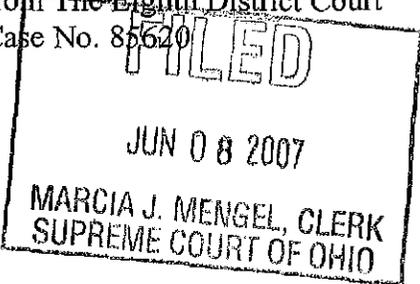


IN THE SUPREME COURT OF OHIO

DISCOUNT CELLULAR, INC.,) CASE NO. 05-2302
)
Appellee,) On Appeal From The Eighth District Court
) of Appeals, Case No. 85618
v.)
)
AMERITECH MOBILE)
COMMUNICATIONS, INC., *et al.*,)
)
Appellants.)

CLEVELAND MOBILE RADIO SALES,) CASE NO. 05-2299
INC. *et al.*,)
) On Appeal From The Eighth District Court
Appellees,) of Appeals, Case No. 85620
v.)
)
VERIZON WIRELESS, *et al.*,)
)
Appellants.)



BRIEF OF APPELLANTS AMERITECH MOBILE COMMUNICATIONS, LLC
AND CINCINNATI SMSA LIMITED PARTNERSHIP
IN RESPONSE TO APPELLEES' JOINT BRIEF IN SUPPORT OF MOTION FOR
RECONSIDERATION

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TABLE OF CONTENTS

I.	Introduction.....	1
II.	The “Clarification” Requested By Appellees Is Not Sought With Regard To An Issue Before This Court On Appeal.....	3
III.	The One-Year Statute of Limitations Begins to Run When an Action Can Be Brought Under R.C. 4905.61.....	4
	A. Appellees Were Not Required to File Their R.C. 4905.61 Action Before There Was a Finding of Violation Against Ameritech.....	4
	B. Discount Cellular’s R.C. 4905.61 Claim Accrued on January 18, 2001.....	6
	1. The PUCO Order Became Effective, and Discount Cellular’s Claims Began to Accrue, on January 18, 2001.....	6
	2. The Ohio Supreme Court’s Ruling in Westside Cellular, Which Extended the Damages Period to 1993 and 1994, Is Not Relevant to Discount Cellular’s Damages Claim Here.....	8
	C. The Statute of Limitations Governing Cleveland Mobile’s Claim Under R.C. 4905.61 for Damages for 1995-1998 Began to Run as of the Date of the PUCO Order, And the Statute of Limitations for Damages for 1993-1995 Began to Run as of the Date of the Ohio Supreme Court’s Westside Cellular Decision.....	9
	1. Cleveland Mobile’s Claim for 1995-1998 Accrued on January 18, 2001 When the PUCO Order Became Effective.....	10
	2. Cleveland Mobile’s Claim for 1993-1995 Accrued on December 26, 2002 When the Court Issued Its Westside Cellular Decision.....	10
IV.	Conclusion.....	13

I. Introduction

In its May 23, 2007 decision, this Court held that the statute of limitations in an action brought under R.C. 4905.61 is one year. This Court never reached the issue of when the one-year statute of limitations began to run with respect to Appellees' claims under R.C. 4905.61. In fact, the running of the one-year statute of limitations was not considered by the court of appeals below. Rather, the only issue before this court on appeal was whether the statute of limitations in an action brought under R.C. 4905.61 was one year or six. Thus, Appellees' Motion for Reconsideration – which seeks “reconsideration” of the date on which the one-year statute of limitations began to run – is improper and should be denied.

However, even if Appellees' Motion for Reconsideration were properly before the Court, Appellees' position on the running of the one-year statute of limitations is contrary to established Ohio law. The statute of limitations begins to run for a cause of action under R.C. 4905.61 on the date the Public Utilities Commission of Ohio (“PUCO”) or this Court first finds that a public utility has violated Ohio's public utilities laws. This is the date when a plaintiff who has been injured by that violation may file an R.C. 4905.61 action in common pleas court. Although Appellees feign concern in their Motion that complainants who lose at the PUCO will be compelled to prematurely file R.C. 4905.61 actions, this concern has no basis in Ohio law. Under clear Ohio law, the statute of limitations in an action brought under R.C. 4905.61 begins to run when a violation is found – no sooner and no later.

Under the facts presented to the lower courts by Appellee Discount Cellular, the finding that put it on notice of its R.C. 4905.61 action against Ameritech Mobile was made by the PUCO

on January 18, 2001 in the Westside Cellular case.¹ The violations period in the PUCO Order extends from 1995 through 1998, and Discount Cellular seeks to piggy back on the findings in the PUCO Order for years 1997 and 1998 only. Thus, Discount Cellular's R.C. 4905.61 action accrued and the one-year statute of limitations began to run on January 18, 2001. Discount Cellular, however, did not file its action until December 26, 2003. Accordingly, its claims are barred by the one-year statute of limitations applicable to claims brought under R.C. 4905.61.

Appellee Cleveland Mobile Radio Sales ("Cleveland Mobile") seeks damages for injuries allegedly resulting from statutory violations occurring between 1993 and 1998. As with Discount Cellular, its claims relating to violations in years 1995-98 were triggered by the PUCO Order on January 18, 2001. However, the PUCO Order found that no violations occurred in the 1993-95 period, so Cleveland Mobile's claims for this time period could not have accrued on January 18, 2001. Instead, the first finding of a violation for years 1993-95 was made by this Court on December 26, 2002 in Westside Cellular, Inc. v. Pub. Util. Comm., 98 Ohio St. 3d 165 (Dec. 26, 2002) ("Westside Cellular"). Thus, the one-year statute of limitations began to run on December 26, 2002 as to statutory violations occurring during 1993-95. Cleveland Mobile filed its Complaint on February 19, 2004, which was not within one year of either the PUCO Order (January 18, 2001) or this Court's decision in Westside Cellular (December 26, 2002). Like Discount Cellular, its complaint is time barred.

The accrual dates and expiration dates for Discount Cellular's and Cleveland Mobile's R.C. 4905.61 actions can be summarized as follows:

¹ Opinion and Order, In the Matter of the Complaint of Westside Cellular, Inc. d/b/a Cellnet, PUCO Case No. 93-1758-RC-CSS, 2001 Ohio PUC LEXIS 18 (January 18, 2001) ("PUCO Order").

- January 18, 2001 - The PUCO issues its Order finding regulatory violations against Ameritech Mobile for 1995–98
 - January 18, 2002 - Statute of limitations expires for Appellees’ R.C. 4905.61 action based on 1995–98 violations. This bars Discount Cellular’s entire claim and Cleveland Mobile’s claim for 1995-98.
 - December 26, 2002 - Ohio Supreme Court’s Westside Cellular decision finds regulatory violations against Ameritech Mobile for 1993–95
 - December 26, 2003 - Statute of Limitations expires for Cleveland Mobile’s R.C. 4905.61 action based on 1993–95 violations
-

Because neither Appellee filed any part of its R.C. 4905.61 action within one year of the applicable statute of limitations, Appellees’ motion for reconsideration should be denied.

II. The “Clarification” Requested By Appellees Is Not Sought With Regard To An Issue Before This Court On Appeal.

The Court’s May 23, 2007 decision in these consolidated appeals determined that the one-year statute of limitations in R.C. 2305.11 applies to claims brought under R.C. 4905.61. 2005-Ohio-5439, at ¶ 1. As a result, the Court reversed the decision of the court of appeals, thereby reinstating two trial court decisions which dismissed plaintiffs-appellees’ R.C. 4905.61 claims. *Id.* In Appellees’ motion for reconsideration, they do not ask the Court to reconsider any aspect of its decision. Instead, they ask the Court for “clarification” regarding when the one-year statute of limitations begins to run under the facts present in these two cases.

Appellees’ motion is improper. Appellees do not seek reconsideration of any issue discussed in the Court’s decision on the merits. *Cf.* S. Ct. Prac. R. XI(2)(A). Instead, appellees ask this Court to consider and decide a separate question not reached by this Court or by the Eighth District Court of Appeals. This separate question was not raised in the parties’ jurisdictional briefing, not mentioned in the Court’s order accepting this appeal, and not

addressed at oral argument. Appellees did not raise this separate issue as an assignment of error in its merits brief filed on July 24, 2006. See R.C. 2505.22. Instead, the issue was merely summarized in Appellees' merits brief and in Appellants' reply briefs filed with this Court. Because this Court lacks an assignment of error from appellees and a decision addressing this issue from the lower court, it should deny Appellees' Motion.

III. The One-Year Statute of Limitations Begins to Run When an Action Can Be Brought Under R.C. 4905.61.

A. Appellees Were Not Required to File Their R.C. 4905.61 Action Before There Was a Finding of Violation Against Ameritech.

Appellees' Motion is premised on the untenable legal fiction that the one-year statute of limitations applicable to an action brought under R.C. 4905.61 can only run from the date of the last, final, non-appealable decision of the PUCO or this Court. Otherwise, Appellees suggest, a parade of horrors would befall any action brought under R.C. 4905.61. Motion at 3-5. Indeed, Appellees go so far in advancing this fiction as to misstate Ameritech Mobile's position as one that would require Appellees to file their 1993-95 claims within one year of the PUCO Order – even though there was no finding in the PUCO Order of a violation for the 1993-95 time period. Motion at p. 3-4. That, of course, is not Ameritech's position, nor is it the law. More generally, but just as misleading, Appellees proclaim that acceptance of Ameritech Mobile's position means that those plaintiffs who lose before the PUCO and take an appeal to this Court must nevertheless file their R.C. 4905.61 action within one year of the PUCO decision. Id. at 4-6. Appellees even go so far as to suggest that plaintiffs' legal counsel would be forced to file R.C. 4905.61 actions having no factual basis, thereby subjecting themselves to Rule 11 sanctions. Id. at 4. This is nonsense.

Contrary to Appellees' posturing, a plaintiff who loses at the PUCO has no R.C. 4905.61 action to file given that a claim brought under R.C. 4905.61 must be preceded by a finding of a

violation by the PUCO. Milligan v. Ohio Bell Tel. Co., 56 Ohio St. 2d 191 (1978), syllabus ¶ 1. As explained in Zimmie v. CH&G, 43 Ohio St. 3d 54, 57-58 (1989), a cause of action accrues when a cognizable event creating the cause of action happens – be it a PUCO decision or a Supreme Court decision finding, for purposes of R.C. 4905.61, a violation of Ohio’s public utilities laws. Until such a finding is made, a plaintiff need not (indeed, *cannot* properly) file an R.C. 4905.61 action, and a plaintiff filing such an action prematurely *should* be subject to Rule 11 sanctions. However, as also explained in Zimmie, appeals do not toll the running of the statute of limitations once the cause of action accrues. Id. at 58-59.

Appellees’ insincerity is at its peak in claiming – at page four of their Motion – that Ameritech Mobile has taken a contradictory position in the Satterfield litigation currently pending in the Cuyahoga County Court of Common Pleas. To the contrary, Ameritech Mobile’s position is consistent and true – the statute runs from the date when a violation is found. Thus, Ameritech Mobile has argued here and in Satterfield that the statute of limitations for claims relating to the violations period found by the PUCO – 1995-98 – runs from the January 18, 2001 date of the PUCO Order. Likewise, Ameritech Mobile has argued here and in Satterfield that the statute of limitations for claims relating to the violations period found by this Court in its Westside Cellular decision – 1993-95 – runs from the December 26, 2002 date of that decision. Ameritech Mobile has never argued to the contrary.

The straw man arguments of Appellees’ counsel, on the other hand, are belied by the actions taken by the same counsel in the Westside Cellular matter. Notably, Westside Cellular’s counsel, the same counsel representing Appellees here, believed that Westside Cellular had a cause of action under R.C. 4905.61 as of the date the PUCO Order was issued – in fact they filed Westside Cellular’s R.C. 4905.61 action on January 18, 2001, *the same day* the PUCO Order was

issued. Westside Cellular's counsel then amended the same action to include the 1993-95 time period on January 3, 2003 *immediately* after this Court issued its decision adding these years to the violations period – and nearly seven weeks before the clerk issued its mandate. Appellees' counsel saw no reason to wait to file, and had no reason to wait to file, until the clerk of the Supreme Court issued a mandate. Of course, in those cases when a PUCO order is appealed and the parties determine that extensive work on the damages action could be inefficient, the parties and trial court always have the option of staying proceedings until the Supreme Court appeal is decided. Regardless, as the actions of Appellees' counsel in the Westside Cellular matter lay bare, once the cognizable event giving rise to a cause of action has occurred, the statute of limitations begins to run and is not tolled by the filing of motions for reconsideration or further appeals.

B. Discount Cellular's R.C. 4905.61 Claim Accrued on January 18, 2001.

1. The PUCO Order Became Effective, and Discount Cellular's Claims Began to Accrue, on January 18, 2001.

Discount Cellular's claim under R.C. 4905.61 accrued on January 18, 2001, when the PUCO issued its Order in Westside Cellular. Discount Cellular, however, delayed filing its complaint until December 26, 2003, and now it is time barred. (See Supp. at 1). While a cause of action in the case of a statutory action for a penalty or forfeiture typically accrues when the violation of the statute occurs, Lynch v. Dial Finance Co. of Ohio, 101 Ohio App. 3d 742, 747 (Cuyahoga 1995), because a claim brought under R.C. 4905.61 must be preceded by a PUCO finding of a violation, see Milligan, 56 Ohio St. 2d at syllabus ¶ 1, the effective date of that finding (as opposed to the date of the violation itself) is the last date when the cause of action can accrue. Thus, the statute of limitations began to run on Discount Cellular's action on January 18, 2001.

Section 4903.15 of the Revised Code mandates that “every order made by the public utilities commission” becomes “effective immediately upon entry.” Further, an action to reverse, vacate, or modify a PUCO order “does not stay execution of the order,” R.C. 4903.16, or “excuse any person from complying with the order, or operate to stay or postpone the enforcement” of the order. R.C. 4903.10. As this Court has made clear, appeals do not toll statutes of limitations. See Zimmie v. CH&G, 43 Ohio St. 3d 54, 58-59 (1989). See also Esselburne v. Ohio Dep't of Agriculture, 64 Ohio App. 3d 578, 581, 582 N.E.2d 48, 51 (Franklin 1990) (“the general rule in Ohio is that the pendency of an appeal does not toll the relevant limitations period”). As in Zimmie, where a legal malpractice action accrued on the date of a trial court decision and was not tolled during appeals taken from that decision (id.), Discount Cellular’s action accrued on the date of the PUCO Order and was not tolled while Westside Cellular and Ameritech Mobile pursued appeals from the PUCO Order.

The only authority relied on by Appellees in arguing that the statute of limitations was tolled by appeals taken from the PUCO Order is the concurring opinion of Judge Gallagher below, in which he opined that a cause of action under R.C. 4905.61 does not accrue “until a formal determination of liability is established” by the Ohio Supreme Court. (Appx. 24, 42.) Judge Gallagher properly states that a two-step process exists for adjudicating and remedying violations of Ohio’s public utilities law – first an R.C. 4905.26 complaint filed with the PUCO, then an R.C. 4905.61 complaint filed in a common pleas court. (Id.) His error, however, is in believing that an Ohio Supreme Court appeal is necessary to establish liability in step one. As discussed above, a PUCO finding of a statutory violation *is* the “formal determination of liability” required to bring an R.C. 4905.61 action. Judge Gallagher’s reasoning is contrary to Ohio law and should not be followed by this Court.

Accordingly, Discount Cellular's claim under R.C. 4905.61 should have been filed within the applicable statute of limitations period running from January 18, 2001 -- the date of the PUCO Order. Discount Cellular's lawsuit could have been filed no later than one year after January 18, 2001; in other words, no later than January 18, 2002. But this suit was filed on December 26, 2003 -- almost two years after the limitations period closed. Therefore, Discount Cellular's claim under R.C. § 4905.61 is barred by the statute of limitations.

2. The Ohio Supreme Court's Ruling in Westside Cellular, Which Extended the Damages Period to 1993 and 1994, Is Not Relevant to Discount Cellular's Damages Claim Here.

Although Appellees complain in their Motion that they could not have brought a claim relating to the 1993-95 time period until after this Court found a violation for that time period in its Westside Cellular decision (Motion at p. 2-3), Discount Cellular has no cause to complain because it has no claims for this time period. Discount Cellular did not exist until March 1995, it did not operate as a cellular telephone reseller until 1996, and its claim did not begin to run until 1997. (Supp. at 40-43; Doc. # 7 filed in Case No. CV 03 518042, Brief in Opp. to Mot. to Dismiss at 2 ("Plaintiff, Discount Cellular, is a cellular telephone service reseller operating in the state of Ohio during the relevant time period 1996 through 1998"); Brief of Appellant filed Feb. 28, 2005 in Case No. CA 04 85618, at 21 ("In this case, Appellants' claim begin to run in 1997"). The PUCO Order determined that Cellnet had been discriminated against from 1995 through 1998, and Discount Cellular seeks to piggy-back on this finding for years 1997 and 1998 only.

Thus, Discount Cellular does not have a claim for damages relating to any part of the violations period at issue in Westside Cellular. Because the Supreme Court's ruling did not affect that part of the violations period during which Discount Cellular was in business, and the appeal from the PUCO Order did not toll the statute of limitations, the statute of limitations

governing Discount Cellular's claim for damages *as to the years that it was doing business* began to run when the PUCO entered its Opinion and Order on January 18, 2001. See Zimmie, 43 Ohio St. 3d at 58-59. Although Appellees attempt to distinguish Usternal v. Gem Boat Service, Inc., 1992 Ohio App. LEXIS 5881 (Ottawa Nov. 20, 1992) (Exhibit A), on the basis that the underlying PUCO order in that case was not appealed (Motion at p. 5 fn. 2), whether or not the underlying PUCO Order was appealed is immaterial since, as this Court held in Zimmie, appeals do not toll statutes of limitations. Zimmie, 43 Ohio St. 3d at 58-59. The cause of action under R.C. 4905.61 accrues upon the finding of a violation and is not tolled by an appeal. Therefore, the Court's ruling in Westside Cellular did not affect the running of the statute of limitations against Discount Cellular's claim.

C. The Statute of Limitations Governing Cleveland Mobile's Claim Under R.C. 4905.61 for Damages for 1995-1998 Began to Run as of the Date of the PUCO Order, And the Statute of Limitations for Damages for 1993-1995 Began to Run as of the Date of the Ohio Supreme Court's Westside Cellular Decision.

Determining the date when the one-year statute began to run on Cleveland Mobile's R.C. 4905.61 claim is made slightly more complex by Cleveland Mobile's failure to plead the date or dates when it believes it was denied nondiscriminatory reseller rates by Ameritech Mobile. Unlike Discount Cellular, Cleveland Mobile never served as a reseller of Ameritech Mobile's cellular service and is unknown to Ameritech Mobile (which did not provide cellular service in the Cleveland area during the 1990s). Yet it is clear that Cleveland Mobile seeks somehow to piggy-back on the PUCO Order and the Court's Westside Cellular decision for claims it might have for the 1993-95 violations period found in Westside Cellular and the 1995-98 violations period found in the PUCO Order. Motion at p. 2-3. Thus, the statute of limitations for each such period began to run when Cleveland Mobile could have filed its action as to each part of its claim. However, because Cleveland Mobile filed its complaint on February 19, 2004 – more

than one year after both the PUCO Order *and* the Westside Cellular decision – its entire R.C. 4905.61 claim is barred as a matter of law.

1. Cleveland Mobile's Claim for 1995-1998 Accrued on January 18, 2001 When the PUCO Order Became Effective.

With regard to Cleveland Mobile's claim related to violations occurring in 1995 through 1998, the analysis of Discount Cellular's claim is equally applicable here. Cleveland Mobile's claim under R.C. 4905.61 for 1995-98 accrued on January 18, 2001, when the PUCO Order became effective pursuant to Ohio law. As of January 18, 2001, Cleveland Mobile's attempt to piggy-back on Westside Cellular's claims pursued through the PUCO² was fully developed for these years. Thus, by failing to file its R.C. 4905.61 claim within one year of the PUCO Order, Cleveland Mobile's claim related to violations occurring from 1995 through 1998 is barred by R.C. 2305.11.

2. Cleveland Mobile's Claim for 1993-1995 Accrued on December 26, 2002 When the Court Issued Its Westside Cellular Decision.

No finding of violation had been made against Ameritech Mobile with regard to the 1993-95 time period until this Court's December 26, 2002 decision in Westside Cellular. Thus, because a finding of violation is the final element of an R.C. 4905.61 action, Cleveland Mobile's claim for this time period, if any, accrued on December 26, 2002 when it was put on notice by the Court's announcement and entry of its decision that those injured by Ameritech Mobile's violations in 1993-95 could recover treble damages under R.C. 4905.61. As the Appellees write in their Motion, the Court's Westside Cellular decision on December 26, 2002 found "a violation

² The PUCO has made no finding that Ameritech Mobile discriminated against Cleveland Mobile or, for that matter, against Discount Cellular. Most importantly here, unlike in Westside Cellular's case, the PUCO has made no determination regarding the date or dates on which these companies approached Ameritech Mobile, engaged in substantive discussions, and were denied nondiscriminatory rates.

for the 1993-95 time period which would allow Appellees to bring a damage action.” Motion at p. 3. However, because Cleveland Mobile did not file its action within one year of the Court’s decision, the action is barred by R.C. 2305.11.

Cleveland Mobile argued to the court of appeals that the Court’s Westside Cellular decision was not effective, and the statute of limitations did not begin to run, until this Court issued its mandate on February 19, 2003. Although Appellees sidestep that issue in their Motion, the Court’s Rules of Practice are clear that a Court judgment entry is effective on the date issued and filed with the clerk:

The filing of a judgment entry or other order by the Supreme Court with the Clerk for journalization constitutes entry of the judgment or order. *A Supreme Court judgment entry or other order is effective when it is filed with the Clerk.*

S. Ct. Prac. R. XI § 1 (emphasis added). The clerk’s issuance of the mandate occurs ten days after filing or following decision on a motion for reconsideration. *Id.* § 4 (“mandate shall be issued 10 days *after entry of the judgment*, unless a motion for reconsideration is filed”) (emphasis added). 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. Prac. R. XI, staff comment.

According to the Court’s docket, the Westside Cellular decision was announced and filed with the clerk’s office on December 26, 2002. A court speaks through its docket and journals,³ and the docket in Westside Cellular states clearly that the Court’s December 26, 2002 decision “**DISPOSES CASE.**” Thus, Cleveland Mobile was on notice on that date that it had a cause of

³ See Oney v. Allen, 39 Ohio St. 3d 103, 107 (1988).

action for damages for 1993-95, but did not file its Complaint until February 19, 2004 – well after the statute of limitations had run.⁴ See Zimmie, 43 Ohio St. 3d at 57-58 (statutes of limitation begin to run on the happening of a cognizable event that does or should alert a party that it has a cause of action). Indeed, the very argument made by Appellees is belied by the actions taken by their counsel in the Westside Cellular litigation when Westside Cellular filed an Amended Complaint on *January 3, 2003* – immediately after the Supreme Court’s December 26, 2002 decision and long before the February 19, 2003 “issuance of mandate” date – to add the years 1993-1995 to the period in which they sought damages.

Moreover, on previous occasions when the timing of a Supreme Court decision has been at issue, courts have cited the date of the decision (here, December 26, 2002) as controlling – *not* the date that the clerk may have issued a mandate. See, e.g., Muehreke v. Muehreke, 1998 Ohio App. Lexis 4991, *7-9 (Cuyahoga Oct. 22, 1998) (Exhibit B) (equating decision date of Court’s prior decision to effective date); Althouse Brown Motor Co. v. Wilcox, 19 Ohio L. Abs. 417 (Mahoning 1935) (citing to decision date of this Court’s ruling in Vega v. Evans, 128 Ohio St. 535 (1934), as governing a trial court’s decision). Similarly, in Szabo v. Goetsch, 2007-Ohio-1147, ¶¶ 15-16, 2007 Ohio App. LEXIS 1060, at *8-9 (Cuyahoga Mar. 15, 2007) (Exhibit C), the latest possible date proposed by any party as the cognizable event that triggered the one-year statute of limitations was the date the court of appeals announced its decision, thereby putting the plaintiff on notice of its claim, not the journalization date or date the mandate was issued. This

⁴ Judge Gallagher, in his court of appeals concurrence, opined that Appellees’ R.C. 4905.61 action “did not accrue until the Supreme Court issued and filed its judgment entry regarding the earlier PUCO decision.” (Appx. at 23-24, 41-42.) However, Judge Gallagher mistakenly stated that the date of issuance and filing was February 19, 2003. (*Id.*) Moreover, Judge Gallagher did not address the accrual on January 18, 2001 of Discount Cellular’s and Cleveland Mobile’s actions related to violations during the 1995-98 period.

makes perfect sense, given that cases are reported with their decision date, not their "issuance of mandate" date.

Because Cleveland Mobile's R.C. 4905.61 action was filed after the one-year statute of limitations ran on January 18, 2002 (for 1995-98 violations) *and* after December 26, 2003 (for 1993-95 violations), the entire action is time barred.

IV. Conclusion

Although Appellees did not properly put before this Court the question of when the one-year statute of limitations began to run in each of their cases, Ohio law is clear that the R.C. 4905.61 actions asserted by Discount Cellular and Cleveland Mobile are time barred. This Court should deny Appellees' Motion for Reconsideration.

Respectfully submitted,

Mark I. Wallach

Mark I. Wallach, Counsel of Record

*Peter A. Rosato
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CERTIFICATE OF SERVICE

A copy of this Brief of Appellants Ameritech Mobile Communications, LLC and Cincinnati SMSA Limited Partnership was served by regular U.S. Mail, postage pre-paid, this 8th day of June, 2007, upon the following counsel of record:

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EXHIBITS

Usternal v. Gem Boat Service, Inc., 1992 Ohio App. LEXIS 5881 (Ottawa Nov. 20, 1992)A

Muehreke v. Muehreke, 1998 Ohio App. Lexis 4991 (Cuyahoga Oct. 22, 1998).....B

Szabo v. Goetsch, 2007-Ohio-1147, 2007 Ohio App. LEXIS 1060 (Cuyahoga Mar. 15, 2007)C

LEXSEE 1992 OHIO APP. LEXIS 5881

David Usternal, et al. Appellants v. Gem Boat Service, Inc. Appellee

Court of Appeals No. 91-OT-051

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, OTTAWA COUNTY

1992 Ohio App. LEXIS 5881

November 20, 1992, Decided

PRIOR HISTORY: [*1] Trial Court No. 89-CI-283

DISPOSITION: The judgment of the Ottawa County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal.

COUNSEL: Joseph Castrodale, David Carney, Mark Wallach, D. Bowen Loeffler, for appellee.

D.R. Pheils, for appellants.

JUDGES: George M. Glasser, P.J., Peter M. Handwork, J., Melvin L. Resnick, J., CONCUR.

OPINION*DECISION AND JUDGMENT ENTRY*

On September 12, 1989, appellants filed a class action complaint in the Ottawa County Court of Common Pleas. The caption of the complaint identified four named class representatives and indicated that the class included water and sewer customers of the appellee prior to 1988. Appellee, Gem Boat Service Inc. N/K/A Gem Beach Marina Inc. was named as the defendant in the complaint. The basis of the complaint was an allegation that appellee ran a water and sewer utility in Catawba Township and charged appellants rates for providing the service without any approval or registration from the Public Utilities Commission of Ohio (PUCO). The complaint contained a paragraph which stated:

"This action is brought under *Section 4905.61, Ohio Revised Code.*"

Appellee filed an answer on October [*2] 12, 1989, and discovery proceeded in the case. On May 18, 1990, the Ottawa County Court of Common Pleas certified the class. Appellants then filed a first

amended class action complaint which contained the same statement regarding the basis for the suit. Appellee filed an answer to the amended class action complaint and subsequently filed a motion for summary judgment, arguing that the statute of limitations had run for the cause of action appellants wished to pursue. Appellants opposed the motion for summary judgment, but on September 17, 1991, the Ottawa County Court of Common Pleas filed a decision and judgment entry in which the court determined that the statute of limitations had run, and appellee was entitled to summary judgment. On October 11, 1991, appellants filed a notice of appeal to this court challenging the trial court's determination that appellee was entitled to summary judgment. Appellants raised two assignments of error for this court's consideration. The assignments of error are:

"I. THE TRIAL COURT ERRED IN RULING THAT § 4905.61 IS A PENALTY STATUTE SUBJECT TO THE LIMITATION OF § 2305.11 RATHER THAN § 2305.07 O.R.C.

"II. THE TRIAL [*3] COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT ON PLAINTIFFS' COMPLAINT WHICH STATES A CLAIM FOR COMMON LAW BREACH OF CONTRACT."

When determining whether summary judgment should be granted, Ohio courts are guided by the provisions of *Civ.R. 56(C)* which states in pertinent part:

"Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be

rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

Keeping this standard in mind, we now review the decision of the Ottawa County [*4] Court of Common Pleas.

The facts of this case are undisputed. Both parties agree that appellee installed and operated a water and sewer system in the marina which was also built by appellee. Appellants, who purchased lots from appellee at the marina, were charged a water fee and a sewer fee by appellee for several decades. Appellee never registered with PUCO and never sought approval of the fees levied for providing water and sewer service. A landowner not included in the class in this suit eventually filed a complaint with PUCO. The case proceeded to an administrative hearing and PUCO determined that appellee was a utility that was required to register with PUCO and to seek approval of fees charged for the services provided. The order containing that finding by the PUCO was filed on March 3, 1987. Appellee did not appeal the finding of the PUCO. Appellants subsequently initiated this case, seeking triple damages available under *R.C. 4905.61*. The trial court considered the undisputed facts in this case and concluded that even when construing the facts most strongly in favor of appellants, appellee was entitled to judgment as a matter of law, because the statute of limitations [*5] which was applicable in this case had run. Appellants argued that the trial court's determination was in error, and urged this court to reach an opposite conclusion.

The statute which appellee was found to have violated is *R.C. 4905.32* which states:

"No public utility shall charge, demand, extract, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.

"No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service." *R.C. 2905.32*.

Because appellee was found in violation of 4905.32, the provisions of *R.C. 4905.61* apply. Those provisions are:

"If any public utility or railroad does, or causes to be done, any act or thing prohibited [*6] by Chapters * * * 4925. of the Revised Code, or declare to be unlawful, or omits to do any act or thing required by such chapters, or by order of the public utilities commission, such public utility or railroad is liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of such violation, failure, or omission. Any recovery under this section does not affect a recovery by the state for any penalty provided for in such chapters." *R.C. 4905.61*.

The dispute between the parties in this case is: what is the purpose for the enactment of *R.C. 4905.61*? Appellants argue that the purpose of the statute is to provide monetary compensation to persons who were wrongfully charged for utilities. Appellee contends that the purpose of the statute is to provide a penalty for failing to comply with *R.C. 4905.32*. The significance of the interpretation of the purpose of the statute becomes clear when reference is made to the portions of the revised code which establish statutes of limitations for causes of action. If the primary purpose for *R.C. 4905.61* is to provide punishment, the one year statute of limitations found in *R.C. 2305.11* applies. [*7] However, if the purpose of *R.C. 4905.61* is simply to compensate individuals who were wrongfully charged for utilities, a six year statute of limitations listed in *R.C. 2305.07* applies. The trial court determined that the primary purpose of *R.C. 4905.61* is to provide punishment. Accordingly, the trial court determined that the one year statute of limitations found in *R.C. 2305.11* applied in this case and that appellants had failed to timely file their complaint. Appellants argue that ruling was in error and urge this court to issue an opposite ruling.

Appellants argue that the provisions of *R.C. 4905.61* were written only to provide for private damages in the event a utility violated *R.C. 4905.32*. Appellants point to a separate statutory section, *R.C. 4905.99(C)*, which establishes penalties which may be pursued by the State when a utility violates *R.C. 4905.32*. Appellants argue that the existence of the separate statute imposing penalties which may be sought by the State is evidence that the first statute, which enables private individuals to seek damages, was not drafted to establish any punishment to a utility company which fails to conform with the requirements of *R.C. 4905.32*. [*8] Appellee disagrees, arguing that the existence of treble damages in the statute which creates a private remedy, demonstrates that the purpose of the statute was to punish the utility company which

violated R.C. 4905.32. Appellee cites to decisions from this court in which we construed treble damage provisions of the Consumer Sales Practices Act as being designed to provide compensatory and punitive damages. Appellee cites several other cases decided by various Ohio courts in which the courts stated that treble damages are punitive. See, e.g., *Hardman v. Wheels, Inc.* (1988), 56 Ohio App.3d 142, certiorari denied (1989), 493 U.S. 848; *Mihailoff v. Ionna* (May 6, 1987), Hamilton App. No. C-860040, unreported. Appellee argues that the trial court was correct as a matter of law when it ruled that R.C. 4905.61 was designed by the legislature to inflict a penalty. After careful review of the arguments, this court concludes that the trial court did not err when it ruled that R.C. 4905.61 was designed to inflict a penalty, thereby triggering the one year statute of limitations listed in R.C. 2305.11. Appellants' first assignment of error is found not well-taken.

In appellants' [*9] second assignment of error, appellants argue that the trial court erred in not finding that a common law cause of action existed for a breach of contract, thereby triggering a longer statute of limitations. Appellee correctly points out that appellants

never raised this argument in the trial court. This court has carefully reviewed the record presented and can find no instance where appellants made this argument to the trial court. Generally, Ohio Appellate Courts will not consider issues on appeal which were not first raised in the trial court. *State v. Childs* (1968), 14 Ohio St.2d 56, paragraph three of the syllabus, certiorari denied (1969), 394 U.S. 1002; *Williams v. Jerry L. Kattenbach Ent., Inc.* (1981), 2 Ohio App.3d 113, 115. Appellants' second assignment of error is not well-taken.

The judgment of the Ottawa County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended [*10] 1/1/80.

George M. Glasser, P.J.

Peter M. Handwork, J.

Melvin L. Resnick, J.

CONCUR.

LEXSEE 1998 OHIO APP. LEXIS 4991

CECILE S. MUEHRCKE, Plaintiff-appellee vs. ROBERT C. MUEHRCKE, Defendant-appellant

NO. 73434

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY***1998 Ohio App. LEXIS 4991***October 22, 1998, Date of Announcement of Decision**

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDING: Civil appeal from Court of Common Pleas. Domestic Relations Division. Case No. D-148,673.

DISPOSITION: JUDGMENT: AFFIRMED.

COUNSEL: For plaintiff-appellee: CECILE S. MUEHRCKE, pro se, Shaker Heights, Ohio.

For defendant-appellant: JOHN V. HEUTSCHE, Attorney at Law, John V. Heutsche Co., L.P.A., Cleveland, Ohio.

Guardian ad litem: MARGARET KAZDIN STANARD, Attorney at Law, Reid, Berry & Stanard, Cleveland, Ohio.

JUDGES: KENNETH A. ROCCO, PRESIDING JUDGE. JAMES D. SWEENEY, J. and MICHAEL J. CORRIGAN, J. CONCUR.

OPINION BY: KENNETH A. ROCCO

OPINION**JOURNAL ENTRY and OPINION**

KENNETH A. ROCCO, J.:

This case is before the court on appeal from a decision by the Cuyahoga County Court of Common Pleas, Domestic Relations Division, awarding a post-judgment increase in the child support due from defendant-appellant Robert C. Muehrcke. Appellant argues the trial court erred by denying his motion for a mistrial and his motion to vacate an interim child support order issued by a judge not assigned to the case. Second, he asserts the court erred by making its final award retroactive to the

date appellee filed her motion for increased child support. Finally, appellant contends the court [*2] miscalculated his income for purposes of determining his ability to pay child support.

Appellee Cecile S. Muehrcke cross-appeals from the trial court's order requiring her to pay attorney's fees to appellant. Appellee argues the court erred because the attorney's fees were not due under the court's prior order.

For the reasons that follow, this court finds no error in the trial court's orders and accordingly affirms its decisions.

PROCEDURAL HISTORY

The parties to this case were divorced on September 10, 1987 pursuant to a decree entered by Judge Timothy M. Flanagan based on the parties' in-court settlement agreement, which the court approved and adopted. Among other things, the decree required appellant "to quit claim to the [appellee] all of his right, title and interest in and to the real estate located at 14270 South Park Boulevard, Shaker Heights, Cuyahoga County, Ohio." Further,

*** [appellee] will assume all financial responsibility for the South Park Boulevard real estate including but not limited to Dr. Jobe and the obligation for any repairs or replacement required by the City of Shaker Heights, but she shall not be responsible for any civil and/or criminal [*3] penalties which may be imposed upon [appellant] by the Shaker Heights Municipal Court. [Appellee] will hold harmless [appellant] from any liability concerning the South Park Boulevard real estate EXCEPT any civil and/or criminal penalties which may be imposed upon

[appellant] by the Shaker Heights Municipal Court.

The Parties had previously entered into a joint custody plan concerning their four children. In addition to provisions for, e.g., the custody, education, upbringing, medical care, and psychological counseling of the children, this plan provided for the division of certain child support expenses and provided that the court should determine additional child support issues. As part of the divorce decree, the court ordered appellant to pay appellee \$ 75 per child per week, plus poundage.

Several months later, on March 22, 1988, the court approved and adopted an amended joint custody plan. This plan included revised provisions regarding child support, so the court terminated its previous order requiring appellant to pay support to appellee.

On April 23, 1992, appellee filed a motion to change the custody of the parties' children and to amend the joint custody plan [*4] in accordance with the recommendation of the parties' mediator. Approximately one week later, on April 30, 1992, appellant filed his motion to "vacate" the "award" of the "arbitrator" on which appellee had based her motion for a change of custody.¹

1 On October 6, 1994, the court dismissed appellee's motion to change custody, based upon appellee's voluntary withdrawal of the motion. The court later denied appellant's motion to vacate.

On June 1, 1992, appellant filed a motion to show cause and a motion for attorney's fees, asserting that appellee had failed to pay all costs and expenses associated with the South Park Boulevard property as required by the divorce decree. Appellant argued he had incurred some \$ 5,000 in attorney's fees as a result of appellee's failure to comply with her obligations and requested that the court order her to reimburse him for this amount.

On September 2, 1992, appellee filed a motion for interim and permanent child support. Appellant moved to "dismiss" this motion, asserting, [*5] *inter alia*, that the court could modify the terms of the joint custody plan under *R.C. 3109.04(B)(2)(b)* only if the parties agreed to the modification.

Judge Flanagan referred all of these motions to Referee Maurice Schoby for hearing.

After numerous continuances, on December 2, 1993, Judge Flanagan issued the following order:

This matter came on for hearing on [appellee's] motion for interim Child Support

212422 before Referee Maurice Schoby. For good cause, during the pendency of this motion, the Court hereby orders [appellant] to pay [appellee] \$ 3,000 per month as temporary child support for the minor children Alyssa, Jennifer and Kira plus 2% statutory fee through C.S.E.A. effective 12-1-93.

On June 29, 1994, appellant moved to vacate this award and to declare a mistrial on the ground that Judge Flanagan was not the judge assigned to the case. Pursuant to Loc.R. 2(A) of the Court of Common Pleas of Cuyahoga County, Domestic Relations Division, the matter had been reassigned to Judge Anthony Russo. The motions to vacate and to declare a mistrial were denied by Judge Russo on July 19, 1994, and all pending motions were subsequently referred to Referee [*6] John Homolak.

Referee Homolak conducted hearings on the parties' motions and filed a report and recommendation with the court on July 25, 1995. Appellant filed objections to the report in January 1996; appellee did not object, but she did oppose appellant's objections. On September 8, 1996, the court sustained appellant's objections in part, modified the referee's report, and approved the report as modified.

Appellant then moved for a new trial, but his motion was denied on October 10, 1997. He timely filed his notice of appeal on October 30, 1997. Appellee timely filed her cross-appeal on November 10, 1997.

LAW AND ANALYSIS

A. First Assignment of Error.

THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DENYING APPELLANT'S MOTION FOR MISTRIAL AND TO VACATE THE "INTERIM CHILD SUPPORT ORDER" AND COMPOUNDED SUCH ERROR WHEN IT DENIED APPELLANT'S FIRST OBJECTION REGARDING THE ISSUANCE OF A POST-DECREE AWARD OF "INTERIM CHILD SUPPORT."

In the first assignment of error, appellant argues the court erred by awarding interim child support because (a) the court had no power to award interim child support in a post-judgment proceeding and (b) the judge who en-

tered the order [*7] was not the judge assigned to the case, so his order was voidable. The interim award of child support was rendered moot by the court's final order of September 8, 1997, which awarded child support from September 2, 1992, the date appellee filed her motion for interim and permanent support. The final order took account of the amounts appellant paid pursuant to the interim order and gave him credit for these amounts in determining arrearages due. Therefore, the interim court order had no continuing effect on appellant, and the validity of the order is a moot question. See *Knutty v. Wallace* (1995), 100 Ohio App. 3d 555, 559, 654 N.E.2d 420. Accordingly, the first assignment of error is overruled.

B. Second Assignment of Error.

THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN AWARDING CHILD SUPPORT RETROACTIVE TO THE DATE OF THE FILING OF APPELLEE'S MOTION, SEPTEMBER 2, 1992, WHEN THE OHIO SUPREME COURT DID NOT RULE ON THE MARTIN CASE UNTIL APRIL 14, 1993.

Second, appellant asserts the trial court erred by making its final order of support retroactive to September 2, 1992, the date appellee filed her motion for interim and permanent support. Appellant contends that until [*8] the Ohio Supreme Court's decision in *Martin v. Martin* (1993), 66 Ohio St. 3d 110, 609 N.E.2d 537, the parties' consent to any modification of a support agreement was required under R.C. 3109.04(B)(2)(b). Therefore, appellant argues, the order modifying the support award could only be effective from the date of the *Martin* decision, April 14, 1993.

Contrary to appellant's argument, the Ohio Supreme Court's ruling in *Martin* did not work a change in Ohio law that applied only prospectively from the date of that decision; rather, the supreme court construed two statutes, R.C. 3109.04 and 3113.215, concluding that:

Notwithstanding former R.C. 3109.04(B)(2)(b), a trial court may modify a child support obligation under a joint custody plan without the consent of both custodians pursuant to the ten percent variation exception set forth in former R.C. 3113.215(B)(4).

Martin v. Martin (1993), 66 Ohio St. 3d 110, 609 N.E.2d 537, syllabus. The court determined the two statutes were not irreconcilable but even if they were, the special provisions of R.C. 3113.215 (permitting court modification) would override the more general provisions of R.C. 3109.04 (requiring the [*9] custodian's consent). The court also noted that subsequent revisions to R.C. 3109.04, effective April 11, 1991, clarified the intent of the General Assembly by providing that "**** the child support obligations of the parents under a shared parenting order issued under this division shall be determined in accordance with section 3113.215 of the Revised Code." This provision was in effect when appellee filed her motion for increased child support.

The supreme court's decision in *Martin* resolved a conflict among the decisions of the courts of appeals; it did not reverse a prior supreme court ruling on the same issue. R.C. 3113.215, the statute which the supreme court found to permit modification of a joint custody order, existed well before appellee filed her motion for support. The court clearly had the power to order child support effective as of the date appellee filed her motion. See *Meyer v. Meyer* (1985), 17 Ohio St. 3d 222, 478 N.E.2d 806. The second assignment of error is therefore overruled.

C. Third Assignment of Error.

THE TRIAL COURT ERRED, AS A MATTER OF LAW, WHEN FOR THE PURPOSE OF DETERMINING CHILD SUPPORT MONEY IT (a) INCLUDED IN APPELLANT'S INCOME, [*10] MONEY WHICH WAS A ONE TIME PAYMENT AND (b) BY EXCLUDING CERTAIN MONETARY LOSSES WHICH HE INCURRED WHICH WOULD HAVE LOWERED HIS INCOME SUBSTANTIALLY AND (c) FURTHER INCLUDED MONEY WHICH DID NOT BELONG TO THE APPELLANT.

In his third assignment of error, appellant contends the trial court erroneously calculated his income in three respects, each of which is discussed below. "Abuse of discretion" is the proper standard of review in matters concerning child support. *Booth v. Booth* (1989), 44 Ohio St. 3d 142, 144, 541 N.E.2d 1028. An abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Id.*

1. Self-Generated Income.

Appellant urges that the trial court misapplied the statutory definition of "self-generated income" in *R.C. 3113.215(A)(3)* when it included in his income a one-time consulting fee of \$ 117,000, which was paid to appellant by Robert C. Muehrcke, M.D., Inc., a closely held corporation of which he is the sole shareholder. In his report, Referee Homolak found:

The Referee further finds that [appellant], as principal owner and director of Robert C. Muehrcke M.D., Inc., has the sole authority to determine levels [*11] of compensation for all employees, including himself, along with expenditures. In 1992, the corporation had gross receipts of \$ 884,217.00 and deductions of \$ 982,964.00, resulting in a loss of \$ 95,042.00. This is the same year in which [appellant] received annual compensation of \$ 363,000.00 plus an additional \$ 117,000.00 consulting fee. As his accountant testified, the fee was paid in 1992 in anticipation of less favorable tax legislation the following year. This was purely a tax-planning device. This one-time payment should be averaged over three (3) years when calculating child support.

Although appellant listed this finding as one "pertinent" to his objections, he did not argue that the finding and related conclusion were in error. Not surprisingly, the trial court did not address the issue in its judgment.

As noted above, *Civ.R. 53(E)(3)(b)* provides that a party may not assign as error on appeal "the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion." Accordingly, this court must reject this portion of the third assignment of error.

2. Losses.

Appellant next asserts the trial court erred [*12] by excluding consideration of losses incurred by Swan Landscaping, Inc. and Valley Therapy. The referee determined:

The Referee further finds that [appellant's] use of the operating losses generated by Swan Landscaping Co., Inc. and Valley Therapy to offset his compensation from his medical practice is not permitted by the statute. When reviewing *R.C. § 3113.215(A)(3)*, self-generated income is

gross receipts from joint ownership of a partnership or closely held corporation minus ordinary and necessary expenses "incurred by the parent IN GENERATING THE GROSS RECEIPTS." Therefore, all of the income that was generated by Swan Landscaping & Valley Therapy could be offset by the ordinary and necessary expenses resulting from both companies [*sic*] efforts to produce income for themselves. Operating losses from a separate business enterprise can not be used to reduce income generated from an individual's primary occupation. [Appellant] acknowledged that the landscaping business was an effort to diversify his income. Just as the statute, in calculating support, would not allow [appellant] to leave his orthopedic surgery practice to suddenly become a landscaper, it does [*13] not provide for losses of one business to offset self-generated income in a non-related business.

The question whether a loss from one business may be applied against income from a separate business for purposes of determining a parent's self-generated income under *R.C. 3113.215(A)(3)* and (4) appears to be one of first impression in this court. Apparently, the only other Ohio court to have addressed the issue is the Tenth District Court of Appeals in *Bailey v. Bailey*, 1994 Ohio App. LEXIS 4390 (Sep. 29, 1994), Franklin App. No. 93APF12-1694, unreported.

The referee in *Bailey* did not permit the appellant to offset losses from rental property ownership against the net gains from the other forms of self-generated income. The appellate court concluded "the more logical approach would be to arrive at an aggregate of self-generated income, permitting a full set-off of losses (other than noncash depreciation type losses, which are excluded under 3113.215[A][4][b]) to arrive at a more accurate estimate of the resources actually available to the parent from which child support may be paid."

A "loss" is not equivalent to an "ordinary and necessary expense incurred in generating gross receipts." "Ordinary [*14] and necessary expenses" refer to "actual cash items expended by the parent or the parent's business." *R.C. 3113.215(A)(4)(a)*. They do not include "depreciation expenses and other noncash items that are allowed as deductions on any federal tax return of the parent or the parent's business." *R.C. 3113.215(A)(4)(b)*.

Appellant has not pointed to anything in the record to show that the "losses" were actual, out-of-pocket expenditures which might possibly be subtracted from his self-generated income pursuant to *R.C. 3113.215(A)(4)*. Even if they were actual expenditures, appellant did not show the expenses were "ordinary and necessary." Cf. *Kamm v. Kamm (1993)*, 67 Ohio St. 3d 174, 176, 616 N.E.2d 900; *Higgins v. Danvers*, 1997 Ohio App. LEXIS 4891, *9-10 (Nov. 6, 1997), Cuyahoga App. No. 71352, unreported. Accordingly, the trial court did not abuse its discretion by refusing to deduct losses appellant incurred in the Valley Therapy and Swan Landscaping businesses.

3. Monies Paid to JAAK Corp.

Finally, appellant argues the trial court erred by including in his income monies paid by Robert C. Muehrcke, M.D., Inc. to JAAK Corporation for billing and x-ray services. In its journal entry, the court concluded [*15] that JAAK was a corporation set up by appellant for the dual purpose of providing a trust for the benefit of his minor children and also reducing his taxable income. The court concluded that the monies paid to JAAK were "directly under [appellant's] control, [and were] available to him for his use and benefit." The court further determined "the [appellant] has no legal obligation to pay said monies to JAAK Inc. and, hence, said monies should be attributable as income to the [appellant] for purposes of computing the [appellant's] child support obligation."

Appellant apparently disputes the court's factual determination that the payments were not for billing services but were "sham" payments which appellant could recover at any time. "Above all, a reviewing court should be guided by a presumption that the findings of a trial court are correct ***." *In re Jane Doe 1 (1991)*, 57 Ohio St. 3d 135, 138, 566 N.E.2d 1181. Appellant does not argue that the trial court's decision is not supported by competent, credible evidence. See *Seasons Coal Co. v. Cleveland (1984)*, 10 Ohio St. 3d 77, 80, 461 N.E.2d 1273. Under these circumstances, this court will not substitute its judgment for the trial [*16] court's.

The third assignment of error is overruled.

D. Cross-Appeal.

THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN GRANTING DEFENDANT'S MOTION FOR ATTORNEY FEES ERRONEOUSLY ORDERING PLAINTIFF/CROSS-APPELLANT TO PAY THE SUM OF \$ 8,200.00 IN LEGAL FEES ALLEGEDLY DUE UNDER A PRIOR

AGREEMENT AND/OR COURT ORDER, BUT WHICH WERE NOT ENCOMPASSED WITHIN ANY AGREEMENT OF THE PARTIES OR PRIOR COURT ORDER.

Appellee contends the court erred by awarding attorney's fees against her because the court's prior orders did not require her to pay those fees. Appellee did not object to the referee's report and recommendation on this matter. Pursuant to *Civ.R. 53(E)(3)(b)*, "[a] party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule." Whatever the merits of her argument might be, appellee waived the argument by failing to object to the referee's report. Accordingly, the cross-appeal is overruled and the judgment of the common pleas court is affirmed.

Judgment affirmed.

It is ordered that appellee recover of appellant her costs herein taxed.

The Court finds [*17] there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Court of Common Pleas, Domestic Relations Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

JAMES D. SWEENEY, J. and

MICHAEL J. CORRIGAN, J. CONCUR

PRESIDING JUDGE

KENNETH A. ROCCO

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)*, *22(D)* and *26(A)*; *Loc.App.R. 27*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, [*18] *S. Ct. Prac.R. II, Section 2(A)(1)*.

LEXSEE 2007 OHIO 1147

**JULIUS J. SZABO, PLAINTIFF-APPELLANT vs. ALEXANDER E. GOETSCH,
ET AL., DEFENDANTS-APPELLEES**

No. 88125

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY**

2007 Ohio 1147; 2007 Ohio App. LEXIS 1060

March 15, 2007, Released

PRIOR HISTORY: [**1] Civil Appeal from the Cuyahoga County Court of Common Pleas. Case No. CV-569120.

DISPOSITION: AFFIRMED.

COUNSEL: FOR APPELLANT: Joseph G. Stafford, Kenneth J. Lewis, Stafford & Stafford Co., LPA, Cleveland, Ohio.

For Alexander E. Goetsch, APPELLEE: George S. Coakley, Todd M. Jackett, Reminger & Reminger, Cleveland, Ohio.

For Bruce R. Freedman, APPELLEE: Bruce R. Freedman, Akron, Ohio.

For William Love, APPELLEE: William Love II, Akron, Ohio.

JUDGES: BEFORE: Kilbane, J., Gallagher, P.J., and Stewart, J. MARY EILEEN KILBANE, JUDGE. SEAN C. GALLAGHER, P.J., and MELODY J. STEWART, J., CONCUR.

OPINION BY: MARY EILEEN KILBANE

OPINION:

JOURNAL ENTRY AND OPINION

MARY EILEEN KILBANE, J.:

[*P1] Julius J. Szabo ("Szabo") appeals from the trial court's decision to grant summary judgment in favor of Alexander E. Goetsch ("Goetsch"). Szabo argues that genuine issues of material fact remain as to when the cause of action for legal malpractice accrued. For the

following reasons, we affirm the decision of the trial court.

[*P2] On August 3, 2005, Szabo filed a complaint for legal malpractice, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of contract, [**2] and breach of fiduciary duty against Goetsch, Bruce Freedman ("Freedman"), and William Love ("Love"). Szabo's allegations stem from Goetsch's representation of Szabo in two separate matters in the Cuyahoga County Court of Common Pleas.

[*P3] The defendants in the legal malpractice action represented Szabo at varying times during the course of this underlying litigation. Goetsch entered an appearance on behalf of Szabo and thereby commenced an attorney-client relationship on October 16, 2003. Soon thereafter, the opposing parties in both cases moved for summary judgment. Goetsch, Freedman, and Love filed responsive pleadings, neither of which contained a certificate of service.

[*P4] The trial court granted summary judgment in both cases. On December 4, 2003, the opposing parties moved to strike Szabo's responsive pleadings because of the failure to include certificates of service. The trial court denied the motion to strike on December 10, 2003.

[*P5] Szabo retained new counsel who filed notices of appeal on December 22, 2003. The following day, Goetsch sent Szabo a letter terminating Goetsch's representation of Szabo. The two separate appeals were subsequently consolidated. [**3] The appellees in the consolidated appeal raised the following cross assignment of error:

"On Appellees' first Cross-Assignment of Error, the trial court should have stricken from the files and from the court's consideration, Mr. Szabo's response brief in op-

position to summary judgment and the opposition affidavits submitted to the court but not served in contravention of Civ. R. 5."

[*P6] In response, Szabo's counsel argued that appellees were not prejudiced by the trial court's failure to strike because the trial court granted summary judgment in their favor, despite the consideration of the brief in opposition. On July 21, 2004, this court conducted oral arguments at which time the parties again argued the issue regarding the failure to include the certificate of service.

[*P7] On August 5, 2004, this court released its decision, affirming the decision of the trial court to grant summary judgment in favor of appellees. See *Robert C. Nosal et al. v. Szabo, Cuyahoga App. Nos. 83974 and 83975, 2004 Ohio 4076*. In our decision, this court addressed the failure of Goetsch, Freedman, and Love to attach a certificate of service to their responsive [*4] pleading. Specifically, we held as follows:

"Ordinarily, where the appellee does not file a notice of cross-appeal, this court would pass upon the review of any of appellee's assignments of error *** However, under the peculiar procedural circumstances that occurred in the trial court below, the consideration of appellee's first cross-assignment of error is virtually dispositive of this appeal and will be addressed first." Id.

[*P8] The remainder of the appellate decision addresses the failure of Szabo's attorneys to serve copies of their responsive briefs upon counsel for the appellees. Id. This court never addressed the merits of Szabo's assignments of error; we affirmed the decision of the trial court on the basis of the failure to serve the responsive briefs and to attach a certificate of service page to the responsive briefs. Id.

[*P9] Szabo then filed the underlying lawsuit on August 3, 2005, almost one year from the release of Szabo. Szabo claimed that although argued at the trial court level and in this Court of Appeals, Szabo "did not discover that the failure to serve and/or failure to attach a certificate of service to his responsive pleadings, would [*5] result in the barring of his claims in the underlying cases; until after the appellate decision was released." In response, Goetsch argued that at the latest, Szabo discovered the error when the issue was argued at oral argument on July 21, 2004. Goetsch further argued in his motion for summary judgment that because Szabo did not file the instant lawsuit within one year of July 21,

2004, his claim was barred by the one-year statute of limitation. R.C. 2305.11(A). The trial court agreed with Goetsch and granted the motion for summary judgment filed November 1, 2005.

[*P10] Szabo appeals, raising a single assignment of error.

"The trial court erred as a matter of law in granting the appellee, Alexander Goetsch's motion for summary judgment."
n1

n1 Szabo fails to raise any issue regarding the trial court's decision to apply the one-year statute of limitations to all claims asserted in his complaint. Accordingly, we will not disturb the trial court's application of the one-year statute of limitations to Szabo's claims of intentional infliction of emotional distress, negligent infliction of emotional distress, breach of contract and breach of fiduciary duty.

[**6]

[*P11] We review an appeal from summary judgment under a de novo standard of review. *Baiko v. Mays (2000), 140 Ohio App.3d 1, 746 N.E.2d 618*. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. Id. See, also, *Brown v. Scioto Bd. Of Commrs. (1993), 87 Ohio App. 3d 704, 622 N.E.2d 1153*. Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion, which is adverse to the nonmoving party. *Temple v. Wean United, Inc. (1997), 50 Ohio St.2d 317, 364 N.E.2d 267*.

[*P12] The moving party carries the initial burden of setting forth specific facts that demonstrate his entitlement to summary judgment. *Dresher v. Burt, 75 Ohio St.3d 280, 1996 Ohio 107, 662 N.E.2d 264*. If the movant fails to meet this burden, summary judgment is not appropriate. Id. If the movant does meet this burden, summary judgment will be appropriate only if [*7] the nonmovant fails to establish the existence of a genuine issue of material fact. Id.

[*P13] In the instant case, the parties do not dispute the fact that legal malpractice occurred. At issue in this appeal is when the statute of limitations began to run.

R.C. 2305.11 sets forth a one-year statute of limitations for legal malpractice claims. The one-year statutory period begins to run upon the termination of the attorney-client relationship or the discovery of the alleged malpractice, whichever occurs later. *Ladanyi v. Crookes & Hanson Ltd., et al., Cuyahoga App. No. 87888, 2007 Ohio 540*. In *Zimmie v. Calfee, Halter & Griswold (1989)*, 43 *Ohio St.3d 54, 538 N.E.2d 398*, the Ohio Supreme Court set forth the standard with respect to the statute of limitations for malpractice:

"Under *R.C. 2305.11(A)*, an action for legal malpractice accrues and the statute of limitations begins to run when there is a cognizable event whereby the client discovers or should have discovered his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue its possible remedies against the attorney, or when the attorney-client relationship [**8] for that particular transaction or undertaking terminates, whichever occurs later."

[*P14] The *Zimmie* court defined a cognizable event as an event "which should alert a reasonable person that in the course of legal representation, his attorney committed an improper act." See, also, *Spencer v. McGill (1993)*, 87 *Ohio App.3d 267, 622 N.E.2d 7*.

[*P15] The parties in the instant case are not in dispute about when the attorney-client relationship terminated; however, the parties are in dispute about when the cognizable event occurred. Goetsch argues that the cognizable event occurred no later than July 21, 2004, when this court heard oral arguments concerning Szabo's underlying appeal. Goetsch argues that one of the issues raised and argued at oral argument was the failure to include the certificate of service and the ramifications of such failure. Goetsch claims that because Szabo was present during the oral argument, he was put on notice of any malpractice on the part of Goetsch. Therefore, Szabo had only until July 21, 2005, to file a legal malpractice claim.

[*P16] In response, Szabo argues that it was not until August 5, 2004, when this court released its [**9] decision, that he discovered the negligent acts of Goetsch, Freedman and Love. Szabo admits that although the issue of the certification of service was argued at the trial court level and in this Court of Appeals, he did not discover that the failure to serve and/or failure to attach a certificate of service to his responsive pleadings would result in the barring of his claims in the underlying cases. Accordingly, Szabo argues that his Au-

gust 3, 2005 claim of legal malpractice was filed within the one-year statute of limitations.

[*P17] Upon review, it is uncontroverted that on December 4, 2003, the opposing parties moved to strike Szabo's responsive pleadings because of the failure of defendants to include certificates of service. Additionally, on May 17, 2004, the opposing parties raised a cross-assignment of error arguing that the trial court should have stricken Szabo's response briefs for violating *Civ.R. 5*. Szabo's counsel responded to this cross-assignment of error, arguing that the opposing parties were not prejudiced by the trial court's failure to strike because summary judgment was granted in appellees favor despite the consideration of the brief in opposition. Finally, [**10] on July 21, 2004, this court conducted oral arguments on the consolidated appeal; Szabo was present during the oral argument. The parties for each side argued the issue regarding the failure to include the certificate of service with the responsive pleadings.

[*P18] Accordingly, viewing the facts in the light most favorable to Szabo, we conclude that no genuine issue of material fact remains to be litigated. In determining the cognizable event, "the focus should be on what the client was aware of and not an extrinsic judicial determination." *Vagianos v. Halpern, (Dec. 14, 2000)*, *Cuyahoga App. No. 76408, 2000 Ohio App. LEXIS 5856*. The facts enunciated above reveal that, at the latest, Szabo became aware that improper legal work had occurred as of July 21, 2004, and that notice was given on this date of the need to investigate and pursue possible legal malpractice remedies. *Id.*; *McDade v. Spencer (1991)*, 75 *Ohio App.3d 639, 600 N.E.2d 371*; *Koerber v. Levey and Gruhin, Summit App. No. 21730, 2004 Ohio 3085*. Consequently, Szabo had until July 21, 2005, to file a claim for legal malpractice. Szabo did not file his claim until August 3, 2005.

[*P19] Therefore, we find that the one-year [**11] statute of limitations barred Szabo's August 3, 2005 complaint for legal malpractice. Although we affirm the grant of summary judgment, we note the harsh result of this decision. This case stands for the unfortunate position that a litigant must identify the cognizable event and act on it, all before the litigant's case is resolved. Requiring a litigant to recognize and appreciate a legal concept he is not trained in and then requiring the litigant to file suit, all before his case is resolved places a heavy burden upon litigants. Nonetheless, the law requires us to conclude that the cognizable event in the instant case took place on July 21, 2004. Therefore, Szabo's August 3, 2005 claim of legal malpractice is barred by the statute of limitations.

[*P20] Szabo's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

MARY [**12] EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., and MELODY J. STEWART, J., CONCUR