Ohio App.3d 578, 581.

In the Public Utilities Code context, the rule that actions based on predicate legal rulings accrue before appeals have been concluded is entrenched by statute. The General Assembly has provided that “every order made by the public utilities commission” becomes “effective immediately upon entry.” R.C. 4903.15. It has further provided that, although PUCO orders are subject to appeal as of right in the Supreme Court, *see* R.C. 4903.12, a proceeding seeking “to reverse, vacate, or modify” a PUCO order “does not stay execution of such order,” or excuse any person from complying with the order, or operate to stay or postpone enforcement of the order. R.C. 4903.16. A cause of action under R.C. 4905.61 thus accrues by statute — as well as according to “general rule” of Ohio law — when the PUCO finds statutory violations.

This analysis is confirmed by the Court’s decision in *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54, 538 N.E.2d 398, which is the leading Ohio statute of limitations case where a legal ruling provided the basis for bringing suit. In *Zimmie*, the Court held that a cause of action for legal malpractice in drafting a pre-nuptial agreement accrued —

and the applicable limitations period began to run — when a trial court invalidated the agreement. *Id.* at 58-59. The Court further held that the limitations period was not tolled by the subsequent appeal of the trial court’s decision. *See id.*

Zimmie follows a long line of Ohio authority holding, contrary to Cleveland Mobile’s arguments, that the statute of limitations under R.C. 2305.11 is not tolled during the pendency of an appeal. *Compare* Joint Br. in Supp. of Mot. for Recons., at 6 *with Esselburne*, 64 Ohio App.3d at 581 (“the general rule in Ohio is that the pendency of an appeal does not toll the relevant limitations period”). Most significantly, in *Levering v. National Bank* (1912), 87 Ohio St. 117, 100 N.E. 322, this Court addressed whether the precise one-year statute of limitations at issue in this case, R.C. 2305.11, begins to run at the time of a trial court’s final judgment in favor of the party seeking to bring an action for malicious prosecution, as opposed to the time the trial court’s judgment was subsequently affirmed on appeal. Rejecting the same arguments that Cleveland Mobile raises here, the Court held that the “right to sue for malicious prosecution ... accrues upon the rendition in the trial court of a judgment ... and is barred by the statute of limitations if not brought within one year after such judgment,” notwithstanding any subsequent appeals. *Id.* at 118 (syllabus). The Court reasoned that the pendency of an appeal “may be a good reason for a stay of proceedings,” but it does not toll the statute of limitations. *Id.* at 121.

In the nine decades since *Levering* was decided, Ohio’s courts have consistently applied the rule that the statute of limitations under R.C. 2305.11 runs when the trial court enters a final judgment and all of the elements needed to bring an action are in place. *See, e.g., Board of Education v. Marting* (1966), 7 Ohio Misc. 64, 71-72, 36 O.O.2d 134, 217 N.E.2d 712 (one-year statute of limitations under R.C. 2305.11 for malicious prosecution run from entry of trial court judgment, not at the conclusion of appeals); *Nationwide Ins. Enter. v. Progressive Specialty Ins.*

Co. (June 20, 2002), Franklin App. No. 01AP-1223, 2002 WL 1338791, at *3, 2002-Ohio-3070, 3070 (a “cause of action for malicious prosecution accrues upon the rendition in the trial court of a judgment for the defendant in the action complained of”).

The same principles apply here. Cleveland Mobile’s cause of action for damages resulting from public utility law violations accrued — and the applicable limitations period began to run — when the PUCO issued its final ruling finding regulatory violations, thereby providing the basis for a suit for past damages in a Court of Common Pleas. *Zimmie*, 43 Ohio St.3d at 58-59. Under settled Ohio law, the commencement of the limitations period was *not* tolled by the subsequent appeals of the PUCO’s decision before this Court.

The clarity of these established principles is well illustrated by the parties’ conduct in the *Cellnet* litigation itself. In that litigation, Cellnet (represented by the same attorneys now representing Cleveland Mobile) filed its complaint in the Common Pleas Court on January 18, 2001 — the very same day that the PUCO issued its *Cellnet* Order and more than a year and half before this Court issued its December 2002 decisions on all of the various appeals from the *Cellnet* Order. While the Supreme Court appeals were pending, the Common Pleas suit proceeded, with extensive discovery and depositions. If the position taken in Cleveland Mobile’s motion for reconsideration were correct, then Cellnet had no cause of action, its suit should have been dismissed as premature, and the Court of Common Pleas was wrong in accepting and retaining a hard-fought and very active case over which it lacked all jurisdiction. *See, e.g., Goldmans, Inc. v. Retail Clerks Union, Local 1522* (May 4, 1979), Montgomery App. No. CA-6108, 1979 WL 208418, at *3 (if “no cause of action has yet arisen, the complaint so asserting a cause of action should be dismissed”); *cf. Steel Co. v. Citizens for A Better Env’t* (1998), 523 U.S. 83, 95 (stating that every court “has a special obligation” to satisfy itself as to

its own jurisdiction, even though the parties are prepared to concede it"). The old saying that actions speak louder than words applies with particular force here.

2. A Supreme Court Decision Is "Effective When Filed" Notwithstanding The Pendency Of A Motion For Reconsideration.

For Cleveland Mobile's February 19, 2004 filing to be timely under the applicable one-year statute of limitations, Cleveland Mobile must establish two separate propositions. Specifically, it must establish not only that its cause of action accrued only with the completion of judicial review (*i.e.*, on December 30, 2002, as opposed to upon entry of the PUCO's decision on January 18, 2001), but also that judicial review of the PUCO decision became final only upon the issuance of the appellate mandate (on February 19, 2003), as opposed to the entry of the Court's decision and judgment (on December 30, 2002). In fact, Cleveland Mobile cannot make either showing.

Even if appellate review did toll a limitations period (which, as explained above, it does not) such review would be complete upon a decision from this Court and need not await the issuance of the mandate. The Ohio Rules of Supreme Court Practice establish that a "Supreme Court judgment entry or other order is effective when it is filed with the Clerk," not when the mandate issues either ten days later or following a motion for reconsideration. S. Ct. Rule XI § 1; *see also id.* § 4. Furthermore, the official Comments to the Supreme Court Rules explain that this rule was drafted to reduce confusion by providing that a Court entry (whether a judgment entry or any other Court order) "is effective when it is filed with the Clerk's Office." S. Ct. Rule XI, staff comment. Accordingly, in other cases where the timing of Ohio Supreme Court decisions has been at issue, courts have cited to the date of the decision, not the date the Supreme Court's mandate issued. *See e.g. Muehrcke v. Muehrcke* (Oct. 22, 1998), Cuyahoga App. No.

73434, 1998 WL 741942, *7-9; *Althouse Brown Motor Co. v. Wilcox* (Mahoning App. 1935), 19 Ohio Law Abs. 417.

Moreover, it is “axiomatic that a court speaks through its docket and journals,” *Oney v. Allen* (1988), 39 Ohio St.3d 103, 107, 529 N.E.2d 471. Here, the docket states plainly that the Supreme Court’s December 30, 2002 decision “DISPOSES CASE.” Cellnet (represented by the same attorneys who represent Cleveland Mobile) took its cue from this unambiguous entry and promptly amended their complaint based on this Court’s decision — without awaiting the later-issued mandate. Here again, actions speak louder than words. If the position taken by Cleveland Mobile were correct, then *Cellnet’s* amended complaint should have been dismissed as premature. On Cleveland Mobile’s view, *Cellnet* had no cause of action when it amended its complaint on January 3, 2003 — almost seven weeks before the February 19, 2003 issuance of this Court’s mandate. Cleveland Mobile’s “accrual” argument thus fails for a second and independent reason, and its claims are doubly barred under the applicable, one-year limitations period.

3. Cleveland Mobile’s Arguments In Favor Of Reconsideration Are Meritless And Find No Support In Ohio Law.

Cleveland Mobile never addresses this Court’s authorities making clear that the limitations period begins to run when the cause of action accrues and that the statute of limitations is not tolled during the pendency of an appeal. In fact, Cleveland Mobile effectively cites no authority in support of its position, except the dissenting and concurring opinion of Judge Gallagher in the Eighth District Court of Appeals. Judge Gallagher concluded that the “right of direct appeal to the Supreme Court of Ohio for parties involved in PUCO rulings ... changes the traditional view involving when a cause of action ‘accrues’ for purposes of determining the commencement date of the statute of limitations.” *Cleveland Mobile Radio*

Sales, Inc. v. Verizon Wireless (Oct. 13, 2005), 2005-Ohio-5439, at ¶ 3. In his view, a “formal finding of liability” does not occur until after all parties have exhausted their appeals to the Ohio Supreme Court. *Id.*

But, with all respect, Judge Gallagher’s opinion confuses the fundamentally different concepts of “finality” and “exhaustion.” As courts have recognized, the question whether a party has exhausted its avenues of appeal is conceptually distinct from whether an administrative action is final for statute of limitation purposes. *Cf. South Park Ltd. v. City of Avon* (N.D. Ohio 2007), No. 1:06cv2468, 2007 WL 927959, at *3 (courts have “routinely rejected claims that the Section 1983 statute of limitations begins only when administrative appeals are completed or that the limitations period is tolled while a plaintiff exhausts administrative remedies”); *cf. also R&J Holding Co. v. Redevelopment Auth. of County of Montgomery* (C.A.3, 2006), 165 Fed. Appx. 175, 179-81 (statute of limitations for a section 1983 action runs at time of final judgment, not conclusion of subsequent appeals). Accordingly, although an aggrieved party may appeal to the Supreme Court for judicial review of a PUCO order, the commencement of an appeal does not affect the finality — and effectiveness — of the PUCO’s underlying order.

Not surprisingly, Judge Gallagher’s view has not been embraced by any of the other four lower court judges to consider the issue. Judge Gallagher’s colleagues on the Eighth District Court of Appeals declined to join or comment on his concurring opinion, and both trial court judges — Judge Stuart A. Friedman and Judge Michael J. Russo — reached opposite conclusions when they dismissed Cleveland Mobile’s and Discount Cellular’s complaints.

Ultimately, with no authority supporting its position, Cleveland Mobile’s motion attempts to confuse the issues, arguing that if the one-year statute of limitations “commences on the date of the PUCO Order,” parties would be “required to file damage actions” before there is any

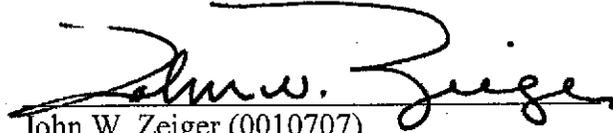
finding of violation. Joint Br. in Supp. of Mot. for Recons., at 3. But as explained above, no statute of limitations begins to run until a cause of action exists. *See Zimmie*, 43 Ohio St.3d at 58. Accordingly, plaintiffs that win before the PUCO must file their complaints in court within one year of the PUCO's decision. In contrast, plaintiffs that lose before the PUCO will have no cause of action (because there is no predicate finding of violation) while appeals to the Supreme Court are taken; hence, there is no risk that these parties would be required to file protective damage actions based on an expected ruling yet to be issued. *See id.* Of course, in cases where an unsuccessful PUCO plaintiff appeals a no-violation finding of the PUCO to this Court, and prevails, a cause of action immediately accrues and the limitations period begins to run at the time of the Court's decision. Under this straightforward regime, no protective filings are required; no confusion is engendered; and there is no risk of claims expiring before they exist.

Finally, the Court should recognize that adopting Cleveland Mobile's approach, while it may help these particular plaintiffs, would disserve the interests of plaintiffs generally. If no cause of action accrues until this Court affirms a PUCO finding of violation, plaintiffs with genuine discrimination claims will be forced to wait for years to litigate their claims in court *in every single case*. Just as defendants here should not be burdened with defending decade-old claims, after relevant limitations period has expired, plaintiffs with genuinely meritorious claims should not be prevented from promptly pursuing their judicial remedies.

CONCLUSION

For the foregoing reasons, the motion for reconsideration should be denied.

Respectfully submitted,



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DATED: June 8, 2007

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2007, a copy of this Response to Motion for Reconsideration was sent by ordinary U.S. mail to the following individuals:

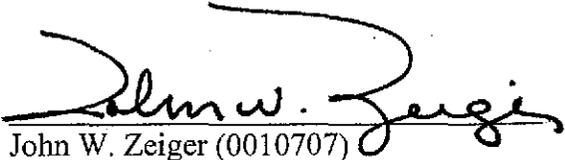
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