

SUPREME COURT OF OHIO

Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless

113 Ohio St. 3d 394 (Ohio 2007) · Decided May 23, 2007

SUMMARY

The Ohio Supreme Court considered whether claims under Ohio Revised Code § 4905.61 are subject to the one-year limitations period for actions upon a statute imposing a penalty or forfeiture, or the six-year period for statutory liabilities other than penalties or forfeitures. The court held that § 4905.61 is a penalty statute because its treble-damages provision primarily serves to deter and punish public-utility violations, and therefore the one-year limitations period applies. The court reversed the court of appeals.

CASE DETAILS

COURT	Supreme Court of Ohio
WRITING FOR THE COURT	O'Connor, J.; Moyer, C.J.; Lundberg Stratton, J.; O'Donnell, J.; Lanzinger, J.; Cupp, J.; Pfeifer, J.
JURISDICTION	Ohio
DECIDED	May 23, 2007
DISPOSITION	reversed
PROCEDURAL POSTURE	The Supreme Court of Ohio accepted discretionary jurisdiction over consolidated appeals concerning the statute of limitations applicable to treble-damages claims under R.C. 4905.61.
STANDARD OF REVIEW	Statutory interpretation is reviewed de novo. The court determined the applicable statute of limitations by construing R.C. 4905.61 and related provisions of R.C. Chapter 2305.
PRECEDENTIAL VALUE	Published precedential decision of the Supreme Court of Ohio
PARTIES	Ameritech Mobile Communications, Inc., Cincinnati SMSA Limited Partnership, AirTouch Cellular Eastern Region, L.L.C., Verizon Wireless, a.k.a. New Par v. Discount Cellular, Cleveland Mobile Radio Sales, Inc., Tele-Trak

TOPICS

statutory interpretation

commercial litigation

administrative law

remedies

appellate procedure

PRACTICE AREAS

commercial litigation

administrative law

appellate procedure

remedies

QUESTIONS PRESENTED

1. Whether claims under R.C. 4905.61 are actions upon a statute for a penalty or forfeiture subject to the one-year limitations period in R.C. 2305.11(A), or actions upon a statutory liability other than a penalty or forfeiture subject to the six-year period in R.C. 2305.07.
2. Whether the treble-damages remedy in R.C. 4905.61 is primarily punitive or remedial for statute-of-limitations purposes.

HOLDINGS

1. R.C. 4905.61 is a statute for a penalty within the meaning of R.C. 2305.11(A), rather than a remedial statute under R.C. 2305.07.
2. Claims brought under R.C. 4905.61 are subject to the one-year statute of limitations in R.C. 2305.11(A).

KEY QUOTATIONS

“Because we conclude that the statute was designed to deter public utilities from committing regulatory violations and to punish them for failing to comply with the provisions set forth in R.C. Chapter 49, we also conclude that the legislature’s primary intent in enacting R.C. 4905.61 was to provide “a statute for a penalty.”” (§ 20)

“Accordingly, R.C. 4905.61 is subject to the one-year statute of limitations set forth in R.C. 2305.11(A).” (§ 21)

FACTUAL BACKGROUND

The appellees were cellular-telephone-service resellers, while the appellants were wholesale and retail cellular-service providers. The appellees sought treble damages under R.C. 4905.61 based on a Public Utilities Commission determination that the appellants had engaged in unlawful discriminatory pricing and violated commission orders and provisions of R.C. Chapter 4905. The claims concerned violations occurring from 1993 through 1998.

PROCEDURAL HISTORY

The appellees filed separate actions in the Cuyahoga County Court of Common Pleas seeking treble damages under R.C. 4905.61 based on alleged violations of Public Utilities Commission orders and Ohio public-utility statutes. The trial court dismissed the claims as barred by the one-year limitations period in R.C. 2305.11. The court of appeals reversed, holding that the six-year period in R.C. 2305.07 applied. The Supreme Court of Ohio accepted discretionary jurisdiction, consolidated the cases, and reversed the court of appeals.

DISPOSITION

reversed

CASES CITED

- Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc., 70 Ohio St. 3d 281, 638 N.E.2d 991 (1994)
- Rosette v. Countrywide Home Loans, Inc., 105 Ohio St. 3d 296, 825 N.E.2d 599 (2005)
- Rice v. CertainTeed Corp., 84 Ohio St. 3d 417, 704 N.E.2d 1217 (1999)
- Lake Ridge Academy v. Carney, 66 Ohio St. 3d 376, 613 N.E.2d 183 (1993)
- Cook County v. United States ex rel. Chandler, 538 U.S. 119, 123 S. Ct. 1239, 155 L. Ed. 2d 247 (2003)
- Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)
- Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)
- Porter v. Household Fin. Corp. of Columbus, 385 F. Supp. 336 (S.D. Ohio 1974)
- Lahke v. Cincinnati Bell, Inc., 1 Ohio App. 3d 114, 439 N.E.2d 928 (1981)
- Usternal v. Gem Boat Serv., Inc., Ottawa App. No. 91-OT-051, 1992 WL 337600
- Fed. Res. Bank of Cleveland v. Purolator Courier Corp., 13 Ohio App. 3d 296, 469 N.E.2d 542 (1983)
- French v. Dwiggins, 9 Ohio St. 3d 32, 458 N.E.2d 827 (1984)
- Milligan v. Ohio Bell Tel. Co., 56 Ohio St. 2d 191, 383 N.E.2d 575 (1978)
- Liddell v. SCA Servs. of Ohio, Inc., 70 Ohio St. 3d 6, 635 N.E.2d 1233 (1994)
- Westside Cellular, Inc. v. Pub. Util. Comm., 98 Ohio St. 3d 165, 781 N.E.2d 199 (2002)
- Cincinnati SMSA Ltd. Partnership v. Pub. Util. Comm., 98 Ohio St. 3d 282, 781 N.E.2d 1012 (2002)
- New Par v. Pub. Util. Comm., 98 Ohio St. 3d 277, 781 N.E.2d 1008 (2002)
- Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless, 108 Ohio St. 3d 1508, 844 N.E.2d 854 (2006)

OPINION

Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless 113 Ohio St. 3d 394

CONNOR, J.

O'Connor, J. {¶ 1} In this matter, we address whether claims brought pursuant to provisions of the Revised Code identified in R.C. 4905.61 are subject to the one-year statute of limitations set forth in R.C. 2305.11 or the six-year statute of limitations found in R.C. 2305.07. We conclude that R.C. 4905.61 is a penalty statute and that the one-year statute of limitations in R.C. 2305.11 applies to it. Accordingly, we reverse the decision of the court of appeals. *395

Relevant Background {¶ 2} The appellees in these consolidated actions, Discount Cellular, Cleveland Mobile Radio Sales, Inc., and Tele-Trak (collectively, "Cleveland Mobile"), are cellular-telephone-service resellers. Their business includes the purchase of wholesale cellular telephone service and the rebranding and marketing of that service for retail resale to the public. Appellants, Ameritech Mobile Communications, Inc., and Cincinnati SMSA Limited Partnership (collectively, "Ameritech"), AirTouch Cellular Eastern Region, L.L.C., and Verizon Wireless, a.k.a. New Par (collectively, "Verizon"), provide wholesale and retail cellular telephone service. {¶ 3} In December 2003, Discount Cellular filed a complaint against Ameritech in the Cuyahoga County Court of Common Pleas. Six weeks later, in February 2004, Cleveland Mobile filed a complaint against Verizon,

Ameritech, and Air-Touch Cellular Eastern Region, L.L.C., in the same court. In both actions, the appellees sought treble damages under R.C. 4905.61, which provides: “If any public utility or railroad does, or causes to be done, any act or thing prohibited by Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code, or declared 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.” In support of their claims, the appellees relied on an order by the Public Utilities Commission of Ohio, *In re Complaint of Westside Cellular, Inc. v. New Par Cos.*, PUCO No. 93-1758-RC-CSS, Jan. 18, 2001 (“Cellnet ”), that had found that Ameritech and Verizon had violated commission orders and portions of R.C. Chapter 4905 by engaging in unlawful discriminatory pricing.¹ In three separate cases, we affirmed the commission’s order but found that the unlawful acts had occurred from 1993 through 1998 rather than from 1995 through 1998, as the commission had found. *Westside Cellular, Inc. v. Pub. Util. Comm.*, 98 Ohio St.3d 165, 2002-Ohio-7119, 781 N.E.2d 199, ¶ 10; *Cincinnati SMSA Ltd. Partnership v. Pub. Util. Comm.*, 98 Ohio St.3d 282, 2002-Ohio-7235, 781 N.E.2d 1012, ¶ 2; *New Par v. Pub. Util. Comm.*, 98 Ohio St.3d 277, 2002-Ohio-7245, 781 N.E.2d 1008, ¶ 2.

*396{¶ 4} Ameritech and Verizon moved to dismiss the appellees’ complaints, arguing that the claims are barred by the one-year statute of limitations set forth in R.C. 2305.11, which governs actions involving statutes “for a penalty or forfeiture.” Appellees opposed the motions, arguing that the six-year statute of limitations set forth in R.C. 2305.07 applies because R.C. 4905.61 is a remedial statute. The court of common pleas granted the motions to dismiss, finding that the statute was penal.

{¶ 5} The court of appeals reversed. It held that R.C. 4905.61 is a remedial statute because the statute is intended to address individual wrongs and refers to “damages” rather than to a “penalty” or “forfeiture.” It thus concluded that the six-year statute of limitations applied and that the claims had been dismissed improperly by operation of the one-year statute of limitations. *Discount Cellular, Inc. v. Ameritech-Mobile Communications, Inc.*, Cuyahoga App. No. 85618, 2005-Ohio-5437, 2005 WL 2589998; *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, Cuyahoga App. No. 85620, 2005-Ohio-5439, 2005 WL 2600635. We accepted discretionary jurisdiction over both cases and sua sponte consolidated them for briefing, argument, and decision. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 108 Ohio St.3d 1508, 2006-Ohio-1329, 844 N.E.2d 854. Analysis {¶ 6} R.C. 4905.61, the treble-damages statute, does not contain a statute of limitations. Accordingly, we turn to R.C. Chapter 2305 to determine the appropriate limitations period. See *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St.3d 281, 282, 638 N.E.2d 991. {¶ 7} R.C. 2305.07 provides: “[A]n action upon * * * a liability created by statute other than a forfeiture or penalty * * * shall be brought within six years after the cause thereof

accrued.” In contrast, R.C. 2305.11(A) provides for a one-year statute of limitations for “an action upon a statute for a penalty or forfeiture.” As the court of appeals noted in considering which statute of limitations applies, the salient question is whether R.C. 4905.61 “creates a statutory liability or whether it is a ‘statute for a penalty,’ i.e., whether it is a remedial statute or a penalty statu[t]e.” *Discount Cellular, Inc.*, Cuyahoga App. No. 85618, 2005-Ohio-5437, 2005 WL 2589998, ¶ 8, citing *Cosgrove*, 70 Ohio St.3d at 283, 638 N.E.2d 991. {¶ 8} In concluding that the statute was governed by the six-year statute of limitations, the court of appeals relied primarily on our decision in *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St.3d 296, 2005-Ohio-1736, 825 N.E.2d 599. There, we concluded that R.C. 5301.36(C) is a remedial statute and thus subject to the six-year statute of limitations set forth in R.C. 2305.07. *Rosette*, 105 Ohio St.3d 296, 2005-Ohio-1736, 825 N.E.2d 599, syllabus.

*397{¶ 9} Our holding in *Rosette* was based on the plain language of that statute, which provides, “[A] mortgagor may recover, in a civil action, damages of two hundred and fifty dollars” if a mortgagee failed to record the satisfaction of a residential mortgage with the county recorder within ninety days of satisfaction. See R.C. 5301.36(C).² Indeed, we focused expressly on the clear statutory language and the fact that had the General Assembly intended to do so, it could have used the term “forfeiture” or “penalty” rather than “damages” in the statute. *Rosette*, 105 Ohio St.3d 296, 2005-Ohio-1736, 825 N.E.2d 599, ¶ 13-14. We reasoned that in enacting the statute and choosing the particular words that were codified in it, the legislature intended to provide a remedy to an aggrieved individual mortgagor rather than to impose a penalty upon the wrongdoing mortgagee. We held that to conclude that the General Assembly had intended to create a penalty in R.C. 5301.36(C) rather than to provide for damages, we would be required to ignore the plain term “damages” in the statutory language and to insert the term “penalty” or “forfeiture” into the statute. We declined to do so, noting that the legislature has used the latter terms in other statutes and could have used them again if it so intended. *Rosette* at ¶ 14, quoting R.C. 1321.56 (“ ‘Any person who willfully violates section 1321.57 of the Revised Code shall forfeit to the borrower the amount of interest paid by the borrower’ ” [emphasis added in *Rosette*]) and R.C. 149.351(B)(2) (“ ‘any person who is aggrieved by the removal, destruction, mutilation, or transfer of * * * a [public] record, may commence * * * [a] civil action to recover a forfeiture in the amount of one thousand dollars for each violation’ ” [emphasis added in *Rosette*]).

{¶ 10} In the instant cases, the court of appeals held that the analysis in *Rosette* applied “equally” to the analysis here. *Discount Cellular, Inc.*, Cuyahoga App. No. 85618, 2005-Ohio-5437, 2005 WL 2589998, ¶ 14. It concluded that the General Assembly chose the word “damages” rather than “penalty” or “forfeiture” to describe the liability to be imposed on a public utility for violation of R.C. Chapter 4905 and that that language “indicates that the statute was not intended to inflict a penalty, but rather, allow an aggrieved party to recover damages.” *Id.* at ¶ 14-15. It then concluded that R.C. Chapter 4905 was primarily remedial and that the six-year statute of limitations applied. *Id.* at ¶ 16-17. {¶ 11} In reviewing that decision, we begin with familiar law. {¶ 12} In construing

a statute, the reviewing court must ascertain the intent of the legislature in enacting the statute. *Rosette*, 105 Ohio St.3d 296, 2005-Ohio-1736, 825 N.E.2d 599, ¶ 12. To determine the intent of a statute, a court looks to *398the language of the statute, giving effect to the words used. *Rice v. CertainTeed Corp.* (1999), 84 Ohio St.3d 417, 419, 704 N.E.2d 1217. A court is neither to insert words that were not used by the legislature nor to delete words that were used. *Id.* {¶ 13} In considering the language of R.C. 4905.61, the court of appeals focused on the term “damages” without also noting the modifying word “treble.” R.C. 4905.61 provides that if a public utility violates certain laws, “such public utility * * * 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.” See *Rice*, 84 Ohio St.3d at 420, 704 N.E.2d 1217. The court of appeals failed to give due consideration to the meaning of “damages” as modified by “treble.” We believe that the court missed an important distinction between the statute at issue here and the one at issue in *Rosette*. {¶ 14} The statute at issue in *Rosette*, R.C. 5301.36(C), expressly provided for “damages of two hundred fifty dollars.” Consequently, that damages provision is more akin to stipulated or liquidated damages than to punitive damages. See *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 382, 613 N.E.2d 183. {¶ 15} Unlike R.C. 5301.36(C), R.C. 4905.61 contains a treble-damages provision. That fact alone is not dispositive, however, see *Rice*, 84 Ohio St.3d at 421, 704 N.E.2d 1217, and *Cosgrove*, 70 Ohio St.3d at 289, 638 N.E.2d 991, particularly given that the statute’s treble-damages provision has a compensatory side that serves remedial purposes as well as “punitive objectives.” *Cook Cty. v. United States ex rel. Chandler* (2003), 538 U.S. 119, 130, 123 S.Ct. 1239, 155 L.Ed.2d 247. See, also, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985), 473 U.S. 614, 635-636, 105 S.Ct. 3346, 87 L.Ed.2d 444, citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (1977), 429 U.S. 477, 485-486, 97 S.Ct. 690, 50 L.Ed.2d 701. {¶ 16} In undertaking the inquiry into whether the statute is remedial or punitive, it is not possible to determine the precise “tipping point between payback and punishment.” *Cook Cty.*, 538 U.S. at 130, 123 S.Ct. 1239, 155 L.Ed.2d 247. Rather, we are guided by the particular statute at issue in the litigation and its context. *Id.*; see, also, *Rice*, 84 Ohio St.3d at 421, 704 N.E.2d 1217. Furthermore, we must determine whether the primary purpose of the statute is to penalize or to remedy and compensate. *Cosgrove*, 70 Ohio St.3d at 288, 638 N.E.2d 991, citing *Porter v. Household Fin. Corp. of Columbus* (S.D. Ohio 1974), 385 F.Supp. 336, 342. In making that determination, we must not focus solely on the statute’s ultimate goals or effect. Instead, we look to the methods used by the General Assembly to accomplish the goals and overall purpose of the statutory scheme. *Rice*, 84 Ohio St.3d at 419-420, 704 N.E.2d 1217; *Cosgrove*, 70 Ohio St.3d at 284, 288, 638 N.E.2d 991.

*399{¶ 17} R.C. Title 49 reflects a comprehensive statutory regime that governs the business activities of public utilities. In addressing the nature of R.C. 4905.61, however, we note that it differs from R.C. Chapter 4112, which governs the practice of the Ohio Civil Rights Commission and through which an aggrieved may seek redress through a variety of remedies. See, e.g.,

Cosgrove, 70 Ohio St.3d at 288-289, 638 N.E.2d 991 (Resnick, J., concurring). R.C. 4905.61 is more narrowly tailored, and like other sections in the statutes that constitute R.C. Title 49, it compels public utilities to comply with the regulatory rubric through the imposition of penalties or forfeitures. See, e.g., R.C. 4905.54 (imposing a fine of up to \$10,000 for a statutory violation or noncompliance with a commission order) and 4905.57 and 4905.59 (governing actions for forfeitures). These provisions do not offer a mechanism for consumers to pursue relief against utilities.

{¶ 18} Moreover, R.C. 4905.61 is very specific. It appears to be the only mechanism through which the legislature permits an injured party to obtain damages after liability is found by the commission. The statute thus furthers the legislature's goal of ensuring compliance with the statutes governing public utilities and with commission orders. And notably for our purposes, in so doing, the statute does not simply compensate an injured party with an award for actual damages but, rather, incorporates a treble-damage-award provision and provides that any recovery by a private plaintiff pursuant to it does not preclude the state from seeking additional penalties under R.C. 4905.99. Thus, the statute was designed to augment enforcement of the law and to deter violations through penalties rather than to simply compensate consumers for violations. See *Lahke v. Cincinnati Bell, Inc.* (1981), 1 Ohio App.3d 114, 117, 1 OBR 420, 439 N.E.2d 928 (“we conceive that the provision for private recovery of treble damages for statutory violations * * * aids in [the] enforcement [of commission orders] by furnishing another incentive for the utility company to operate in accordance with [the commission's] dictates”). {¶ 19} Based on these and other factors, we conclude that the statute was intended to penalize public utilities for failing to comply with their statutory obligations. That conclusion is in accord with the decision of the only other court of appeals to consider the issue presented herein, *Usternal v. Gem Boat Serv., Inc.*, Ottawa App. No. 91-OT-051, 1992 WL 337600, *3. Other Ohio courts have concluded that the treble-damages provision in this statute was designed to deter utilities from ignoring the commission's authority and the requirements set forth in R.C. Title 49. See *Lahke*, 1 Ohio App.3d at 117, 1 OBR 420, 439 N.E.2d 928; *Fed. Res. Bank of Cleveland v. Purolator Courier Corp.* (1983), 13 Ohio App.3d 296, 300-302, 13 OBR 362, 469 N.E.2d 542, fn. 5. See, also, *French v. Dwiggins* (1984), 9 Ohio St.3d 32, 35-36, 9 OBR 123, 458 N.E.2d 827 (noting that the mandatory treble-damages provision in R.C. 1345.09(B) was intended by the General Assembly as a penalty for misconduct and as a deterrent).

*400 {¶ 20} Because we conclude that the statute was designed to deter public utilities from committing regulatory violations and to punish them for failing to comply with the provisions set forth in R.C. Chapter 49, we also conclude that the legislature's primary intent in enacting R.C. 4905.61 was to provide “a statute for a penalty.” R.C. 2305.11(A).

{¶ 21} Our conclusion is consistent with the nature of this particular statute, which requires, as a prerequisite to filing suit, a prior determination by the Public Utilities Commission that the utility violated a designated public utilities statute or commission order. R.C. 4905.61; *Milligan v. Ohio*

Bell Tel. Co. (1978), 56 Ohio St.2d 191, 10 O.O.3d 352, 383 N.E.2d 575, paragraph one of the syllabus. Given that the statute requires a prior finding of a violation, a plaintiff in a claim brought pursuant to R.C. 4905.61 need only show causation and damages flowing from the adjudicated violation. No reason exists to allow for the longer (six-year) statute of limitations set forth in R.C. 2305.07. See *Liddell v. SCA Servs. of Ohio, Inc.* (1994), 70 Ohio St.3d 6, 10, 635 N.E.2d 1233 (statutes of limitations are designed to ensure fairness to a defendant, to foster prompt prosecution of causes of action, to avoid fraudulent or “stale” claims, and to avoid inconvenience resulting from delay). Accordingly, R.C. 4905.61 is subject to the one-year statute of limitations set forth in R.C. 2305.11(A). Judgment reversed. Moyer, C.J., Lundberg Stratton, O’Donnell, Lanzinger and Cupp, JJ., concur. Pfeifer, J., dissents. . “[B]efore a Court of Common Pleas has jurisdiction to hear a complaint for treble damages under R.C. 4905.61, there first must be a determination by the commission that a violation has in fact taken place.” *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, 194, 10 O.O.3d 352, 383 N.E.2d 575. Although the appellees were not parties to Cellnet, we have not found that R.C. 4905.61 precludes nonparties from filing an action for treble damages based on prior commission orders. . R.C. 5301.36(C) states: “If the mortgagee fails to comply with division (B) of this section, the mortgagor may recover, in a civil action, damages of two hundred fifty dollars. This division does not preclude or affect any other legal remedies that may be available to the mortgagor.”