[Cite as *Discount Cellular, Inc. v. Ameritech Mobile Communications, Inc.*, 2005-Ohio-5437.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85618

DISCOUNT CELLULAR, INC.	:	
	:	
Plaintiff-Appellant	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
AMERITECH MOBILE COMMUNICATIONS, INC., ET AL.	:	
	:	
Defendants-Appellees	:	

DATE OF ANNOUNCEMENT OF DECISION:	October 13, 2005
CHARACTER OF PROCEEDING:	Civil appeal from Common Pleas Court Case No. CV-518042
JUDGMENT:	REVERSED AND REMANDED
DATE OF JOURNALIZATION:	_____
APPEARANCES:	
For Plaintiff-Appellant:	CARLA M. TRICARICHI MARK D. GRIFFIN RANDY J. HART Tricarichi & Carnes, LLC 614 Superior Avenue, N.W. Suite 620 Cleveland, Ohio 44113
For Defendants-Appellees: (Ameritech Mobile Communications & Cincinnati SMSA Limited Partnership	MARK I. WALLACH JAMES F. LANG WILLIAM J. MICHAEL Calfee, Halter & Griswold, LLP 800 Superior Avenue, #1400

Cleveland, Ohio 44114-2688

JOHN F. McCAFFREY
McLaughlin & McCaffrey, LLP
1111 Superior Avenue, #1350
Cleveland, Ohio 44114-2500

COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Plaintiff-appellant, Discount Cellular, appeals the trial court's dismissal of their complaint for treble damages. Finding merit to the appeal, we reverse.

{¶ 2} In December 2003, Discount Cellular commenced the underlying action against defendants-appellees, Ameritech Mobile Communications, LLC and Cincinnati SMSA Limited Partnership (collectively, "Ameritech"), seeking treble damages pursuant to R.C. 4905.61. In support of its action, Discount Cellular relied on a January 18, 2001 Opinion and Order of the Public Utilities Commission of Ohio (the "PUCO") entered in *In the Matter of the Complaint of Westside Cellular, Inc. d/b/a Cellnet*, PUCO Case No. 93-1758-RL-CSS, wherein the PUCO found that the defendants had violated commission orders and R.C. 4905.22, 4905.33, and 4905.35 by engaging in price discrimination.[1] In December 2002, in three separate cases, the Ohio Supreme Court upheld the PUCO's findings regarding the defendants' unlawful price discrimination and further held that the unlawful acts occurred from 1993 through 1998, as

[1]Notably, "before 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.

opposed to the commission's finding of 1995 through 1998. See *Westside Cellular, Inc. v. Pub. Util. Comm.*, 98 Ohio St.3d 165, 2002-Ohio-7119; *Cincinnati SMSA L.P. v. Pub. Util. Comm.*, 98 Ohio St.3d 282, 2002-Ohio-7235; *New Par v. Pub. Util. Comm.*, 98 Ohio St.3d 277, 2002-Ohio-7245.

{¶ 3} In February 2004, Ameritech moved to dismiss the complaint, arguing that an action under R.C. 4905.61 was subject to a one-year statute of limitations as provided in R.C. 2305.11, thereby rendering Discount Cellular's suit time-barred. In response, Discount Cellular contended the action was governed by R.C. 2305.07 because R.C. 4905.61 was a remedial statute, not a penal statute and, therefore, subject to a six-year statute of limitations. The trial court disagreed and granted Ameritech's motion to dismiss.

{¶ 4} Discount Cellular appeals, raising two assignments of error. It contends that the trial court erred in granting the motion to dismiss because the action was subject to a six-year statute of limitations and, therefore, was not time barred. In the alternative, it claims that the statute of limitations period did not begin to run until the Ohio Supreme Court's decision in 2002.

{¶ 5} When reviewing a judgment granting a Civ.R. 12(B)(6) motion, an appellate court must independently review the complaint to determine whether dismissal was appropriate. Decisions on Civ.R. 12(B)(6) motions are not findings of fact, but are rather conclusions of law. *State ex. rel. Drake v. Athens Cty. Bd. of*

Elections (1988), 39 Ohio St.3d 40. An appellate court need not defer to the trial court's decision in Civ.R. 12(B)(6) cases. *McGlone v. Grimshaw* (1993), 86 Ohio App.3d 279, citing *Athens Cty. Bd. of Elections*, supra.

{¶ 6} In order to prevail on a Civ.R. 12(B)(6) motion, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recover. A court is confined to the averments set forth in the complaint and cannot consider outside evidentiary materials. *Greeley v. Miami Valley Maintenance Contrs. Inc.* (1990), 49 Ohio St.3d 228; *State ex rel. Plaza Interiors v. City of Warrensville Heights* (May 24, 2001), Cuyahoga App. No. 78267; *Wickliffe Country Place v. Kovacs*, 146 Ohio App.3d 293, 2001-Ohio-4302; *Frost v. Ford* (July 12, 2001), Franklin App. No. 00AP-1205. Moreover, a court must presume that all factual allegations set forth in the complaint are true and must make all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190; *Kennedy v. Heckard*, Cuyahoga App. No. 80234, 2002-Ohio-6805.

{¶ 7} R.C. 4905.61, which does not contain an explicit statute of limitations, 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."

{¶ 8} Because R.C. 4905.61 does not contain its own statute of limitations, we must turn to Chapter 2305 of the Revised Code for the appropriate limitations period. See *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.*, 70 Ohio St.3d 281, 282, 1994-Ohio-295. R.C. 2305.07 provides in relevant part that, "an action upon* * * a liability created by statute other than a forfeiture or penalty * * * shall be brought within six years after the cause of action accrued." In contrast, R.C. 2305.11(A) sets a statute of limitations of one year for "an action upon a statute for a penalty or forfeiture." Thus, the applicable statute of limitations depends on 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 statue. *Cosgrove*, supra, at 283.

{¶ 9} Relying on the Ohio Supreme Court's recent decision in *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St.3d 296, 2005-Ohio-1736, Discount Cellular argues that R.C. 4905.61 is remedial because it expressly provides for "damages" as opposed to a "penalty" or "forfeiture." In *Rosette*, the Ohio Supreme Court held that R.C. 5301.36(C), which allows a mortgagor to recover $250 in damages against a mortgagee who fails to timely record the satisfaction of a residential mortgage, irrespective of his or her actual damages, is a remedial statute.[2]

[2] R.C. 5301.36(C) states: "If the mortgagee fails to comply with division (B) of this

{¶ 10} In construing the intent of the legislature, the Court relied on the express language of the statute which provides that a mortgagor "in a civil action" may sue for "damages." Based on this language, the Court reasoned that the legislature's intent was clearly to provide a remedy to an aggrieved individual, rather than to impose a penalty upon the wrongdoer. In refusing to find otherwise, the Court explained:

> "To conclude that R.C. 5301.36(C) creates a penalty, this court would have to delete the term 'damages,' a word used by the legislature, and insert the term 'penalty' or 'forfeiture,' words not chosen by the legislature. Doing so would flout our responsibility to give effect to the words selected by the legislature in enacting a statute.
>
> Clearly, the General Assembly could have used the term 'penalty' or 'forfeiture' if it had intended R.C. 5301.36(C) to create an action for a penalty or forfeiture. Indeed, the legislature has used such penalty/forfeiture language in other statutes. See 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'); see, also, R.C. 149.351(B)(2) (providing that any person aggrieved by the removal, destruction, transfer, or mutilation of a public record may bring a civil action to recover a '*forfeiture* in the amount of one thousand dollars for each violation'). (Emphasis added.) To presume that the legislature meant 'penalty' or 'forfeiture' when it used the term 'damages' is to presume imprecision on the part of the General Assembly. We decline to make such a presumption in this case." Id. at 298-299.

{¶ 11} Ameritech argues that *Rosette* is inapplicable to the instant case because it did not address treble damages and, therefore, applies only in the context of "liquidated damages." It

---

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."

further argues that Ohio law has long recognized that treble damages are punitive in nature, thereby warranting the application of a one-year statute of limitations pursuant to R.C. 2305.11. Moreover, it contends that the only Ohio case to address this issue, *Usternal v. Gem Boat Service, Inc.* (Nov. 20, 1992), Ottawa App. No. 91-OT-051, found R.C. 4905.61 to be a penal statute and, accordingly, they urge this court to follow the Sixth Appellate District's decision. However, we find these arguments unpersuasive.

{¶ 12} The Ohio Supreme Court has repeatedly recognized that most legislation "'has a dual purpose of remedying harm to the individual and deterring socially inimical business practices.'" *Cosgrove*, supra at 288, (Resnick, J., concurring), quoting *Porter v. Household Fin. Corp. of Columbus* (S.D. Ohio 1974), 385 F. Supp. 336, 342. See, also *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 421, 1999-Ohio-361. Thus, the mere fact that an Act has a deterrent aim, does not render it penal. Id. Rather, the critical factor in classifying a statute as penal or remedial is its primary purpose. Id.

{¶ 13} Accordingly, while we recognize that the imposition of treble damages operates as a deterrent and punishes the wrongdoer, we cannot say that this alone renders R.C. 4905.61 penal. Indeed, the Ohio Supreme Court has declared that even when a statute allows punitive damages, it is not rendered penal. See *Rice*, supra. "'"[A] law is not penal merely because it imposes an extraordinary liability on a wrongdoer in favor of a person wronged, which is not

limited to damages suffered by him."'" Id., citing *Cosgrove*, supra, at 289, quoting *Floyd v. DuBois Soap Co.* (1942), 139 Ohio St. 520, 523.

{¶ 14} Moreover, contrary to Ameritech's assertions, we find that the Ohio Supreme Court's analysis in *Rosette* applies equally in this case. Thus, in determining whether R.C. 4905.61 is a remedial or penal statute, we "must look to the language of the statute, giving effect to the words used and not deleting words or using words not used." *Rosette*, supra, at ¶12, citing *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 419, 1999-Ohio-361; *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 97. In doing so, we note that the legislature chose the word "damages" in describing the liability of a public utility for violating Chapter 4905, rather than "penalty" or "forfeiture."

{¶ 15} Thus, like the statute at issue in *Rosette*, the language indicates that the statute was not intended to inflict a penalty, but rather, allow an aggrieved party to recover damages. See, also, *Pittsburgh, Ft. Wayne & Chicago Railway Co. v. Methven* (1871), 21 Ohio St. 586, syllabus 2 ("If a statute in the nature of a police regulation gives a remedy for private injuries resulting from the violations thereof, and also imposes fines and penalties at the suit of the public for such violations, the former will not be regarded in the nature of a penalty unless *so declared*." (Emphasis added).

{¶ 16} Accordingly, we find that the plain language of R.C. 4905.61 demonstrates that the primary purpose of the statute is

remedial. Cf. *Ohio Pub. Interest Action Group, Inc. v. Pub. Util. Comm.* (1975), 43 Ohio St.2d 175, 185 ("The evidence purpose of [R.C. 4905.61] is to provide damages to parties injured by the acts of utilities * * *.")

{¶ 17} Moreover, we find that the statute's reference to the State's right to pursue an action for a penalty, irrespective of a person's or a corporation's right to recover treble damages, further supports our finding that the statute is remedial. The existence of a separate statute, i.e., R.C. 4905.99(C), which establishes penalties which may be pursued by the State when a utility violates various provisions of Chapter 4905, including R.C. 4905.22 through 4905.51, indicates that R.C. 4905.61 was primarily intended to compensate wronged parties.[3] Notably, no other provision under the chapter allows an aggrieved party to recover compensation for the wrongdoing of a public utility. Thus, the allowance of the recovery of treble damages for a person or corporation wronged by a public utility, as opposed to the State's right to pursue an action, convincingly demonstrates that the statute was intended to redress individual wrongs, thereby making it remedial. See *Huntington v. Attrill* (1892), 146 U.S. 657 (penal laws redress wrongs to the State, not to the individual).

[3]Although this argument was expressly rejected in *Usternal*, we find that our conclusion here is supported by recent Ohio Supreme Court decisions, i.e., *Rice*, supra, and *Rosette*, supra.

{¶ 18} Likewise, we do not find the Sixth Appellate District's decision in *Usternal* to be persuasive. In finding R.C. 4905.61 to be penal, the *Usternal* court relied on a line of cases finding that treble damages are punitive in nature, and, thus, a provision which provides for such damages is penal. However, the Ohio Supreme Court subsequently rejected the claim that a statute which allowed punitive damages was presumptively penal. *Rice*, supra. Accordingly, we decline to apply the holding of *Usternal* to the instant case.

{¶ 19} The first assignment of error is sustained.

{¶ 20} The second assignment of error, which challenges the date on which the statute of limitations began to run, is rendered moot.

Judgment reversed and case remanded for further proceedings.

It is, therefore, considered that said appellants recover of said appellees the costs herein.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

KENNETH A. ROCCO, J. CONCURS
WITH JUDGE COONEY'S OPINION
(SEE SEPARATE CONCURRING OPINION);

SEAN C. GALLAGHER, J. CONCURS IN
JUDGMENT ONLY AND DISSENTS (SEE
SEPARATE CONCURRING AND DISSENTING
OPINION)

PRESIDING JUDGE
COLLEEN CONWAY COONEY

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. 22. 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, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 85618

DISCOUNT CELLULAR, INC.	:	
	:	
Plaintiffs-Appellants	:	CONCURRING
	:	
vs.	:	OPINION
	:	
AMERITECH MOBILE COMUNICATIONS, INC., ET AL.	:	
	:	
Defendants-Appellees	:	

DATE: October 13, 2005

KENNETH A. ROCCO, J., CONCURRING:

{¶ 21} Although I concur with the majority opinion's disposition of this appeal, I write separately, both to acknowledge and to lend

a cautionary note to the sentiments embodied in Judge Gallagher's concurring and dissenting opinion.

{¶ 22} As the writer of the appellate opinion in *Rosette v. Countrywide Home Loans, Inc.*, Cuyahoga App. No. 82938, 2004-Ohio-359, which was overruled by the Ohio Supreme Court in *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St.3d 296, 2005-Ohio-1736, I understand his position; members of this court, myself included, however, are constrained to follow the supreme court's precedent until such time as it may directly consider the matter of whether in R.C. 4905.61, the legislature's intent was that the word "treble" is a misplaced "modifier" of the word "damages."

{¶ 23} I therefore concur with the majority opinion.

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 85618

DISCOUNT CELLULAR, INC.	:	
	:	CONCURRING AND
	:	
Plaintiff-Appellant	:	DISSENTING
	:	
vs.	:	OPINION
	:	
AMERITECH MOBILE COMMUNICATIONS, INC., ET AL.	:	
	:	
	:	
Defendants-Appellees	:	
	:	

DATE: October 13, 2005

SEAN C. GALLAGHER, J., CONCURRING IN JUDGMENT ONLY AND DISSENTING:

{¶ 24} I dissent from the majority opinion with respect to the finding that R.C. 4905.61 is a remedial provision. Nevertheless, I agree that the matter should be reversed and remanded because, in my view, the matter is not barred by the one-year statute of limitations.

{¶ 25} Although I believe the facts are distinguishable, I understand the majority's application of *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St.3d 296, 2005-Ohio-1736, to the case at hand. Nevertheless, because I believe the facts are distinguishable, I would find the triple damage provision outlined under R.C. 4905.61 punitive, regardless of the statutory language used, since the effect is punitive, applying common sense and basic logic involving damages. When a party is compensated to the tune of three times the actual damages sustained, it is hard to keep a straight face and say the tortfeasor is not being "penalized" or the statute is not "punitive."

{¶ 26} Understandably, the majority analysis places great weight on the language in the statute, yet I am left to wonder just how much the legislature thought about the term "damages" or "penalty" when the statute was implemented. Although the legislature did not expressly state it as a penalty, common sense, logic, and the extensive prior precedent concerning triple damage awards suggest that is what was intended. *Usternal v. Gem Boat Service, Inc.*, (Nov. 20, 1992), Ottawa App. No. 91-OT-051, *Hardman v. Wheels, Inc.*

(1988), 56 Ohio App.3d 142,; *Mihailoff v. Ionna* (May 6, 1987), Hamilton App. No. C-860040.

{¶ 27} The majority opinion points out what I see as the critical problem with the analysis in this case: "* * * we note that the legislature chose the word 'damages' in describing the liability of a public utility for violating Chapter 4905, rather than 'penalty' or 'forfeiture.'"

{¶ 28} I don't believe the legislature "chose" anything. I doubt the legislature had any concept that courts would find a reason to draw any distinction involving the innocuous term "damages" as it appears in this statute. While I acknowledge in principle the line of cases preferring the "form" of language as written over the "substance" as intended, I find the application of that result illogical and inconsistent.

{¶ 29} As noted, the majority places great weight on the recent Supreme Court decision in *Rosette,* supra, where the court determined that damages of $250 set forth in R.C. 5301.36(C) were not punitive because the General Assembly failed to use the term "penalty" or "forfeiture" and instead used the term "damages." I believe *Rosette* is distinguishable from the current case by the type of damages involved. *Rosette* involved a set damage figure of $250, far different than the triple damage amount awarded here. A triple damage claim is clearly designed to award an amount far in excess of the actual damages. *Usternal v. Gem Boat Service, Inc.* (Nov. 20, 1992), Ottawa App. No. 91-OT-051.

{¶ 30} The majority declined to address appellants' second assignment of error, which reads as follows:

{¶ 31} "The trial court erred in granting appellee's motions to dismiss by failing to apply the statute of limitations period from the date of the decisions of the Ohio Supreme Court which provide the basis for the claims below."

{¶ 32} I would address this assigned error and find that while the one-year statute of limitations is applicable to actions under R.C. 4905.61, as I believe they are punitive, it does not commence until the action has "accrued." In my view, the action in this case did not accrue until the Supreme Court issued and filed its judgment entry regarding the earlier PUCO decision on February 19, 2003.

{¶ 33} The right of direct appeal to the Supreme Court of Ohio for parties involved in PUCO rulings, in my view, changes the traditional view involving when a cause of action "accrues" for purposes of determining the commencement date of the statute of limitations. Ohio employs a bifurcated procedure for adjudicating and remedying violations of state utility laws. The two-step liability process, involving both the PUCO and the Supreme Court of Ohio, is distinct from the determination of damages held at the trial court level. Because parties cannot directly sue in common pleas court,[1] absent a finding of liability on the part of the utility, I would hold that the cause of action does not accrue, and

---

[1] *State ex rel. Cleveland Elec. Illuminating Co. v. Cuyahoga County Court of Common Pleas*, 88 Ohio St.3d 447, 2000-Ohio-379.

thus the statute of limitations does not commence, until a formal determination of liability is established.

{¶ 34} Here, the parties exercised their right of direct appeal to the Supreme Court of Ohio. This case could not proceed on the damage claim until the two-step liability process was concluded. As such, I would find that while the one-year statute of limitations under R.C. 2305.11 does apply to R.C. 4905.61, it does not commence to run until the cause of action accrues, which occurs when the Supreme Court formally issues its judgment entry on the subject.[2] In this instance the cause of action was filed within one year after the journalization of that order and, as such, the action was timely filed.

[2] In the unlikely event neither party exercised its right of direct appeal to the Supreme Court of Ohio, the cause of action would "accrue" when the appeal time lapsed.