IN THE SUPREME COURT OF OHIO

PHILIP J. CHARVAT,	:	
	:	
Appellant,	:	Case Nos. 06-1647 and 06-1855
	:	
v.	:	
	:	
THOMAS N. RYAN, D.D.S., *et al.*,	:	
	:	
Appellees.	:	

AMENDED MERIT BRIEF OF APPELLANT PHILIP J. CHARVAT

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STATEMENT OF FACTS

Using automated dialing equipment and a prerecorded voice messaging system, Appellees placed a telemarketing call to the residence of Appellant on December 9, 2003 without Appellant's prior express permission. (R. 14, Affidavit of Philip J. Charvat, No. 74 of Lower Court's Case History Index) On December 22, 2003, after managing to identify Appellees – despite Appellees' failure to identify themselves in the call, as they are legally required to do, Appellant sent Appellees a letter demanding that their written Do-Not-Call policy be sent to him. (R. 14, Affidavit of Philip J. Charvat, No. 74 of Lower Court's Case History Index) However, Appellees did not respond to Appellant's demand letter. (R. 14, Affidavit of Philip J. Charvat, No. 74 of Lower Court's Case History Index)

Thereafter, on January 20, 2004, Appellant filed his Complaint in the Franklin County Court of Common Pleas against Appellees, asserting claims under the federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §227, *et seq.* (Appdx. 57),[1] and the Ohio Consumer Sales Practices Act ("CSPA"), R.C. §1345.01, *et seq.* (Appdx. 66)(R. 14, Complaint, No. 8 of Lower Court's Case History Index) Appellant alleged that Appellees "willfully" and/or "knowingly" violated the TCPA in four distinct respects,[2] and that Appellant was entitled to an

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[1] Citations herein to items included within the Appellant's Appendix, attached hereto, are designated by "(Appdx. _)".

[2] Specifically, for his the First Cause of Action, Appellant's Complaint alleges that, in connection with their December 9, 2003 call to Appellant's residence, Appellees "willfully" and/or "knowingly" violated:

(1) 47 U.S.C. §227(b)(1)(B)(Appdx. 69) by initiating a prerecorded advertising call to Appellant's residence without Plaintiff's prior express permission;
(2) 47 C.F.R. §64.1200(b)(Appdx. 70) by initiating a prerecorded advertising call to Appellant's residence without properly identifying the individual or entity making the call at the beginning of the call;
(3) 47 C.F.R. §64.1200(d)(4)(Appdx. 71) by initiating a prerecorded advertising call to Appellant's residence without stating the telephone number or address of the business making the call; and

award against Appellees of statutory treble damages in the amount of $1,500 per violation. (R. 14, Complaint, No. 8 of Lower Court's Case History Index) Appellant also alleged that Appellees "knowingly" violated the CSPA in five distinct respects,[3] and that Appellant was entitled to an award against Appellees of statutory damages in the amount of $200, as well as his reasonable attorney's fees and costs pursuant to R.C. §1345.09(F)(2) (Appdx. 73). (R. 14, Complaint, No. 8 of Lower Court's Case History Index)

On February 12, 2004, Appellees filed their Answer to the Complaint.[4] (R. 14, Answer, No. 18 of Lower Court's Case History Index) On May 10, 2004, Appellees moved for summary

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(4) 47 C.F.R. §64.1200(d)(1)(Appdx. 72) by failing to send Appellant a copy of their Do-Not-Call policy upon his demand. (R. 14, Complaint at ¶¶1, 35-46, No. 8 of Lower Court's Case History Index)

[3] Specifically, for his Second Cause of Action, Appellant's Complaint alleges that, in connection with their December 9, 2003 call to Appellant's residence, Appellees also "knowingly" violated R.C. §1345.02(A)(Appdx. 74) by:

(1) initiating a prerecorded advertising call to Appellant's residence without Appellant's prior express permission;
(2) initiating a prerecorded advertising call to Appellant's residence without properly identifying the individual or entity making the call at the beginning of the call;
(3) initiating a prerecorded advertising call to Appellant's residence without stating the telephone number or address of the business making the call;
(4) failing to send Appellant a copy of their Do-Not-Call policy upon his demand; and
(5) initiating a prerecorded advertising call to Appellant that did not state, at the beginning of the call, that the purpose of the call was to make a sale. (R. 14, Complaint at ¶¶47-58, No. 8 of Lower Court's Case History Index)

[4] In their Answer, Appellees **admitted** each of the following allegations in the Complaint:

"31. The **Defendants acted of free will to use automated equipment to place the call(s)**.
"32. The Defendants **intended** that their equipment call residences.
"33. The Defendants **knowingly** called residences with the prerecorded messages(s).
"34. The Defendants **purposely** called residences with the prerecorded message(s)." (Emphasis added.)(R. 14, Complaint at ¶¶31-34, No. 8 of Lower Court's Case History Index; R. 14, Answer, p. 1, No. 20 of the Lower Court's Case History Index.)

judgment in their favor, again admitting that their prerecorded voice message telemarketing calls had been made "knowingly" and "purposely." (R. 14, Motion for Summary Judgment, No. 34 of Lower Court's Case History Index) However, Appellees argued that their conduct did not constitute a "knowing" or "willful" violation of the TCPA or a "knowing" violation of the CSPA. (R. 14, Motion for Summary Judgment, No. 34 of Lower Court's Case History Index) Appellant opposed Appellees' summary judgment motion. (R. 14, Memorandum in Opposition to Motion for Summary Judgment, No. 36 of Lower Court's Case History Index)

On December 8, 2005, the trial court granted Appellees' Motion for Summary Judgment, although, in doing so, it actually entered judgment in favor of Appellant on several of his claims. (R. 14, December 8, 2005 Entry, No. 83 of Lower Court's Case History Index; Appdx. 50) The trial court's ruling does not make clear which of Appellant's claims had merit and which did not; the trial court merely ruled that Appellant had established one violation of the TCPA based upon Appellee's call, one TCPA violation based upon Appellees' failure to send their Do-Not-Call policy to Appellant pursuant to his request, and one CSPA violation for unspecified conduct.

The trial court held that Appellees did not "knowingly" or "willfully" violate the TCPA, and that Appellees' single violation of the CSPA was not committed "knowingly." (R. 14, December 8, 2005 Entry, No. 83 of Lower Court's Case History Index; Appdx. 50) Based on these determinations, the trial court refused to award Appellant the treble damages he sought for each of Appellees' violations of the TCPA and refused to award Appellant his reasonable attorney's fees and costs under the CSPA. (R. 14, December 8, 2005 Entry, No. 83 of Lower Court's Case History Index; Appdx. 50)

On December 19, 2005, Appellant timely appealed the adverse rulings of the trial court by filing his Notice of Appeal with the Tenth District Court of Appeals. (R. 13) On July 20,

2006, the Tenth District Court of Appeals issued its Opinion and Judgment Entry. (R. 34; Appdx. 28; R. 35; Appdx. 27) In its July 20, 2006 Opinion, the appeals court sustained in toto several of Appellant's assignments of error, sustained in part several others, and overruled Appellant's assignments of error pertaining to the trial court's rulings that: (1) Appellant was only entitled to an award of the minimum statutory damages of $500 on his TCPA claims because Appellees' did not "knowingly" or "willfully" violate the TCPA or the regulations promulgated under it; and (2) Appellant was not entitled to an award of his attorney's fees and costs pursuant to R.C. §1345.02(F)(2) because Appellees' violations of the CSPA were not committed "knowingly." (R. 34; Appdx. 28)

On July 28, 2006, Appellant filed with the Tenth District Court of Appeals his Motion to Certify a Conflict as to the issue of whether a defendant "knowingly" violates Section 227(b) of the TCPA, or the TCPA's regulations, where the defendant has knowledge of the facts constituting an offense. (R. 36) Appellant's motion contended that the appeals court's July 20, 2006 Opinion conflicts with the decision issued by the Sixth District Court of Appeals in *Reichenbach v. Financial Freedom Ctrs., Inc.*, 2004 Ohio 6164. (R. 36)

On September 1, 2006, Appellant timely filed his Notice of Appeal with the Ohio Supreme Court by which he sought this Court's discretionary review of the appeals court's July 20, 2006 Opinion as to the following Propositions of Law: (1) Because the determination of whether a trial court properly granted summary judgment involves only questions of law, an appellate court reviews a trial court's summary judgment ruling under the de novo standard of review; (2) The term "willfully," as used in Section 227(b)(3) of the TCPA, means the voluntary commission of an act or omission, irrespective of whether the act or omission is known or intended to violate the law; (3) The term "knowingly," as used in the CSPA, R.C. §1345.09,

means the intentional commission of an act or practice that violates the Act, not the commission of an act or practice that is intended or known to violate the CSPA. (R. 57; Appdx. 1)

On September 8, 2006, the Tenth District Court of Appeals issued its Journal Entry certifying a conflict to this Court on the issue of whether a defendant "knowingly" violates Section 227(b) of the TCPA, or its regulations, where the defendant has knowledge of the facts constituting an offense. (R. 62; Appdx. 26) Appellant timely filed his Notice of Certified Conflict with this Court on October 5, 2006. (R. 65; Appdx. 3)

On December 4, 2006, this Court issued its Certification Order and determined that a conflict exists between the Ohio appellate districts, and directed the parties to submit Briefs regarding this issue. (R. 69) Also, on December 4, 2006, this Court allowed Appellant's appeal for discretionary review of the following Propositions of Law: (1) The term "willfully," as used in Section 227(b)(3) of the Telephone Consumer Protection Act, means the voluntary commission of an act or omission, irrespective of whether the act or omission is known or intended to violate the law; and (2) The term "knowingly," as used in the Ohio Consumer Sales Practices Act, R.C. §1345.09, means the intentional commission of an act or practice that violates the Act, not the commission of an act or practice that is intended or known to violate the Act. (R. 70) The Court ordered that all briefing in this matter be consolidated. (R. 71)

In the instant appeal, Appellant respectfully submits that the Tenth District Court of Appeals erred in three significant respects in its July 20, 2006 Opinion. After improperly using interchangeably the terms "knowingly" and "willfully" under the TCPA, even though they do not mean exactly the same thing, the appeals court defined each term incorrectly, disregarding the definition of "willful" adopted by Congress in the Communications Act of 1934, as amended, 47 U.S.C. §151, *et seq.*, and the definition of "knowingly" articulated by the United States Supreme

Court in *Bryan v. U.S.* (1998), 524 U.S. 184. Lastly, the appeals court committed reversible error by disregarding this Court's ruling in *Einhorn v. Ford Motor Company* (1990), 48 Ohio St.3d 27, as to what constitutes a "knowing" violation under R.C. §1345.09(F)(2). In support for Appellant's foregoing contentions, Appellant respectfully submits the following propositions of law, arguments and legal authorities.

ARGUMENT

Proposition of Law No. 1: A defendant "knowingly" violates Section 227(b) of the Telephone Consumer Protection Act, 47 U.S.C. §227, *et seq.*, or the regulations promulgated thereunder, for purposes of awarding treble damages under Section 227(b)(3), where the plaintiff demonstrates that the defendant had knowledge of the facts constituting the offense, irrespective of whether the defendant knew that its conduct constituted a violation of the Telephone Consumer Protection Act or any regulations promulgated thereunder.

In 1991, Congress enacted the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §227, *et seq.*, one of the principal purposes of which was to immediately stop prerecorded voice message telemarketing calls from reaching into and disturbing private residences. To facilitate the enforcement of its remedial purpose, the TCPA provides, at 47 U.S.C. §227(b):

> "Restrictions on use of automated telephone equipment –
>
> "(1) **Prohibitions** **It shall be unlawful for any person within the United States** –
>
> * * *
>
> "(B) **to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party**, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B); (Emphasis added)
>
> * * *
>
> "(3) **Private right of action.** **A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State**—
>
> (A) **an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation**,

> (B) **an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater**, or
> (C) both such actions.
> **If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph**." (Emphasis added)(Appdx. 78)

Thus, a residential telephone customer who receives an unauthorized prerecorded voice message telemarketing call may sue the telemarketer and recover statutory damages in the amount of $500 for each violation of the TCPA's provisions or the FCC's corresponding regulations. 47 U.S.C. §227(b)(3)(B); *Jemiola v. XYZ Corp.* (Cuyahoga C.P. 2003), 126 Misc.2d 68, 73, 802 N.E.2d 745 ("The TCPA provides for minimum statutory damages of $500 per violation."); see also *Aronson v. Bright-Teeth Now LLC* (Allegheny Cty. C.P. 2002), 57 Pa D. & C. 4th 1; *ESI Ergonomic Solutions, LLC v. United Theatre Circuit, Inc.* (App. 2002), 203 Ariz. 94, 101, 50 P.3d 844, 851; *Kenro, Inc. v. Fax Daily* (S.D. Ind. 1997), 962 F.Supp. 1162, 1167. Where the telemarketer is proven to have "willfully" or "knowingly" violated the TCPA or its regulations, a trial court may, in its discretion, award the person called treble statutory damages in the amount of $1,500 per violation. 47 U.S.C. §227(b)(3)(C) (Appdx. 82).

Below, the appeals court followed its prior ruling in *Charvat v. Colorado Prime* (Sept. 17, 1998), Franklin App. No. 97APG09-1277, unreported (Appdx. 83), and affirmed the trial court's determination that a "knowing" violation of the TCPA is established only by a showing of a culpable state of mind on the part of the telemarketer. (R. 34, July 20, 2006 Opinion at ¶35) In *Reichenbach v. Financial Freedom Centers, Inc.*, 2004 Ohio 6164 at ¶37, however, the Sixth District Court of Appeals ruled that "knowingly" merely requires proof of the defendant's knowledge of the facts that constitute the offense.

The TCPA does not expressly define the word "knowingly." Therefore, in the absence of a contrary definition within the TCPA, the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense. As the United States Supreme Court ruled in *Bryan v. U.S.* (1998), 524 U.S. 184, 193:

> "The term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law. As Justice Jackson correctly observed, '**the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.**' Thus, in *United States v. Bailey*, 444 U.S. 394, 62 L. Ed. 2d 575, 100 S. Ct. 624 (1980), we held that the prosecution fulfills its burden of proving a knowing violation of the escape statute 'if it demonstrates that an escapee knew his actions would result in his leaving physical confinement without permission.' *Id.* at 408. And in *Staples v. United States*, 511 U.S. 600, 128 L.ed.2d 608, 114 S. Ct. 1793 (1994), we held that a charge that the defendant's possession of an unregistered machinegun was unlawful required proof 'that he knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun.' *Id.*, at 602. It was not, however, necessary to prove that the defendant knew that his possession was unlawful. See *Roger v. United States*, 522 U.S. 252, 254 (1998)(plurality opinion) (slip op., at 1-3). **Thus, unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense.**" (Emphasis added.)

The Sixth District Court of Appeals, in *Reichenbach, supra* at ¶37, cited *Bryan* with approval. *Bryan* has also been followed consistently by the federal courts.

Quoting *Bryan* in *United States v. Wilson* (7th Cir. 1998), 159 F.3d 280, 289, the Seventh Circuit Court of Appeals held that a "knowing" violation of the law occurs even when the defendant does not know he is violating the law:

> **"[T]he fact that he did not know about the statute does not mean that he could not have committed a 'knowing' violation of it. The Supreme Court has stated that 'the term "knowingly" does not necessarily have any reference to a culpable state of mind or to knowledge of the law.'** *Bryan*, 118 S. Ct. at 1945. **Rather, 'the knowledge requisite to knowing**

> **violation of a statute is factual knowledge as distinguished from knowledge of the law.**' *Id.* (quoting *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 345, 96 L. Ed. 367, 72 S. Ct. 329 (1952) (Jackson, J., dissenting)). Unless the text of the statute at issue dictates a different result, establishing a 'knowing' violation of the statute only requires proof of knowledge by the defendant of the facts that constitute the offense. 118 S. Ct. at 1945. This understanding has been applied to those portions of § 922 that punish 'knowing' conduct, including § 922(g). *Bryan*, 118 S. Ct. at 1945-1946; *United States v. Ladell*, 127 F.3d 622, 624-25 (7th Cir. 1997) (citations omitted)." (Emphasis added.)

More recently, the United States Court of Appeals for the Fifth Circuit cited *Bryan* approvingly and ruled:

> "'Ignorance of the law is no defense.' It is as much a part of 'our national culture' as are the *Miranda* warnings. *Dickerson v. United States,* 530 U.S. 428, 443, 147 L.Ed.2d 405, 120 S. Ct. 2326 (2000). Our criminal laws typically express this maxim with the 'knowing' degree of scienter. The Supreme Court recently has explained in more lawyer-like fashion that 'the term "knowingly" does not necessarily have any reference to a culpable state of mind or to knowledge of the law.' **'The knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.' This maxim is so strongly embedded in our legal system that 'unless the text of a statute *dictates* a different result, the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense.'** *Bryan*, 524 U.S. at 193." (Emphasis added.)

United States v. Kung-Shou Ho (5th Cir. 2002), 311 F.3d 589, 605.

The United States Court of Appeals for the District of Columbia has also made clear its view that a "knowing" violation of a federal statute does not require proof that the defendant knew he was violating the law:

> "The Supreme Court has made clear that 'the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.' *Bryan v. United States*, 524 U.S. 184, 192, 141 L. Ed. 2d 197, 118 S. Ct. 1939 (1998) (internal quotation marks omitted). **The *Bryan* Court concluded that 'unless the text of the statute dictates a different result, the**

term "knowingly" merely requires proof of knowledge of the facts that constitute the offense.' *Id.* at 193." (Emphasis added.)

United States v. Barnes (D.C. Cir. 2002), 295 F.3d 1354, 1367. See also *United States v. Beaver* (6th Cir. 2000), 206 F.3d 706, 708-709 ("[T]he term 'knowingly' only requires that the accused know that he possessed a firearm, not that he knew that such possession was illegal."); *United States v. Bostic* (4th Cir. 1999), 168 F.3d 718, 722-723 ("[S]tatutory interpretation of the term 'knowingly' as used in analogous contexts does not include a requirement that the defendant be aware of the illegality of his conduct."); *United States v. Meade* (1st Cir. 1999), 175 F.3d 215, 226 ("[T]he Court recently reaffirmed its hoary understanding that where, as here, Congress employs a 'knowing' standard of culpability, such a word choice normally signifies that the government needs to prove only that the defendant knew of the facts comprising the offense, and nothing more.")(Internal citations omitted.); and *United States v. International Minerals* (1971), 402 U.S. 558, 562-564 (upholding conviction for "knowing" failure to show shipping papers of corrosive liquid, where there was no proof defendant knew of regulation).

In the instant case, Appellees freely admit that they "knowingly" and "purposely" used automated equipment to place their prerecorded voice message telemarketing calls to consumers, including their call to Appellant's residence on December 9, 2003. (R. 14, Complaint at ¶¶31-34, No. 8 of Lower Court's Case History Index; R. 14, Answer, p. 1, No. 20 of the Lower Court's Case History Index.) Notably, "purposely" is the **highest level** of scienter under Ohio law; **it means that the actor specifically intended to engage in the proscribed conduct**. *State v. Widner* (1982), 69 Ohio St.2d 267. Thus, any claim that Appellees might not have known that their actions were not undertaken "knowingly" is completely contrary to the undisputed facts in this case.

However, given the proper definition of "knowingly," as established in *Bryan, supra*, it is clear that the trial court and appeals court below both erred in failing to apply that definition to Appellant's claims and Appellees' admitted conduct. Accordingly, this Court should declare that a defendant acts "knowingly," for purposes of §227(b) of the TCPA, if the defendant had "knowledge of the facts that constitute the offense, irrespective of whether the defendant knew, at the time of the offending conduct, that such conduct violated the law," and this Court should reverse and remand the appeals court's erroneous July 20, 2006 Opinion in this respect.

Proposition of Law No. 2: The term "willfully," as used in Section 227(b)(3) of the Telephone Consumer Protection Act, 47 U.S.C. §227, *et seq.*, means the voluntary commission of an act or omission, irrespective of whether the act or omission is known or intended to violate the law.

Faced with the issue of whether the trial court properly granted Appellees summary judgment as to Appellant's claims that Appellees violated the TCPA "willfully," the appeals court made the same two significant errors that the trial court made. The appeals court treated "willfully" and "knowingly" interchangeably, although they are different words with somewhat different meanings.[5] More importantly, the appeals court erroneously cited its own prior decision in *Charvat v. Colorado Prime* (Sept. 17, 1998), Franklin App. No. 97APG09-1277, 1998 Ohio App. LEXIS 4292, at *10-11, and held that "knowingly"/"willfully" under the TCPA required a showing that the "defendant must affirmatively know it is violating a regulation when making the telephone call ***." Thus, not only did the Tenth District Court of Appeals erroneously interpret the term "knowingly" under the TCPA, as noted above, but also the appeals court failed to apply the proper definition of the term "willful" in analyzing Appellant's TCPA claims.

[5] See *United States v. Illinois Central R. Co.* (1938), 303 U.S. 239, 243 ("'Willfully' means something not expressed by 'knowingly,' else both would not be used conjunctively.").

The Telephone Consumer Protection Act of 1991, 47 U.S.C. §227, *et seq.*, is a fairly recent amendment to the Communications Act of 1934, as amended, 47 U.S.C. §151, *et seq.* (Appdx. 91) Within the Communications Act, "willful" and "willfully" appear a total of 37 times. However, the term "willful" is defined just once, in Section 312(f)(1)(Appdx. 92), which provides:

> "The term **'willful'**, when used with reference to the commission or omission of any act, **means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.**" (Emphasis added.)

This same definition of the term "willful" was recognized by the United States Supreme Court in *Smith v. Wade* (1983), 461 U.S. 30, 41, a case that did not involve the Communications Act:

> "'**Willful** *** generally, as used in courts of law, implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. **It amounts to nothing more than this: that he knows what he is doing, and intends to do what he is doing, and is a free agent.** And willfully does not imply that an act done in that spirit was necessarily a malicious act. ***' 30 American and English Encyclopedia of Law 529-530 (2d ed. 1905) (footnote omitted)." (Emphasis added)

See also *Dollar Systems, Inc. v. Avcar Leasing Systems, Inc.* (9th Cir. 1989), 890 F.2d 165, 172 ("'[W]illful' means an *act* that is committed knowingly and intentionally. There is no requirement of a showing of an intent to violate the law, an evil motive, or a purpose to gain undue advantage. Good faith or reasonable care are not defenses to 'willfulness'. ***")(Emphasis in original.)

Below, Appellant cited to Section 312(f)(1) of the Communications Act and to the ruling in *Smith v. Wade, supra*. However, the appeals court's July 20, 2006 Opinion makes no mention of either authority, and follows neither. This, Appellant submits, was plain error. Accordingly, Appellant respectfully requests that this Court reverse the Tenth District Court of Appeals' clearly erroneous July 20, 2006 Opinion in this regard.

Proposition of Law No. 3: The term "knowingly," as used in the Ohio Consumer Sales Practices Act, R.C. §1345.09, means the intentional commission of an act or practice that violates the Act, not the commission of an act or practice that is intended or known to violate the Act.

It would seem that this Court made itself abundantly clear when it essentially adopted this third proposition of law in *Einhorn v. Ford Motor Company* (1990), 48 Ohio St.3d 27, 29-30, when this Court ruled:

> "One line of cases finds that the word 'knowingly' in R.C. 1345.09(F)(2) relates to the supplier's knowledge that his act violates the Consumer Sales Practices Act. See *Bierlein* v. *Alex's Continental Inn, Inc.* (1984), 16 Ohio App.3d 294, 16 OBR 325, 475 N.E.2d 1273, and *Hamilton* v. *Davis Buick Co.* (June 24, 1980), Montgomery C.P. No. 79-1875, unreported. According to this interpretation of R.C. 1345.09(F)(2), in order that the consumer be awarded attorney fees, the supplier must not only violate the law, but also must understand that his actions constitute a violation. Such reasoning protects suppliers who are unaware or claim to be unaware of the existence of the Act. See Roberts & Martz, *supra*, at 957. The consumer has the difficult, if not impossible task, of proving, in order to be awarded attorney fees, that the supplier knew of the law.
>
> "Such an interpretation takes the teeth out of the Consumer Sales Practices Act. Attorney fees would rarely be awarded. Since recoveries pursuant to this Act are often small and generally insufficient to cover attorney fees, many consumers would be persuaded not to sue under the Act. This is inapposite to the General Assembly's intention as expressed in Am. Sub. H.B. No. 681, the 1978 amendment to the Consumer Sales Practices Act, which provided for the enactment of R.C. 1345.09(F). The amendment's purpose was '*** to provide strong and effective remedies, both public and private, to assure that consumers will

recover any damages caused by such acts and practices, and to eliminate any monetary incentives for suppliers to engage in such acts and practices.' (137 Ohio Laws, Part II, 3219.)

"**This legislative purpose is better safeguarded by finding that 'knowingly' committing an act or practice in violation of R.C. Chapter 1345 means that the supplier need only intentionally do the act that violates the Consumer Sales Practices Act.** The supplier does not have to know that his conduct violates the law for the court to grant attorney fees. This reasoning is found in cases such as *Brooks v. Hurst Buick-Pontiac-Olds-GMC* (1985), 23 Ohio App. 3d 85, 23 OBR 150, 491 N.E.2d 345.

"We find that the plain meaning of R.C. 1345.09 (F)(2) dictates the Brooks result and comports with the legislative intent. The language '*** knowingly committed an act or practice that violates this chapter' requires that for liability to attach, a supplier must have committed a deceptive or unconscionable act or practice. This conduct must violate the Consumer Sales Practices Act. **The statutory language does not state that the supplier must act with the knowledge that his acts violate the law**, as appellee contends. 'Knowingly' modifies 'committed an act or practice' and does not modify 'violates this chapter.'

"To find otherwise would deny attorney fees to consumers even though the supplier might have blatantly violated the Consumer Sales Practices Act. Such a conclusion flies in the face of the common-law maxim that ignorance of the law is no excuse. Roberts & Martz, supra, at 957.

"Thus, pursuant to R.C. 1345.09(F)(2), a trial court may award a consumer reasonable attorney fees when the supplier in a consumer transaction intentionally committed an act or practice which is deceptive, unfair or unconscionable." (Emphasis added.)

Generally, Ohio's appellate courts have had no trouble following and applying *Einhorn*. For example, in *Fletcher v. Don Foss of Cleveland, Inc.* (1993), 90 Ohio App. 3d 82, 90, the Eighth District Court of Appeals cited to *Einhorn* and ruled:

"R.C. 1345.09(F)(2) provides as follows:

"'(F) **The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if** either of the following apply: '*** (2) **The supplier has**

> **knowingly committed an act or practice that violates this chapter**.'
>
> ***
>
> **"The language '*** knowingly committed an act or practice that violates this chapter' requires that for liability to attach, a supplier must have committed a deceptive or unconscionable act or practice. This conduct must violate the Consumer Sales Practices Act. The statutory language does not state that the supplier must act with the knowledge that his acts violate the law, as appellee contends. 'Knowingly' modifies 'committed an act or practice' and does not modify 'violates this chapter.'" Since the trial court determined from the facts that appellant's conduct violates the Act, on the authority of *Einhorn*, supra. attorney fees can be properly awarded."** (Emphasis added; internal citations omitted.)

In *Vannoy v. Capital Lincoln-Mercury Sales* (1993), 88 Ohio App. 3d 138, 148-149, the Fourth District Court of Appeals also cited *Einhorn*, and held:

> "The Ohio Supreme Court has ruled that attorney fees may be awarded pursuant to R.C. 1345.09(F)(2) when a supplier intentionally committed the deceptive act or practice. *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 548 N.E.2d 933, syllabus. However, **the court has rejected any notion that the statute requires a demonstration of knowledge that the act or practice violates the law**. *Id.* at 29-30, 548 N.E.2d at 935-936. **The legislative purpose of the CSPA 'is better safeguarded by finding that "knowingly" committing an act or practice in violation of R.C. Chapter 1345 means that the supplier need only *intentionally do the act that violates the [CSPA].* The supplier does not have to know that his conduct violates the law** ***.'" (Emphasis added.)

Significantly, prior to the issuance of its erroneous July 20, 2006 Opinion below, the Tenth District Court of Appeals had also cited and followed this Court's well-reasoned opinion in *Einhorn*:

> "In *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 30, 548 N.E.2d 933, the Supreme Court held that the term **'knowingly' in R.C. 1345.09(F)(2) ' *** means that the supplier need only intentionally do the act that violates the Consumer Sales Practices Act. The supplier does not have to know that his**

conduct violates the law for the court to grant attorney fees.'"
(Emphasis added.)

Hahn v. Doe (March 23, 1005), Franklin App. No. 94APE07-1024, unreported at ¶13. (Appdx. 93)

Although Appellant cited *Einhorn* and *Hahn* in his appellate brief and reply brief below, in its July 20, 2006 Opinion, the appeals court never once mentioned *Hahn*, and cited *Einhorn* for reasons unrelated to the definition of "knowingly" under R.C. §1345.02(F)(2). The appeals court left undisturbed the trial court's determination that Appellant had failed to establish that Appellees knowingly violated the CSPA because, as the appeals court reasoned, the trial court had not abused its "discretion" in declining to award Appellant attorney's fees under R.C. §1345.02(F)(2). This conclusion is flawed for two fundamental reasons. First, the appeals court's holding improperly disregards the trial court's failure to apply the correct definition of "knowingly" when it considered the issue of whether Appellees acted knowingly. Second, the proper standard of review in regard to a trial's court's summary judgment ruling is de novo, not abuse of discretion. Thus, the appeals court's errors in rubber-stamping the trial court's decision are doubly plain.

There was ample **undisputed** evidence before the trial court and appeals court that Appellees **knowingly** and **purposely** committed multiple violations of the CSPA. (R. 14, Complaint at ¶¶31-34, No. 8 of Lower Court's Case History Index; R. 14, Answer, p. 1, No. 20 of the Lower Court's Case History Index.) In light of this undisputed evidence and the clear controlling authority set forth in *Einhorn*, *supra*, Appellant respectfully submits that this Court should reverse the July 20, 2006 Opinion of the Tenth District Court of Appeals, and remand this case with instructions that the lower courts must use the definition of "knowingly" set forth in *Einhorn* while Appellant's CSPA claims are reconsidered.

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests that this Court adopt the foregoing propositions of law, and reverse and remand the Tenth District Court of Appeals' July 20, 2006 Opinion for further proceedings consistent with this Court's ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing document was served upon the blow-named counsel of record for Defendants-Appellees, by regular first class U.S. Mail, this 31st day of January, 2007:

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APPENDIX

Notice of Appeal in *Philip J. Charvat v. Thomas N. Ryan, D.D.S., et al.*, Case No. 06-1647	Appdx. 1
Notice of Certified Conflict in *Philip J. Charvat v. Thomas N. Ryan, D.D.S., et al.*, Case No. 06-1855	Appdx. 3
September 8, 2006 Journal Entry of the Franklin County Court of Appeals in *Philip J. Charvat v. Thomas N. Ryan, D.D.S., et al.*, Case No. 05AP-1331	Appdx. 26
July 20, 2006 Judgment Entry of the Franklin County Court of Appeals in *Philip J. Charvat v. Thomas N. Ryan, D.D.S., et al.*, Case No. 05AP-1331	Appdx. 27
July 20, 2006 Opinion of the Franklin County Court of Appeals in *Philip J. Charvat v. Thomas N. Ryan, D.D.S., et al.*, Case No. 05AP-1331	Appdx. 28
December 8, 2005 "Entry" of the Franklin County Court of Common Pleas in *Philip J. Charvat v. Thomas N. Ryan, D.D.S., et al.*, Case No. 04CVH-01-0600	Appdx. 50
47 U.S.C. §227, *et seq.*	Appdx. 57
R.C. §1345.01, *et seq.*	Appdx. 66
47 U.S.C. §227(b)(1)(B)	Appdx. 69
47 C.F.R. §64.1200(b)	Appdx. 70
47 C.F.R. §64.1200(d)(4)	Appdx. 71
47 C.F.R. §64.1200(d)(1)	Appdx. 72
R.C. §1345.09(F)(2)	Appdx. 73
R.C. §1345.02(A)	Appdx. 74
47 U.S.C. §227(b)(3)	Appdx. 75
R.C. §1345.09	Appdx. 76
47 U.S.C. §227(b)	Appdx. 78
47 U.S.C. §227(b)(3)(C)	Appdx. 82

Charvat v. Colorado Prime (Sept. 17, 1998), Franklin App. No. 97APG09-1277, unreported Appdx. 83

47 U.S.C. §151, *et seq.* Appdx. 91

47 U.S.C. §312(f)(1) Appdx. 92

Hahn v. Doe (March 23, 1005), No. Franklin App. No. 94APE07-1024, unreported Appdx. 93

IN THE SUPREME COURT OF OHIO

PHILIP J. CHARVAT,	:	06-1647
Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
THOMAS N. RYAN, D.D.S., *et al.*,	:	Court of Appeals Case No. 05AP-1331
Appellees.	:	

NOTICE OF APPEAL OF APPELLANT PHILIP J. CHARVAT

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SUPREME COURT OF OHIO

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Notice of Appeal of Appellant Philip J. Charvat

Appellant Philip J. Charvat hereby gives notice of his appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 05AP-1331 on July 20, 2006.

This case raises a substantial legal question and is one of great public or general interest.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing document was served upon counsel of record for Defendants-Appellees, John C. McDonald and Stephen J. Smith, SCHOTTENSTEIN, ZOX & DUNN, P.O. Box 165020, 250 West Street, Columbus, Ohio 43216-5020 and Brian M. Zets, WAGENFELD LEVINE, 8000 Walton Parkway, Suite 200, Columbus, Ohio 43054, by regular first class U.S. Mail, this 1st day of September, 2006.

John W. Ferron, Esq. (0024532)

IN THE SUPREME COURT OF OHIO

PHILIP J. CHARVAT,	:	06-1855
Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
THOMAS N. RYAN, D.D.S., *et al.*,	:	Court of Appeals Case No. 05AP-1331
Appellees.	:	

NOTICE OF CERTIFIED CONFLICT BY APPELLANT PHILIP J. CHARVAT

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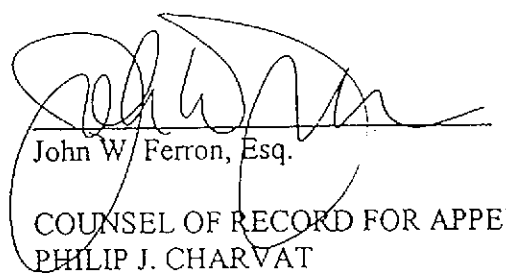
NOTICE OF CERTIFIED CONFLICT BY APPELLANT PHILIP J. CHARVAT

Appellant Philip J. Charvat hereby gives notice to the Supreme Court of Ohio that, in the above-captioned matter, the Franklin County Court of Appeals, Tenth Appellate District, has certified a conflict as to the following issue of law:

> "Whether a defendant "knowingly" violates Section 227(b), Title 47, U.S. Code, or the regulations promulgated thereunder, for purposes of awarding treble damages under Section 227(b)(3), where the plaintiff demonstrates that the defendant has knowledge of the facts constituting the offense; or whether the plaintiff must prove that the defendant knew when it placed the offending call that the call constituted a violation of the TCPA or any regulations promulgated thereunder."

A true and correct copy of the September 8, 2006 "Journal Entry" of the Franklin County Court of Appeals, Tenth Appellate District, certifying this conflict is attached hereto. In addition, the decisions in conflict, *Charvat v. Ryan*, 2006-Ohio-3705 and *Reichenbach v. Financial Freedom Centers, Inc.*, 2004-Ohio-6164, are attached hereto pursuant to S. Ct. Prac. R. IV.

Respectfully submitted,

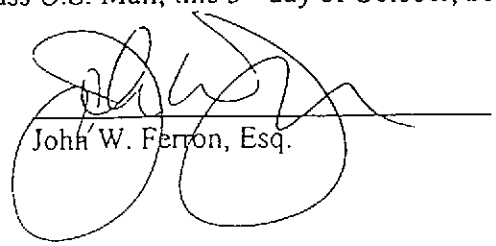


John W. Ferron, Esq.

COUNSEL OF RECORD FOR APPELLANT,
PHILIP J. CHARVAT

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing document was served upon counsel of record for Defendants-Appellees, John C. McDonald and Stephen J. Smith, SCHOTTENSTEIN, ZOX & DUNN, P.O. Box 165020, 250 West Street, Columbus, Ohio 43216-5020 and Brian M. Zets, WAGENFELD LEVINE, 8000 Walton Parkway, Suite 200, Columbus, Ohio 43054, by regular first class U.S. Mail, this 3rd day of October, 2006.



John W. Ferron, Esq.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Philip J. Charvat,	:	
Plaintiff-Appellant,	:	No. 05AP-1331
v.	:	(C.P.C. No. 04CV-600)
Thomas N. Ryan, D.D.S. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

JOURNAL ENTRY

For the reasons stated in the decision of this court rendered herein on September 7, 2006, appellant's motion for reconsideration is denied. It is the order of this court that the motion to certify the judgment of this court as being in conflict with the judgment of the Sixth Appellate District in *Reichenbach v. Financial Freedom Ctrs., Inc.*, 6th Dist. No. L-03-1357, 2004-Ohio-6164, is granted and, pursuant to Section 3(B)(4), Article IV, Ohio Constitution, the record of this case is certified to the Supreme Court of Ohio for review and final determination upon the following issue in conflict:

> Whether a defendant "knowingly" violates Section 227(b), Title 47, U.S.Code, or the regulations promulgated thereunder, for purposes of awarding treble damages under Section 227(b)(3), where the plaintiff demonstrates that the defendant had knowledge of the facts constituting the offense; or whether the plaintiff must prove that the defendant knew when it placed the offending call that the call constituted a violation of the TCPA or any regulations promulgated thereunder.

SADLER, PETREE & FRENCH, JJ.

Judge Lisa L. Sadler

ON COMPUTER 12

Philip J. Charvat, Plaintiff-Appellant, v. Thomas N. Ryan, D.D.S. et al., Defendants-Appellees.

No. 05AP-1331

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2006 Ohio 3705; 2006 Ohio App. LEXIS 3627

July 20, 2006, Rendered

SUBSEQUENT HISTORY: Reconsideration denied by, Motion granted by *Charvat v. Ryan, 2006 Ohio 4592, 2006 Ohio App. LEXIS 4537 (Ohio Ct. App., Franklin County, Sept. 7, 2006)*

PRIOR HISTORY: [**1] APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 04CV-600).

DISPOSITION: Judgment affirmed in part; reversed in part and cause remanded.

COUNSEL: Ferron & Associates, LPA, John W. Ferron, and Lisa A. Wafer, for appellant.

Schottenstein, Zox & Dunn, Brian M. Zets, John C. McDonald and Stephen J. Smith, for appellees.

JUDGES: SADLER, J. PETREE and FRENCH, JJ., concur.

OPINION BY: SADLER

OPINION:

(REGULAR CALENDAR)

SADLER, J.

[*P1] Plaintiff-appellant, Philip J. Charvat ("appellant"), appeals from the December 8, 2005 judgment of the Franklin County Court of Common Pleas in which that court granted summary judgment in favor of defendants-appellees, Thomas N. Ryan, D.D.S. and Thomas N. Ryan, D.D.S., Inc. ("appellees"), on certain of appellant's claims based on appellees' violation of the federal Telephone Consumer Protection Act ("TCPA") and alleged violation of Ohio's Consumer Sales Practices Act ("CSPA"), by making prerecorded voice message telemarketing calls to appellant's residence.

[*P2] The genesis of this case occurred on December 9, 2003, when appellees admittedly used automated dialing equipment and a prerecorded voice messaging system to place a telemarketing call to [**2] appellant's residential telephone number. On December 22, 2003, appellant sent appellees a letter demanding a copy of appellees' "Do Not Call Maintenance Policy." Appellees never responded to the letter. On January 20, 2004, appellant commenced this action.

[*P3] In his complaint, appellant alleges that appellees initiated the December 9, 2003 telephone call using automated equipment, that the call consisted of a prerecorded message re-

garding the opportunity to receive information about dental health and dental services, that appellees made the call for the purpose of soliciting business for appellees' dental practice, and that appellees made the call without first obtaining appellant's prior express consent. Appellant also alleges that the prerecorded message failed to contain, at the beginning of the message, a clear statement of the name of the sponsoring business and it failed to provide the telephone number or address of appellees' business. Appellant further alleges that appellees failed and refused to send appellant a copy of appellees' "Do Not Call Maintenance Policy" despite a request for same.

[*P4] Appellant's complaint contains claims under *Section 227(b), Title 47, U.S.Code* [**3] and seeks separate damages thereunder as follows: (1) $ 500 for the single instance of appellees' having called appellant with a prerecorded message without his prior express consent; (2) an additional $ 1,000 for having done so knowingly and willfully; (3) an additional $ 500 for having used a prerecorded message that did not disclose the name of the business making the call; (4) an additional $ 1,000 for having done so knowingly and willfully; (5) an additional $ 500 for having used a prerecorded message that did not state the telephone number or the address of the business making the call; (6) an additional $ 1,000 for having done so knowingly and willfully; (7) an additional $ 500 for having failed to send to appellant, upon request, a copy of appellees' "Do Not Call Maintenance Policy"; and (8) an additional $ 1,000 for having done so knowingly and willfully.

[*P5] Appellant's complaint also contains claims under the CSPA, which prohibits a supplier from committing "an unfair or deceptive act or practice in connection with a consumer transaction." *R.C. 1345.02(A)*. Appellant seeks separate damages under the CSPA as follows: (1) $ 200 for the single [**4] instance of appellees' having called appellant with a prerecorded message without his prior express consent; (2) an additional $ 200 for having used a prerecorded message that did not disclose the name of the business making the call; (3) an additional $ 200 for having used a prerecorded message that did not state the telephone number or the address of the business making the call; (4) an additional $ 200 for having failed to send to appellant, upon request, a copy of appellees' "Do Not Call Maintenance Policy"; and (5) an additional $ 200 for failing to state, at the beginning of the solicitation, that the purpose of the call was to make a sale. Appellant's complaint also seeks attorney fees, costs and a permanent injunction.

[*P6] In their motion for summary judgment, appellees admitted that they placed the telephone call subject of appellant's complaint, and further admitted that the call contained a prerecorded message, was made to appellant's home telephone line, was placed without appellant's prior express consent, was placed for the purpose of selling goods and services, was placed using automated telephone dialing equipment, was made for commercial purposes, failed to [**5] clearly state the name of the business at the beginning of the message, failed to provide the telephone number and address of the business, was used to find new patients, was made with the intent to make a profit, and was made knowingly and purposely. They further admitted that they failed to send a "Do Not Call Maintenance Policy" to appellant because they did not have such a policy in place.

[*P7] Appellees argued, however, that appellant's recovery based upon the telephone call is limited to a total of $ 500 because he may only recover the TCPA's statutory damage amount on a per-call basis. They argued that he may not recover a separate award of $ 500 for each and every individual statutory violation occasioned by the manner in which the single telephone call was placed. Appellees also argued that their conduct was not so egregious as to warrant imposition of treble damages under

the TCPA. Finally, appellees argued that they are exempt from the requirements of the CSPA and, as such, appellant's claims under that statute should be dismissed.

[*P8] The trial court awarded appellant $ 500 in statutory damages for appellees' failure to provide a copy of a "Do Not Call Maintenance [**6] Policy" upon request, because this is a violation of the TCPA that is separate and distinct from appellees' offending telephone call. *Reichenbach v. Chung Holdings LLC (2004), 159 Ohio App.3d 79, 2004 Ohio 5899, 823 N.E.2d 29, P55.*

[*P9] However, the court determined that damages under *Section 227(b)(3), Title 47, U.S.Code* are available only on a per-call basis and not for each individual statutory violation occasioned by the single call. Thus, the court ruled that appellant is limited to a single $ 500 award of damages based on appellees' violation of *Section 227(b)(1)(B), Title 47, U.S.Code.*

[*P10] The court declined to award treble damages under the TCPA, finding that appellees did not act with the requisite mental state. In fact, the court said, "it is hard to conceive of a situation less appropriate for treble damages [than the one in this case.]" (Entry Granting Defendants' Motion for Summary Judgment, at 5.)

[*P11] The court disagreed with appellees on the CSPA claim, finding that appellant is entitled to recovery thereunder. However, because the court found that appellees' call constituted only [**7] one violation of the TCPA for which appellant was entitled to damages, it found that the call constituted only a single violation of the CSPA. Accordingly, the court awarded appellant $ 200 on that claim. Finally, the court declined to award attorney fees.

[*P12] Appellant timely appealed and advances the following eight assignments of error for our review, as follows:

Assignment of Error No. 1:

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM THAT DEFENDANTS KNOWINGLY VIOLATED THE *TELEPHONE CONSUMER PROTECTION ACT* BY INITIATING A PRERECORDED VOICE MESSAGE TELEMARKETING CALL TO PLAINTIFF'S RESIDENCE WITHOUT VOLUNTARILY PROVIDING THE NAME OF THE INDIVIDUAL OR ENTITY MAKING THE CALL.

Assignment of Error No. 2:

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM THAT DEFENDANTS KNOWINGLY VIOLATED THE *TELEPHONE CONSUMER PROTECTION ACT* BY INITIATING A PRERECORDED VOICE MESSAGE TELEMARKETING CALL TO PLAINTIFF'S RESIDENCE WITHOUT VOLUNTARILY PROVIDING THE TELEPHONE NUMBER OR ADDRESS OF THE INDIVIDUAL OR ENTITY MAKING THE CALL.

Assignment of Error No. 3:

THE [**8] TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM FOR

TREBLE DAMAGES ON EACH OF HIS CLAIMS UNDER THE *TELEPHONE CONSUMER PROTECTION ACT.*

Assignment of Error No. 4:

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM THAT DEFENDANTS KNOWINGLY VIOLATED THE CONSUMER SALES PRACTICES ACT BY INITIATING A PRERECORDED ADVERTISING CALL TO PLAINTIFF'S RESIDENCE WITHOUT VOLUNTARILY IDENTIFYING THE INDIVIDUAL OR ENTITY MAKING THE CALL.

Assignment of Error No. 5:

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM THAT DEFENDANTS KNOWINGLY VIOLATED THE CONSUMER SALES PRACTICES ACT BY INITIATING A PRERECORDED ADVERTISING CALL TO PLAINTIFF'S RESIDENCE WITHOUT VOLUNTARILY PROVIDING THE TELEPHONE NUMBER OR ADDRESS OF THE INDIVIDUAL OR BUSINESS MAKING THE CALL.

Assignment of Error No. 6:

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM THAT DEFENDANTS KNOWINGLY VIOLATED THE CONSUMER SALES PRACTICES ACT BY INITIATING A PRERECORDED ADVERTISING CALL TO PLAINTIFF'S RESIDENCE THAT DID NOT STATE, [**9] AT THE BEGINNING OF THE CALL, THAT THE PURPOSE OF THE CALL WAS TO MAKE A SALE.

Assignment of Error No. 7:

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM THAT DEFENDANTS KNOWINGLY VIOLATED THE CONSUMER SALES PRACTICES ACT BY FAILING TO SEND PLAINTIFF A COPY OF DEFENDANT'S DO NOT CALL MAINTENANCE POLICY UPON PLAINTIFF'S DEMAND.

Assignment of Error No. 8:

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM FOR ATTORNEYS' FEES UNDER THE CONSUMER SALES PRACTICES ACT BECAUSE DEFENDANT'S VIOLATIONS OF THE CONSUMER SALES PRACTICES ACT WERE ALL KNOWING VIOLATIONS.

[*P13] We begin by recalling the standard of review applicable in an appeal from a grant of summary judgment. We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker (1995), 101 Ohio App.3d 38, 654 N.E.2d 1327.* Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, [**10] and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the nonmoving party. *Civ.R. 56(C); State ex rel. Grady v. State Emp. Rels. Bd. (1997), 78 Ohio St.3d 181, 183, 1997 Ohio 221, 677 N.E.2d 343.* We construe the facts gleaned from the record in a light most favorable to appellant, as is appropriate on review of a summary judgment. We review questions of law de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm (1995), 73 Ohio St.3d 107, 108, 1995 Ohio 214, 652 N.E.2d 684*, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm. (1992), 64 Ohio St.3d 145, 147, 593 N.E.2d 286.*

[*P14] In appellant's first and second assignments of error he argues that the trial court erred when it determined that statutory damages under *Section 227(b)(3), Title 47, U.S.Code* are available on a per-call basis only, and additional statutory penalties are not available separately for each violation of a regulation promulgated thereunder, even where - as here - the offending call violated more than one such regulation.

[*P15] The TCPA, [**11] at *Section 227(b)(1)(B), Title 47, U.S.Code* provides, "[i]t shall be unlawful for any person within the United States * * * to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party * * *." *Section 227(b)(3), Title 47, U.S.Code* provides:

> (3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--
>
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.
>
> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) [**12] of this paragraph.

[*P16] The regulations promulgated pursuant to *Section 227(b)(3), Title 47, U.S.Code* are located at *Section 64.1200, Title 47, C.F.R.* The version of those regulations applicable to appellees' telephone call to appellant provides, in relevant part:

> (a) No person or entity may * * *
>
> (2) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver

a message without the prior express consent of the called party[.]

* * *

(b) All artificial or prerecorded telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated, and

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. [**13]

* * *

(d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(1) Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

[*P17] Appellant argues that the language in *Section 227(b)(3), Title 47, U.S.Code*, which establishes a private right of action "based on a violation of this subsection or the regulations prescribed thereunder * * *," clearly reveals that Congress intended to confer the right to bring a separate cause of action for each and every regulation violated by a single telephone call.

[*P18] Appellees argue, however, that this court rejected the very same argument in the case of *Charvat v. Colorado Prime (Sept. 17, 1998), 10th Dist. No. 97APG09-1277, 1998 Ohio App. LEXIS 4292. Colorado Prime* involved *Section 227(c)(5), Title 47, U.S.Code* [**14] , which provides, in pertinent part:

> A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in the appropriate court of that State - -
>
> (A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive up to $ 500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.

[*P19] In that case, the plaintiff argued that the phrase "for each such violation" in *subparagraph (B)* referred to the language "in violation of the regulations prescribed under this subsection." The defendant argued that the

phrase "for each such violation" referred to "telephone call." The court determined:

> * * * the language at issue is amenable to more than one interpretation. * * * "Such" could be argued to refer to the entire noun phrase "telephone call within any 12-month period by or on behalf of the same entity in [**15] violation of the regulations prescribed under this subsection" or, alternatively, to the prepositional phrase "in violation of the regulations" contained within the noun phrase.

*Colorado Prime, 1998 Ohio App. LEXIS 4292, at *12.*

[*P20] Because the court found that the language in the relevant statutory provision was ambiguous, it looked to the purpose of the provision, which "is to prevent repeated telemarketing calls to a person who has asked the telemarketer to stop calling[.]" *1998 Ohio App. LEXIS at *12-13.* Based on the fact that the regulations serve that statutory purpose - that is, to prevent *calls* after the consumer has requested that they cease - the court found that "such" refers to the telephone *calls* themselves, not to violations of the regulations occasioned by such calls. Appellees argue that the same reasoning applies in this case because the purpose of *Section 227(b), Title 47, U.S.Code* is to limit unwanted *calls* containing prerecorded messages.

[*P21] In reply, however, appellant points out that the language of *Section 227(b)(3), Title 47, U.S.Code* is different from that which this court [**16] found ambiguous in *Section 227(c)(5), Title 47, U.S.Code* in *Colorado Prime.* It cannot be ignored, he argues, that unlike the statutory language in *Colorado Prime*, the language at issue in this case does not even contain the word "call." He argues that the ambiguity that exists in *subparagraph (c)(5)* of the statute does not exist in *subparagraph (b)(3).* We agree.

[*P22] *Subparagraph (b)(3)* provides for two types of actions: actions for injunctive relief and actions for damages. A plaintiff may elect to pursue one or the other or both. *Section 227(b)(3)(C), Title 47, U.S.Code.* For ease of discussion and to assist the reader, let us again reprint the pertinent language:

> (3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--
>
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or
>
> (C) [**17] both such actions.

[*P23] We observe that the initial sentence of *subparagraph (b)(3)* contains neither the word "call" nor the word "violation." *Section (A)* provides for an action for injunctive relief "based on a violation of this subsection" ***or*** "the regulations prescribed under this subsection[.]" Thus, an action for injunctive relief may be based upon a violation of *subsection (b)* itself, which prohibits persons from "initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party," ***or*** an action for injunctive relief may be based upon a violation

of the regulations prescribed under *subsection (b)*, which are the various rules contained in *Section 64.1200, Title 47, C.F.R.*

[*P24] *Section (B)* goes on to provide for an action for statutory damages "for each such violation[.]" The phrase "such violation" clearly refers to both "a violation of this subsection" and "[a violation] of the regulations prescribed under this subsection" in *Section (A)*. Thus, monetary damages are recoverable for both types [**18] of violations for which injunctive relief is available, to wit: violation of *subsection (b)* and violation of any of the regulations promulgated thereunder. The language unambiguously allows the plaintiff to seek damages based upon a violation of the subsection itself, which violation occurs when a call containing a prerecorded message is made without the plaintiff's prior express consent, or based upon a violation of one of the regulations prescribing the content of prerecorded telemarketing calls, which violation occurs when the call fails to contain certain specific information.

[*P25] This allows a plaintiff to pursue statutory damages as a remedy for two separate wrongs: first, the intrusion caused by a telemarketing call that delivers a message using an artificial or prerecorded voice without the plaintiff's prior express consent; and second, the impediment to the plaintiff availing him- or herself of other rights conferred by the TCPA, e.g., the right to request a copy of the caller's "Do Not Call Maintenance Policy" or to request that the caller place the recipient on the caller's "Do Not Call" list. This second wrong is caused when the caller omits to include within [**19] the prerecorded message information regarding the caller's identity and the manner in which the caller may be contacted. Such omissions can significantly impair or altogether thwart the called party's efforts to stop future unwanted calls.

[*P26] If a caller violates the subsection but includes all of the required identity and contact information in its message, then the called party may only pursue statutory remedies based upon violation of the subsection. If, on the other hand, the caller not only violates the subsection by placing the call, but also impedes further enforcement of the called party's rights under the TCPA by failing to include within the message the contact information required by the regulations promulgated under the subsection, then the called party may elect to pursue statutory remedies based upon violations of the regulations as well.

[*P27] These are precisely the facts of the instant case. It is undisputed that appellees violated *subsection (b)* by placing the December 9, 2003 call to appellant. It is also undisputed that the prerecorded message delivered by that call failed to contain the name of the caller and failed to contain the telephone number [**20] or address of the caller. These facts alone do not warrant multiple awards of statutory damages. It is significant that appellant's complaint specifically sets forth separate claims for damages for the violation of *subsection (b)* - the call - and for each violation of a regulation that was occasioned by that call. The complaint also contains factual allegations supporting each claim. Under these circumstances, appellant is entitled, pursuant to *Section 227(b)(3), Title 47, U.S.Code*, to "$ 500 in damages for each such violation[.]"

[*P28] Thus, appellant is entitled to an award for appellees' violation of *Section 227(b)(1)(B), Title 47, U.S.Code*, delivery of a message using an artificial or prerecorded voice without the plaintiff's prior express consent; another award for violation of *Section 64.1200(b)(1), Title 47, C.F.R.*, delivery of an artificial or prerecorded telephone message that does not, at the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call; another award for violation of *Section 64.1200(b)(2), Title 47, C.F.R.* [**21] , delivery of an artificial or prerecorded telephone message that does not state clearly the tele-

phone number of such business, other entity, or individual; and another award for violation of *Section 64.1200(d)(1), Title 47, C.F.R.*, failure to have a written policy, available upon demand, for maintaining a "Do Not Call list." Appellant is entitled to an aggregate award under the TCPA of $ 2,000. When the trial court refused to award more than $ 500 for violations occasioned by the violative call, based on a contrary interpretation of the language of *Section 227(b)(3), Title 47, U.S.Code*, and granted summary judgment in favor of appellees on this issue, this was error. For these reasons, appellant's first and second assignments of error are sustained.

[*P29] In his third assignment of error, appellant argues that the trial court erred when it refused to award treble damages on each of his TCPA claims. Pursuant to *Section 227(b)(3), Title 47, U.S.Code*, if the court finds that the defendant willfully or knowingly violated *subsection (b)* or the regulations prescribed thereunder, the court "may, in its discretion" [**22] increase the award to an amount equal to no more than three times the statutory amount.

[*P30] The plain language of *Section 227(b)(3), Title 47, U.S.Code*, vests the trial court with discretion to determine whether the defendant willfully or knowingly violated the subsection. Therefore, the court's decision in that regard will not be reversed absent an abuse of discretion. The term abuse of discretion connotes more than an error of law or judgment; it implies the court's attitude was arbitrary, unreasonable, or unconscionable. *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs. (1995), 72 Ohio St.3d 464, 465, 1995 Ohio 49, 650 N.E.2d 1343.*

[*P31] In the present case the trial court declined to increase appellant's award. It based its decision on language from this court's opinion in *Colorado Prime*, in which we stated:

> [T]o knowingly violate the *regulations* as required by *Section 227(c)(5), Title 47, U.S.Code*, a defendant must do more than make a telephone call. A defendant must affirmatively know it is violating a *regulation* when making the telephone call -- -- for purposes of the treble damages [**23] provision. Furthermore, this court finds no congressional intent indicating that knowingly should be interpreted to encompass "should have known" and finds that this interpretation would be inconsistent with the plain meaning of knowingly.

*Charvat v. Colorado Prime (Sept. 17, 1998), 10th Dist. No. 97APG09-1277, 1998 Ohio App. LEXIS 4292, at *10-11.* (Emphasis sic.)

[*P32] The trial court found that the foregoing language requires "a culpable state of mind" and that "[t]he pleadings are void (sic) of any allegation that the Defendant acted with a culpable state of mind." The court went on to conclude that, "[t]he Defendant, a dentist engaged in the profession of providing dental services, made one telephone call to the Plaintiff, which was not a knowing and willful violation of the law; therefore, treble damages are not warranted." (Entry Granting Defendants' Motion for Summary Judgment, at 5.)

[*P33] Appellant urges us to follow the case of *Reichenbach v. Financial Freedom Ctrs., Inc., 6th Dist. No. L-03-1357, 2004 Ohio 6164.* That case also involved TCPA violations through the use of prerecorded messages. The *Reichenbach* [**24] court explicitly rejected application of this court's *Colorado Prime* standard for determining willfulness. The court distinguished *Colorado Prime*, which involved a portion of the statute under which more than one telephone call is required to establish a

TCPA violation, from cases involving prerecorded messages, in which a cause of action can accrue after only one prerecorded message has been sent.

[*P34] The *Reichenbach* court explained that where a violation can occur with the sending of a single prerecorded message, "[p]resumably, such a violation could arise without the sender's knowledge, because *subsection (b)* contains no provision for the implementation of 'reasonable practices and procedures' to avoid violating the statutory restrictions on pre-recorded telephone calls [like the requirement that telemarketers employ a Do Not Call Maintenance Policy]." *Id. at P40.* The court went on to conclude, "[t]he fact that the threshold for a violation under *subsection (b)* is so low, coupled with the lack of an affirmative defense and the provision that both 'willful' and 'knowing' violations can result in an award of treble damages, leads to the conclusion that [**25] the definition of 'knowingly,' as articulated in *Bryan [v. United States (1998), 524 U.S. 184, 118 S. Ct. 1939, 141 L. Ed. 2d 197]* is more applicable in this context." Ibid. In *Bryan*, the United States Supreme Court determined that, in contrast to a "willful" violation, which requires a culpable state of mind, "the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." *Bryan, supra, at 193.*

[*P35] We decline appellant's invitation to reject our own precedent in favor of the reasoning employed in *Reichenbach*. We are unconvinced that the standard articulated in *Colorado Prime* should be applied only in cases involving *Section 227(c)(5), Title 47, U.S.Code*. Applying the *Colorado Prime* standard for willfulness to this case, we fail to perceive an abuse of discretion in the trial court's finding that the violation of subsection (b) was not willful. However, because the trial court did not find that appellees' violations of *Section 64.1200(b)(1)* and *(2), Title 47, C.F.R.*, constituted separate "violations" for purposes of awarding statutory damages, it did not consider [**26] whether or not those violations were "willful." On remand, the trial court must explicitly set forth its findings as to whether appellees willfully or knowingly violated the regulations prescribed under subsection (b), with respect to each of the violations identified herein as a basis for a separate award of damages, including violation of *Section 64.1200(d)(1), Title 47, C.F.R.* Accordingly, appellant's third assignment of error is sustained in part and overruled in part.

[*P36] In appellant's fourth, fifth, and seventh assignments of error, he argues that each and every separate violation of the TCPA constitutes a separate violation of the CSPA, and the trial court erred in finding the existence of only one CSPA violation and awarding statutory damages therefor in the amount of $ 200.

[*P37] Appellant directs our attention to the case of *Crye v. Smolak (1996), 110 Ohio App.3d 504, 674 N.E.2d 779*, in which this court noted that the majority of Ohio courts have found that where separate acts result in violations of multiple rules promulgated under the CSPA, the consumer is entitled to $ 200 per violation. *Id. at 512.* [**27] Appellant argues that this result is consistent with the notion that "[t]he [CSPA] is a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed pursuant to *R.C. § 1.11*." *Einhorn v. Ford Motor Co. (1990), 48 Ohio St.3d 27, 29, 548 N.E.2d 933.*

[*P38] Appellees argue that even if their single telephone call constitutes multiple violations of the TCPA, the trial court has discretion to determine that because these violations emanate from the same "transaction" they constitute only one violation of the CSPA. Appellees point out that the *Crye* court also said that the general rule of awarding $ 200 per violation does not preclude a court from finding that when multiple violations of the CSPA emanate

from the same transaction, only $ 200 should be awarded.

[*P39] We begin by observing that under the CSPA, "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction." *R.C. 1345.02(A)* [**28] . A "consumer transaction" is defined, for purposes of the CSPA, as "a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, *or solicitation to supply any of these things*." *R.C. 1345.01(A)*. (Emphasis added.) Under this definition, appellees' TCPA violations constitute violations of the CSPA because the violations arose out of a solicitation to an individual for the sale of dental services, which are services that are primarily for personal, family or household purposes.

[*P40] We also observe that in the cases cited by appellees in which courts have held it appropriate to impose only a single CSPA damage award for multiple CSPA rule violations emanating from the same transaction, the courts found that the rules violated were similar in that they were directed at preventing the same harm, and/or that the defendant's acts or omissions had in fact resulted in only one injury. See, e.g., *Couto v. Gibson (Feb. 26, 1992), 4th Dist. No. 1475, 1992 Ohio App. LEXIS 756*; *Buchanan v. Stiving (Apr. 25, 1994), 5th Dist. No. 93-CA-75, 1994 Ohio App. LEXIS 2207*. [**29] Where, however, multiple TCPA violations arise from dissimilar rules directed to preventing distinct harms, and where such violations indeed result in multiple harms, separate CSPA damage awards should be made for each TCPA violation.

[*P41] In the present case, appellant argues in his fourth, fifth and seventh assignments of error, respectively, that appellees' violations of *Section 64.1200(b)(1)* and *(2), Title 47, C.F.R.* and *Section 64.1200(d)(1), Title 47, C.F.R.*, each constitute a separate violation of *R.C. 1345.02(A)*. We agree that appellees' violations of *Section 64.1200(b)(1)* and *(2), Title 47, C.F.R.*, caused a separate and distinct injury from that caused by the placement of the call itself, in violation of *Section 227(b), Title 47, U.S.Code*. Thus, appellant is entitled to a CSPA-based damage award in addition to that which the trial court awarded for the TCPA violation occasioned by placement of the call.

[*P42] However, *Section 64.1200(b)(1)* and *(2), Title 47, C.F.R.*, are both directed at preventing the same harm, to wit: rendering the called party without means to contact the caller in [**30] order to stop future violative calls; moreover, appellees' violations of these two regulations in fact caused a single injury. Thus, appellant is entitled to only one CSPA-based award of damages for these two violations.

[*P43] Finally, we agree with appellant that violation of *Section 64.1200(d)(1), Title 47, C.F.R.*, constitutes the violation of a separate regulation whose purpose is distinct from that of *Section 64.1200(b)(1)* and *(2), Title 47, C.F.R.* We also agree that appellees' violation of *Section 64.1200(d)(1), Title 47, C.F.R.*, caused a separate and distinct harm. Thus, appellant is entitled to a separate damage award under the CSPA based on this TCPA violation. In sum, we hold that appellant is entitled to a total of three CSPA awards of $ 200 each: one award for appellees' violation of *Section 227(b), Title 47, U.S.Code*, one award for appellees' violations of *Section 64.1200(b)(1)* and *(2), Title 47, C.F.R.*, and one award for appellees' violation of *Section 64.1200(d)(1), Title 47, C.F.R.*

[*P44] For the foregoing reasons, then, appellant's fourth and fifth assignments [**31] of error are sustained in part and overruled in part, and his seventh assignment of error is sustained.

[*P45] In his sixth assignment of error appellant argues that appellees' failure to state, at the beginning of the call, that the purpose of the call was to make a sale constituted a violation of *Ohio Adm.Code 109:4-3-11(A)(3)* and *(4)*. But a review of the record reveals that the trial court never passed upon that issue.

[*P46] Appellant's complaint alleges that appellees failed to state, at the beginning of the call, that the purpose of the call was to make a sale (Complaint, at P58), but appellees specifically denied this allegation. (Answer, at P3.) When appellees sought summary judgment on appellant's CSPA claims, the sole basis therefor was that appellees are exempt from the provisions of the CSPA. Thus, when the trial court entered summary judgment it was never presented with, and never passed upon, the question whether genuine issues of fact exist as to whether appellees' December 9, 2003 telephone call, in fact failed to state, at the beginning of the call, that the purpose of the call was to make as sale. Moreover, the trial court [**32] also did not decide the issue of whether this would constitute a violation of the CSPA.

[*P47] "It is axiomatic that issues not passed upon in the court below are not properly before an appellate court on appeal." *Logan v. Liquor Control Comm. (Aug. 11, 1994), 10th Dist. No. 93APE12-1744, 1994 Ohio App. LEXIS 3525, at *4*, citing *Moats v. Metropolitan Bank of Lima (1974), 40 Ohio St.2d 47, 49-50, 69 Ohio Op. 2d 323, 319 N.E.2d 603*. See, also, *State ex rel. Quarto Mining Co. v. Foreman (1997), 79 Ohio St. 3d 78, 81, 1997 Ohio 71, 679 N.E.2d 706*. Accordingly, we decline to address appellant's sixth assignment of error.

[*P48] In appellant's eighth and final assignment of error he argues that the trial court erred in granting appellees' motion for summary judgment with respect to appellant's claim for attorney fees under the CSPA.

[*P49] "Pursuant to *R.C. 1345.09(F)(2)*, a trial court may award a consumer reasonable attorney fees when a supplier in a consumer transaction intentionally committed an act or practice which is deceptive, unfair or unconscionable." *Einhorn v. Ford Motor Co. (1990), 48 Ohio St.3d 27, 548 N.E.2d 933, syllabus* [**33] .

[*P50] Appellant argues that because appellees have admitted that they "knowingly" and "purposely" called appellant with a prerecorded message (Answer, at 1), the trial court erred in refusing to award appellant attorney fees. Appellee argues that even if it knowingly and purposely, or, in the verbiage employed in *Einhorn*, "intentionally" committed a violation of the CSPA, the matter of attorney fees is still committed to the sound discretion of the trial court, and the trial court in the present case did not abuse its discretion. We agree.

[*P51] In the recent case of *Pep Boys - Manny, Moe & Jack of Delaware, Inc. v. Vaughn, 10th Dist. No. 04AP-1221, 2006 Ohio 698*, we held, "[t]he decision to grant or deny attorney fees under *R.C. 1345.09(F)* is discretionary. Thus, an appellate court will not disturb the trial court's decision to grant attorney fees absent an abuse of discretion." *Id. at P32*. (Citations omitted.) As we noted earlier, the term abuse of discretion connotes more than an error of law or judgment; it implies the court's attitude was arbitrary, unreasonable, or unconscionable. *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs. (1995), 72 Ohio St.3d 464, 465, 1995 Ohio 49, 650 N.E.2d 1343*. [**34] We do not perceive an abuse of discretion in the trial court's denial of attorney fees in this case. Accordingly, appellant's eighth assignment of error is overruled.

[*P52] In summary, appellant's first, second and seventh assignments of error are sustained, his third, fourth and fifth assignments of error are sustained in part and overruled in part, and his sixth and eighth assignments of error are overruled. The judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this cause is

hereby remanded to that court for further proceedings consistent with law and with this opinion.

Judgment affirmed in part; reversed in part and cause remanded.

PETREE and FRENCH, JJ., concur.

Gregory Reichenbach, Appellant v. Financial Freedom Centers, Inc., Appellee

Court of Appeals No. L-03-1357

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

2004 Ohio 6164; 2004 Ohio App. LEXIS 5622

November 19, 2004, Decided

PRIOR HISTORY: [**1] Trial Court No. CVF-02-23924.

DISPOSITION: JUDGMENT AFFIRMED IN PART AND REVERSED IN PART.

COUNSEL: Gregory S. Reichenbach, Pro se.

JUDGES: Richard W. Knepper, J. Mark L. Pietrykowski, J., Arlene Singer, J., CONCUR.

OPINION BY: Richard W. Knepper

OPINION:

DECISION AND JUDGMENT ENTRY

KNEPPER, J.

[*P1] This is an accelerated appeal from a judgment of the Toledo Municipal Court, in which the trial court granted a motion for partial summary judgment filed by appellant, Gregory Reichenbach, but denied his request for damages pursuant to the federal *Telephone Consumer Protection Act* and Ohio's *Consumer Sales Practices Act*.

[*P2] Appellant sets forth the following two assignments of error on appeal:

[*P3] "First Assignment of Error

[*P4] "The trial court erred to the prejudice of Plaintiff-Appellant by refusing to award Plaintiff-Appellant the statutory damages to which he was entitled because Defendant-Appellee made a pre-recorded or automated telephone call to Plaintiff-Appellant in violation of the *Telephone Consumer Protection Act*.

[*P5] "Second Assignment of Error

[*P6] "The trial court erred to the prejudice of Plaintiff-Appellant by refusing to consider awarding [**2] Plaintiff-Appellant treble statutory damages, even though Defendant-Appellee 'knowingly' violated the *Telephone Consumer Protection Act*."

[*P7] Appellee, Financial Freedom Centers, Inc., has not filed an appellate brief. Accordingly, pursuant to *App.R. 18(C)*, the following undisputed facts were taken from the record and, where applicable, appellant's statement of facts.

[*P8] On July 23, 2002, appellant received a pre-recorded message from appellee on his home telephone, advertising a debt elimination program. The pre-recorded message was sent on appellee's behalf by Global Broadcast Solutions, LLC ("Global"). After listening to the message, appellant contacted appellee by telephone and by letter, demanding that he be placed on appellee's "do not call" list. In the

letter, appellant also asked for a printed copy of appellee's "do not call" policy.

[*P9] On December 19, 2002, appellant filed a complaint in Toledo Municipal Court, Small Claims Division, in which he alleged that appellee's pre-recorded message was sent in violation of the federal *Telephone Consumer Protection Act* ("TCPA"), specifically, *47 U.S.C. § 227(b)* and *47 C.F.R. § 64.1200*, [**3] and Ohio's Consumer Sales Protection Act ("OCSPA"), *R.C. 1345.01, et seq.* Accordingly, appellant asked the trial court to grant him statutory damages pursuant to both federal and state law and, in the court's discretion, treble damages as allowed under the TCPA.

[*P10] Appellee filed an answer on January 16, 2003, in which it denied liability under both federal law and Ohio law. In support of its answer, appellee filed the affidavit of its vice-president, Timothy Schnelle. A trial was scheduled for July 2, 2003; however, appellee did not appear for trial. On July 28, 2003, appellee's attorney filed a motion to withdraw as counsel, which was granted on July 30, 2003.

[*P11] On September 25, 2003, appellant filed a motion for partial summary judgment and a memorandum in support, in which he asserted that, as a matter of law, appellee violated both the TCPA and the OCSPA by sending him an unsolicited, pre-recorded message, and by failing to send him a copy of appellee's "do not call" policy upon request. Attached to appellant's motion was a transcription of the text of the pre-recorded message, appellant's own affidavit, and the affidavit of Timothy Schnelle.

[*P12] [**4] Appellant stated in his affidavit that, after receiving the pre-recorded message, he telephoned appellee and was told that appellee was offering to sell him a service provided by another company, "Moneytek Corporation." Appellant stated that he did not "authorize, nor give consent, nor invite the phone call * * * on July 23, 2002." Appellant also stated in his affidavit that Global only broadcasts pre-recorded messages for its clients, including appellee. Finally, appellant stated that appellee failed to send him a copy of its "do not call" policy in response to his written request.

[*P13] The text of the transcribed pre-recorded message sent to appellant was as follows:

[*P14] "Hi. this is Lisa from Financial Freedom Centers 1-800-335-4991 extension 1. Sorry to miss you at home. Great news. You can cut your monthly credit card payments by up to half. You've been pre-approved for our non-profit consumer debt elimination program. This is not a loan. It can help you cut your payments, save you money before the next billing cycle. For free advice, give me a call before 9 pm. Again, my name's Lisa 1-800-335-4991 extension 1. Check us out at eliminate debt dot com."

[*P15] [**5] Schnelle stated in his affidavit that the above-quoted message n1 was sent by Global on behalf of appellee, which offers a debt-elimination program provided by Moneytek Human Services, Inc. Schnelle further stated that Moneytek Human Services, Inc. is a non-profit entity and therefore, in his opinion, the call was permitted under both federal law and the OCSPA.

n1 Schnelle did not directly admit in his affidavit that the message sent to appellant was pre-recorded. He did, however, admit that the message was sent by Global. Appellee has produced no evidence to dispute appellant's claim that Global only sends out pre-recorded messages on behalf of its clients.

[*P16] Appellee did not file a response to appellant's partial summary judgment motion, which was summarily granted by the trial court on November 6, 2003. On November 24, 2003, a hearing was held on the issue of damages, at

which only appellant appeared. Appellant argued at the hearing that appellee violated the TCPA, first by causing the pre-recorded [**6] message to be sent, and also by not providing him with a copy of its "do not call" policy upon request. Similarly, appellant argued that appellee's actions resulted in two violations of Ohio's consumer protection law. Accordingly, appellant argued that he was entitled to receive up to $500 for each of appellee's two violations of the TCPA, and $200 for each violation of the OCSPA. Appellant also asserted that his was entitled to an award of treble damages, or $3,000, under the federal statute because appellee "knowingly" violated federal law.

[*P17] On November 25, 2003, the trial court filed a judgment entry in which it found that, although appellant was entitled to partial summary judgment by default, he had no cause of action for damages under either the TCPA or the OCSPA. Specifically, the trial court found that appellee's July 23, 2002 pre-recorded telephone call did not violate *47 U.S.C. § 227* or *R.C. 1345.01, et seq.*, since appellant only received one telephone call. In addition, the trial court found that appellant had no cause of action for failure to provide a copy of its "do not call" policy, because appellee provided appellant with a written [**7] copy of the policy through discovery. The trial court further found that the pre-recorded message was not "unfair" or "deceptive" and, therefore, did not violate the OCSPA. Finally, the trial court found that appellee did not "knowingly" violate federal law by sending appellant the message and, therefore, appellant was not entitled to treble damages. A timely appeal was filed from the trial court's judgment.

[*P18] On appeal, appellant asserts in his first assignment of error that the trial court erred by finding that he had no cause of action under the TCPA. n2 In support thereof, appellant argues that a cause of action can arise under the TCPA, even if only one pre-recorded telephone call is made in violation of the law.

n2 Appellant does not argue on appeal that the trial court erred when it found that he cannot recover damages for appellee's alleged failure to provide a written copy of its do-not-call policy, or by finding that he has no cause of action against appellee under the Ohio law. Accordingly, those issues will not be considered by this court.

[**8]

[*P19] We note at the outset that an appellate court reviews a trial court's granting of summary judgment de novo, applying the same standard used by the trial court. *Lorain Natl. Bank v. Saratoga Apts. (1989), 61 Ohio App. 3d 127, 129, 572 N.E.2d 198*; *Grafton v. Ohio Edison Co. (1996), 77 Ohio St. 3d 102, 105, 1996 Ohio 336, 671 N.E.2d 241.* Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Civ.R. 56(C).*

[*P20] Restrictions on the use of automated telephone equipment are governed by *47 U.S.C.A. § 227(b)(1)(B)*, which states that it is unlawful for any person within the United States "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under *paragraph (2)(B)*; * * *." *Id. Paragraph (2)(B)* states, in pertinent part, that exemptions [**9] apply for telephone calls that are: (1) "not made for a commercial purpose"; and (2) if made for a commercial purpose, "will not adversely affect the privacy rights that this section is intended to protect; and * * * do not include the transmission of

unsolicited advertisement * * *." *47 U.S.C.A. § 227 (b)(2)(B)(ii)(I)* and *(II)*.

[*P21] In addition to the above-stated exemptions, federal regulations promulgated pursuant to *47 U.S.C.A. § 227* state, in relevant part, that:

[*P22] "the term 'telephone call' * * * shall not include a call or message by, or on behalf of, a caller:

[*P23] "(1) That is not made for a commercial purpose,

[*P24] "(2) That is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,

[*P25] "(3) To any person with whom the caller has an established business relationship at the time the call is made, or

[*P26] "(4) Which is a tax-exempt nonprofit organization." *47 C.F.R. § 64.1200(c)*.

[*P27] Pursuant to *47 U.S.C.A. § 227(b)(3)(B)*, any person may bring an action in an appropriate state court for violations of [**10] the TCPA or the regulations promulgated thereunder, "to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater * * *."

[*P28] In this case, the trial court found that appellant had no cause of action under the TCPA, because the pre-recorded message he received was not made in violation of *47 U.S.C.A. § 227(d)(3)(A)* n3, and because appellant received only one pre-recorded telephone call. The trial court's reasoning is flawed, for several reasons.

N3 The applicable statutory provision is found at *47 U.S.C.A. § 227(d)(3)(A)*, and shall be so referenced in this opinion.

[*P29] First, compliance with *47 U.S.C.A. § 227(d)(3)(A)* is not sufficient to relieve appellee of liability, since that subsection addresses only the technical and procedural standards for the use of automated telephone equipment. It does not govern when or to whom such calls may be made. Second, [**11] *47 U.S.C.A. § 227(b)(1)(B)* prohibits the initiation of *any* telephone call under prohibited circumstances. Similarly, the private cause of action outlined in *47 U.S.C.A. § 227 (b)(3)(B)* clearly states that an action may be maintained to recover damages "for *each such violation*." (Emphasis added.) Accordingly, in the case of pre-recorded telephone solicitations, only one call may be sufficient to support a cause of action.

[*P30] In addition, the private right of action that arises under *47 U.S.C.A. § 227(c)(5)(B)* for those persons who receive more than one call in a 12-month period does not apply in this case, since it refers only to those calls made by individuals in violation of a residential telephone subscriber's privacy rights. *47 U.S.C.A. § 227(c)(5)(C)*. Moreover, *subsection (c)* specifically states that its provisions "shall not be construed to permit a communication prohibited by subsection (b)." *47 U.S.C.A. § 227(c)(6)*. See, also, *Grady v. Lenders Interactive Svcs., 8th Dist. No. 83966, 2004 Ohio 4239, P36* (*47 U.S.C.A. § 227(b)(1)(C)* [**12] and *(b)(3)*, which govern both fax transmissions and pre-recorded telephone solicitations, specifically refer to "an" unsolicited advertisement and "a" violation in the context of a private right of action).

[*P31] The record contains undisputed evidence that appellee, through Global, made one unsolicited, pre-recorded telephone call to appellant's home telephone for the purpose of advertising a debt elimination program. No evidence was presented to refute appellant's claim that the message was for a noncommercial purpose, or to demonstrate that appellant had an established business relationship

with appellee. The record does contain evidence, through an undocumented statement made in Schnelle's affidavit and the text of the pre-recorded message, that the product advertised by appellee was ultimately provided by Moneytek Human Services, a non-profit business entity. However, regardless of Moneytek's non-profit status, no evidence was presented by appellee that the pre-recorded call to appellant was exempt from the provisions of the TCPA because appellee, who advertised the sale of the program, is a non-profit organization. See *Chiles v. M.C. Capital Corp., (1994), 95 Ohio App. 3d 485, 642 N.E.2d 1115* [**13] (Entitlement to an applicable exemption from operation of a statute "is an affirmative defense which must be raised by the defendant." *Id. at 496.*).

[*P32] This court has reviewed the entire record of proceedings that was before the trial court and, upon consideration thereof finds that, as a matter of law, in the absence of a statutory exemption, a private right of action can arise after only one pre-recorded telephone solicitation is made in violation of the provisions of *47 U.S.C.A. § 227(b)*. Accordingly, the trial court erred by finding that no cause of action exists under the TCPA unless more than one call is received within a 12-month period, and dismissing appellant's claim for statutory damages on that basis. Appellant's first assignment of error is well-taken.

[*P33] Appellant asserts in his second assignment of error that the trial court erred by finding that appellee did not "knowingly" violate the TCPA, and refusing to award him treble damages on that basis.

[*P34] Pursuant to *47 U.S.C.A. § 227(b)(3)(C)*, if the defendant is found to have willfully or knowingly violated the TCPA, the court may, in its discretion, [**14] award treble damages. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore (1983), 5 Ohio St. 3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140.*

[*P35] In this case, the trial court found that appellee did not "knowingly" violate federal law by sending appellant only one pre-recorded telephone message. In so doing, the lower court relied on the decision of the Tenth District Court of Appeals in *Charvat v. Colorado Prime, Inc. (Sept. 17, 1998), 10th Dist. No. 97APG09-127, 1998 Ohio App. LEXIS 4292*. In *Charvat* the appellate court held that:

[*P36] "to knowingly violate the *regulations* as required by *Section 227 (c)(5), Title 47, U.S. Code*, a defendant must do more than make a telephone call. A defendant must affirmatively know it is violating a *regulation* when making the telephone call for purposes of the treble damages provision." Id. (Emphasis original.)

[*P37] Appellant urges this court to ignore the holding in *Charvat v. Colorado Prime* and apply the definition of "knowingly" that was articulated by the United States Supreme Court in *Bryan v. United States (1998), 524 U.S. 184, 141 L. Ed. 2d 197, 118 S. Ct. 1939.* [**15] In *Bryan*, the Supreme Court determined that, in contrast to a "willful" violation, which requires a culpable state of mind, "the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." *Id. at 193.*

[*P38] As set forth above, *Charvat* was decided pursuant to *47 U.S.C.A. § 227(c)*, which provides that more than one telephone call must be made within a 12-month period before a cause of action accrues. In addition, *subsection (c)(5)(C)* provides, in relevant part, that:

[*P39] "It shall be an affirmative defense in any action brought under [paragraph (5)(C) of subsection (c)] that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of

the regulations prescribed under this subsection. * * *"

[*P40] In contrast, *47 U.S.C.A. § 227(b)(2)(C)(3)* provides that a cause of action can accrue after only one pre-recorded message is sent. Presumably, such a violation could arise without the sender's knowledge, because subsection (b) contains no provision for the implementation [**16] of "reasonable practices and procedures" to avoid violating the statutory restrictions on pre-recorded telephone calls. The fact that the threshold for a violation under subsection (b) is so low, coupled with the lack of an affirmative defense and the provision that both "willful" and "knowing" violations can result in an award of treble damages, leads to the conclusion that the definition of "knowingly," as articulated in *Bryan, supra*, is more applicable in this context.

[*P41] Upon consideration of the foregoing, this court finds that the trial court erred to the extent that it relied on the definition of the term "knowingly" as stated in *Charvat, supra*, and denying appellant's request for treble damages on that basis. Accordingly, appellant's second assignment of error is well-taken.

[*P42] On consideration whereof, this court finds that there remains no genuine issue of material fact. Accordingly, after construing the evidence most strongly in favor of the nonmoving party, we uphold the judgment of the trial court that appellant is entitled to partial summary judgment as a matter of law. However, based on our determination of appellant's two assignments [**17] of error as set forth above, we hereby reverse the trial court's findings as to whether appellant is entitled to statutory damages and discretionary treble damages.

[*P43] The judgment of the Toledo Municipal Court is hereby affirmed in part and reversed in part, and the case is remanded to the trial court for a hearing on the awarding of statutory and/or discretionary damages. Pursuant to *App.R. 24*, costs of these proceedings are assessed to appellee.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART.

A certified copy of this entry shall constitute the mandate pursuant to *App.R. 27*. See, also, *6th Dist.Loc.App.R. 4*, amended 1/1/98.

Richard W. Knepper, J.

Mark L. Pietrykowski, J.

Arlene Singer, J.
CONCUR.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Philip J. Charvat,	:	
Plaintiff-Appellant,	:	
v.	:	No. 05AP-1331 (C.P.C. No. 04CV-600)
Thomas N. Ryan, D.D.S. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

JOURNAL ENTRY

For the reasons stated in the decision of this court rendered herein on September 7, 2006, appellant's motion for reconsideration is denied. It is the order of this court that the motion to certify the judgment of this court as being in conflict with the judgment of the Sixth Appellate District in *Reichenbach v. Financial Freedom Ctrs., Inc.*, 6th Dist. No. L-03-1357, 2004-Ohio-6164, is granted and, pursuant to Section 3(B)(4), Article IV, Ohio Constitution, the record of this case is certified to the Supreme Court of Ohio for review and final determination upon the following issue in conflict:

> Whether a defendant "knowingly" violates Section 227(b), Title 47, U.S.Code, or the regulations promulgated thereunder, for purposes of awarding treble damages under Section 227(b)(3), where the plaintiff demonstrates that the defendant had knowledge of the facts constituting the offense; or whether the plaintiff must prove that the defendant knew when it placed the offending call that the call constituted a violation of the TCPA or any regulations promulgated thereunder.

SADLER, PETREE & FRENCH, JJ.

Judge Lisa L. Sadler

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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Philip J. Charvat,	:	
Plaintiff-Appellant,	:	No. 05AP-1331
v.	:	(C.P.C. No. 04CV-600)
Thomas N. Ryan, D.D.S. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on July 20, 2006, appellant's first, second and seventh assignments of error are sustained, his third, fourth and fifth assignments of error are sustained in part and overruled in part, and his sixth and eighth assignments of error are overruled, and it is the order and judgment of this court that the judgment of the Franklin County Court of Common Pleas is affirmed in part; reversed in part and cause remanded. Costs to be divided equally between the parties.

SADLER, PETREE, & FRENCH, JJ.

Judge Lisa L. Sadler

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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Philip J. Charvat,	:	
Plaintiff-Appellant,	:	
		No. 05AP-1331
v.	:	(C.P.C. No. 04CV-600)
Thomas N. Ryan, D.D.S. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

O P I N I O N

Rendered on July 20, 2006

Ferron & Associates, LPA, John W. Ferron, and *Lisa A. Wafer*, for appellant.

Schottenstein, Zox & Dunn, Brian M. Zets, John C. McDonald and *Stephen J. Smith*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, Philip J. Charvat ("appellant"), appeals from the December 8, 2005 judgment of the Franklin County Court of Common Pleas in which that court granted summary judgment in favor of defendants-appellees, Thomas N. Ryan, D.D.S. and Thomas N. Ryan, D.D.S., Inc. ("appellees"), on certain of appellant's claims based on appellees' violation of the federal Telephone Consumer Protection Act ("TCPA") and alleged violation of Ohio's Consumer Sales Practices Act ("CSPA"), by making prerecorded voice message telemarketing calls to appellant's residence.

{¶2} The genesis of this case occurred on December 9, 2003, when appellees admittedly used automated dialing equipment and a prerecorded voice messaging system to place a telemarketing call to appellant's residential telephone number. On December 22, 2003, appellant sent appellees a letter demanding a copy of appellees' "Do Not Call Maintenance Policy." Appellees never responded to the letter. On January 20, 2004, appellant commenced this action.

{¶3} In his complaint, appellant alleges that appellees initiated the December 9, 2003 telephone call using automated equipment, that the call consisted of a prerecorded message regarding the opportunity to receive information about dental health and dental services, that appellees made the call for the purpose of soliciting business for appellees' dental practice, and that appellees made the call without first obtaining appellant's prior express consent. Appellant also alleges that the prerecorded message failed to contain, at the beginning of the message, a clear statement of the name of the sponsoring business and it failed to provide the telephone number or address of appellees' business. Appellant further alleges that appellees failed and refused to send appellant a copy of appellees' "Do Not Call Maintenance Policy" despite a request for same.

{¶4} Appellant's complaint contains claims under Section 227(b), Title 47, U.S.Code and seeks separate damages thereunder as follows: (1) $500 for the single instance of appellees' having called appellant with a prerecorded message without his prior express consent; (2) an additional $1,000 for having done so knowingly and willfully; (3) an additional $500 for having used a prerecorded message that did not disclose the name of the business making the call; (4) an additional $1,000 for having done so knowingly and willfully; (5) an additional $500 for having used a prerecorded message

that did not state the telephone number or the address of the business making the call; (6) an additional $1,000 for having done so knowingly and willfully; (7) an additional $500 for having failed to send to appellant, upon request, a copy of appellees' "Do Not Call Maintenance Policy"; and (8) an additional $1,000 for having done so knowingly and willfully.

{¶5} Appellant's complaint also contains claims under the CSPA, which prohibits a supplier from committing "an unfair or deceptive act or practice in connection with a consumer transaction." R.C. 1345.02(A). Appellant seeks separate damages under the CSPA as follows: (1) $200 for the single instance of appellees' having called appellant with a prerecorded message without his prior express consent; (2) an additional $200 for having used a prerecorded message that did not disclose the name of the business making the call; (3) an additional $200 for having used a prerecorded message that did not state the telephone number or the address of the business making the call; (4) an additional $200 for having failed to send to appellant, upon request, a copy of appellees' "Do Not Call Maintenance Policy"; and (5) an additional $200 for failing to state, at the beginning of the solicitation, that the purpose of the call was to make a sale. Appellant's complaint also seeks attorney fees, costs and a permanent injunction.

{¶6} In their motion for summary judgment, appellees admitted that they placed the telephone call subject of appellant's complaint, and further admitted that the call contained a prerecorded message, was made to appellant's home telephone line, was placed without appellant's prior express consent, was placed for the purpose of selling goods and services, was placed using automated telephone dialing equipment, was made for commercial purposes, failed to clearly state the name of the business at the

beginning of the message, failed to provide the telephone number and address of the business, was used to find new patients, was made with the intent to make a profit, and was made knowingly and purposely. They further admitted that they failed to send a "Do Not Call Maintenance Policy" to appellant because they did not have such a policy in place.

{¶7} Appellees argued, however, that appellant's recovery based upon the telephone call is limited to a total of $500 because he may only recover the TCPA's statutory damage amount on a per-call basis. They argued that he may not recover a separate award of $500 for each and every individual statutory violation occasioned by the manner in which the single telephone call was placed. Appellees also argued that their conduct was not so egregious as to warrant imposition of treble damages under the TCPA. Finally, appellees argued that they are exempt from the requirements of the CSPA and, as such, appellant's claims under that statute should be dismissed.

{¶8} The trial court awarded appellant $500 in statutory damages for appellees' failure to provide a copy of a "Do Not Call Maintenance Policy" upon request, because this is a violation of the TCPA that is separate and distinct from appellees' offending telephone call. *Reichenbach v. Chung Holdings LLC* (2004), 159 Ohio App.3d 79, 2004-Ohio-5899, 823 N.E.2d 29, ¶55.

{¶9} However, the court determined that damages under Section 227(b)(3), Title 47, U.S.Code are available only on a per-call basis and not for each individual statutory violation occasioned by the single call. Thus, the court ruled that appellant is limited to a single $500 award of damages based on appellees' violation of Section 227(b)(1)(B), Title 47, U.S.Code.

{¶10} The court declined to award treble damages under the TCPA, finding that appellees did not act with the requisite mental state. In fact, the court said, "it is hard to conceive of a situation less appropriate for treble damages [than the one in this case.]" (Entry Granting Defendants' Motion for Summary Judgment, at 5.)

{¶11} The court disagreed with appellees on the CSPA claim, finding that appellant is entitled to recovery thereunder. However, because the court found that appellees' call constituted only one violation of the TCPA for which appellant was entitled to damages, it found that the call constituted only a single violation of the CSPA. Accordingly, the court awarded appellant $200 on that claim. Finally, the court declined to award attorney fees.

{¶12} Appellant timely appealed and advances the following eight assignments of error for our review, as follows:

> Assignment of Error No. 1:
>
> THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM THAT DEFENDANTS KNOWINGLY VIOLATED THE TELEPHONE CONSUMER PROTECTION ACT BY INITIATING A PRERECORDED VOICE MESSAGE TELEMARKETING CALL TO PLAINTIFF'S RESIDENCE WITHOUT VOLUNTARILY PROVIDING THE NAME OF THE INDIVIDUAL OR ENTITY MAKING THE CALL.
>
> Assignment of Error No. 2:
>
> THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM THAT DEFENDANTS KNOWINGLY VIOLATED THE TELEPHONE CONSUMER PROTECTION ACT BY INITIATING A PRERECORDED VOICE MESSAGE TELEMARKETING CALL TO PLAINTIFF'S RESIDENCE WITHOUT VOLUNTARILY PROVIDING THE TELEPHONE

NUMBER OR ADDRESS OF THE INDIVIDUAL OR ENTITY MAKING THE CALL.

Assignment of Error No. 3:

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM FOR TREBLE DAMAGES ON EACH OF HIS CLAIMS UNDER THE TELEPHONE CONSUMER PROTECTION ACT.

Assignment of Error No. 4:

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM THAT DEFENDANTS KNOWINGLY VIOLATED THE CONSUMER SALES PRACTICES ACT BY INITIATING A PRERECORDED ADVERTISING CALL TO PLAINTIFF'S RESIDENCE WITHOUT VOLUNTARILY IDENTIFYING THE INDIVIDUAL OR ENTITY MAKING THE CALL.

Assignment of Error No. 5:

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM THAT DEFENDANTS KNOWINGLY VIOLATED THE CONSUMER SALES PRACTICES ACT BY INITIATING A PRERECORDED ADVERTISING CALL TO PLAINTIFF'S RESIDENCE WITHOUT VOLUNTARILY PROVIDING THE TELEPHONE NUMBER OR ADDRESS OF THE INDIVIDUAL OR BUSINESS MAKING THE CALL.

Assignment of Error No. 6:

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM THAT DEFENDANTS KNOWINGLY VIOLATED THE CONSUMER SALES PRACTICES ACT BY INITIATING A PRERECORDED ADVERTISING CALL TO PLAINTIFF'S RESIDENCE THAT DID NOT STATE, AT THE BEGINNING OF THE CALL, THAT THE PURPOSE OF THE CALL WAS TO MAKE A SALE.

Assignment of Error No. 7:

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM THAT DEFENDANTS KNOWINGLY VIOLATED THE CONSUMER SALES PRACTICES ACT BY FAILING TO SEND PLAINTIFF A COPY OF DEFENDANT'S DO NOT CALL MAINTENANCE POLICY UPON PLAINTIFF'S DEMAND.

Assignment of Error No. 8:

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM FOR ATTORNEYS' FEES UNDER THE CONSUMER SALES PRACTICES ACT BECAUSE DEFENDANT'S VIOLATIONS OF THE CONSUMER SALES PRACTICES ACT WERE ALL KNOWING VIOLATIONS.

{¶13} We begin by recalling the standard of review applicable in an appeal from a grant of summary judgment. We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 654 N.E.2d 1327. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the nonmoving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Rels. Bd.* (1997), 78 Ohio St.3d 181, 183, 677 N.E.2d 343. We construe the facts gleaned from the record in a light most favorable to appellant, as is appropriate on review of a summary judgment. We review questions of law de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d

107, 108, 652 N.E.2d 684, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 145, 147, 593 N.E.2d 286.

{¶14} In appellant's first and second assignments of error he argues that the trial court erred when it determined that statutory damages under Section 227(b)(3), Title 47, U.S.Code are available on a per-call basis only, and additional statutory penalties are not available separately for each violation of a regulation promulgated thereunder, even where – as here – the offending call violated more than one such regulation.

{¶15} The TCPA, at Section 227(b)(1)(B), Title 47, U.S.Code provides, "[i]t shall be unlawful for any person within the United States * * * to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party * * *." Section 227(b)(3), Title 47, U.S.Code provides:

> (3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—
>
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.
>
> If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

{¶16} The regulations promulgated pursuant to Section 227(b)(3), Title 47, U.S.Code are located at Section 64.1200, Title 47, C.F.R. The version of those regulations applicable to appellees' telephone call to appellant provides, in relevant part:

> (a) No person or entity may * * *
>
> (2) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party[.]
>
> * * *
>
> (b) All artificial or prerecorded telephone messages shall:
>
> (1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated, and
>
> (2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual.
>
> * * *
>
> (d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:
>
> (1) Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

{¶17} Appellant argues that the language in Section 227(b)(3), Title 47, U.S.Code, which establishes a private right of action "based on a violation of this subsection or the

regulations prescribed thereunder * * *," clearly reveals that Congress intended to confer the right to bring a separate cause of action for each and every regulation violated by a single telephone call.

{¶18} Appellees argue, however, that this court rejected the very same argument in the case of *Charvat v. Colorado Prime* (Sept. 17, 1998), 10th Dist. No. 97APG09-1277. *Colorado Prime* involved Section 227(c)(5), Title 47, U.S.Code, which provides, in pertinent part:

> A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in the appropriate court of that State - -
>
> (A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.

{¶19} In that case, the plaintiff argued that the phrase "for each such violation" in subparagraph (B) referred to the language "in violation of the regulations prescribed under this subsection." The defendant argued that the phrase "for each such violation" referred to "telephone call." The court determined:

> * * * the language at issue is amenable to more than one interpretation. * * * "Such" could be argued to refer to the entire noun phrase "telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection" or, alternatively, to the prepositional phrase "in violation of the regulations" contained within the noun phrase.

Colorado Prime, 1998 Ohio App. LEXIS 4292, at *12.

{¶20} Because the court found that the language in the relevant statutory provision was ambiguous, it looked to the purpose of the provision, which "is to prevent repeated telemarketing calls to a person who has asked the telemarketer to stop calling[.]" Id. at *12-13. Based on the fact that the regulations serve that statutory purpose – that is, to prevent *calls* after the consumer has requested that they cease – the court found that "such" refers to the telephone *calls* themselves, not to violations of the regulations occasioned by such calls. Appellees argue that the same reasoning applies in this case because the purpose of Section 227(b), Title 47, U.S.Code is to limit unwanted *calls* containing prerecorded messages.

{¶21} In reply, however, appellant points out that the language of Section 227(b)(3), Title 47, U.S.Code is different from that which this court found ambiguous in Section 227(c)(5), Title 47, U.S.Code in *Colorado Prime*. It cannot be ignored, he argues, that unlike the statutory language in *Colorado Prime*, the language at issue in this case does not even contain the word "call." He argues that the ambiguity that exists in subparagraph (c)(5) of the statute does not exist in subparagraph (b)(3). We agree.

{¶22} Subparagraph (b)(3) provides for two types of actions: actions for injunctive relief and actions for damages. A plaintiff may elect to pursue one or the other or both. Section 227(b)(3)(C), Title 47, U.S.Code. For ease of discussion and to assist the reader, let us again reprint the pertinent language:

> (3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or
>
> (C) both such actions.

{¶23} We observe that the initial sentence of subparagraph (b)(3) contains neither the word "call" nor the word "violation." Section (A) provides for an action for injunctive relief "based on a violation of this subsection" *or* "the regulations prescribed under this subsection[.]" Thus, an action for injunctive relief may be based upon a violation of subsection (b) itself, which prohibits persons from "initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party," *or* an action for injunctive relief may be based upon a violation of the regulations prescribed under subsection (b), which are the various rules contained in Section 64.1200, Title 47, C.F.R.

{¶24} Section (B) goes on to provide for an action for statutory damages "for each such violation[.]" The phrase "such violation" clearly refers to both "a violation of this subsection" and "[a violation] of the regulations prescribed under this subsection" in Section (A). Thus, monetary damages are recoverable for both types of violations for which injunctive relief is available, to wit: violation of subsection (b) and violation of any of the regulations promulgated thereunder. The language unambiguously allows the plaintiff to seek damages based upon a violation of the subsection itself, which violation occurs when a call containing a prerecorded message is made without the plaintiff's prior express consent, or based upon a violation of one of the regulations prescribing the

content of prerecorded telemarketing calls, which violation occurs when the call fails to contain certain specific information.

{¶25} This allows a plaintiff to pursue statutory damages as a remedy for two separate wrongs: first, the intrusion caused by a telemarketing call that delivers a message using an artificial or prerecorded voice without the plaintiff's prior express consent; and second, the impediment to the plaintiff availing him- or herself of other rights conferred by the TCPA, e.g., the right to request a copy of the caller's "Do Not Call Maintenance Policy" or to request that the caller place the recipient on the caller's "Do Not Call" list. This second wrong is caused when the caller omits to include within the prerecorded message information regarding the caller's identity and the manner in which the caller may be contacted. Such omissions can significantly impair or altogether thwart the called party's efforts to stop future unwanted calls.

{¶26} If a caller violates the subsection but includes all of the required identity and contact information in its message, then the called party may only pursue statutory remedies based upon violation of the subsection. If, on the other hand, the caller not only violates the subsection by placing the call, but also impedes further enforcement of the called party's rights under the TCPA by failing to include within the message the contact information required by the regulations promulgated under the subsection, then the called party may elect to pursue statutory remedies based upon violations of the regulations as well.

{¶27} These are precisely the facts of the instant case. It is undisputed that appellees violated subsection (b) by placing the December 9, 2003 call to appellant. It is also undisputed that the prerecorded message delivered by that call failed to contain the

name of the caller and failed to contain the telephone number or address of the caller. These facts alone do not warrant multiple awards of statutory damages. It is significant that appellant's complaint specifically sets forth separate claims for damages for the violation of subsection (b) – the call – and for each violation of a regulation that was occasioned by that call. The complaint also contains factual allegations supporting each claim. Under these circumstances, appellant is entitled, pursuant to Section 227(b)(3), Title 47, U.S.Code, to "$500 in damages for each such violation[.]"

{¶28} Thus, appellant is entitled to an award for appellees' violation of Section 227(b)(1)(B), Title 47, U.S.Code, delivery of a message using an artificial or prerecorded voice without the plaintiff's prior express consent; another award for violation of Section 64.1200(b)(1), Title 47, C.F.R., delivery of an artificial or prerecorded telephone message that does not, at the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call; another award for violation of Section 64.1200(b)(2), Title 47, C.F.R., delivery of an artificial or prerecorded telephone message that does not state clearly the telephone number of such business, other entity, or individual; and another award for violation of Section 64.1200(d)(1), Title 47, C.F.R., failure to have a written policy, available upon demand, for maintaining a "Do Not Call list." Appellant is entitled to an aggregate award under the TCPA of $2,000. When the trial court refused to award more than $500 for violations occasioned by the violative call, based on a contrary interpretation of the language of Section 227(b)(3), Title 47, U.S.Code, and granted summary judgment in favor of appellees on this issue, this was error. For these reasons, appellant's first and second assignments of error are sustained.

{¶29} In his third assignment of error, appellant argues that the trial court erred when it refused to award treble damages on each of his TCPA claims. Pursuant to Section 227(b)(3), Title 47, U.S.Code, if the court finds that the defendant willfully or knowingly violated subsection (b) or the regulations prescribed thereunder, the court "may, in its discretion" increase the award to an amount equal to no more than three times the statutory amount.

{¶30} The plain language of Section 227(b)(3), Title 47, U.S.Code, vests the trial court with discretion to determine whether the defendant willfully or knowingly violated the subsection. Therefore, the court's decision in that regard will not be reversed absent an abuse of discretion. The term abuse of discretion connotes more than an error of law or judgment; it implies the court's attitude was arbitrary, unreasonable, or unconscionable. *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.* (1995), 72 Ohio St.3d 464, 465, 650 N.E.2d 1343.

{¶31} In the present case the trial court declined to increase appellant's award. It based its decision on language from this court's opinion in *Colorado Prime*, in which we stated:

> [T]o knowingly violate the *regulations* as required by Section 227(c)(5), Title 47, U.S.Code, a defendant must do more than make a telephone call. A defendant must affirmatively know it is violating a *regulation* when making the telephone call -- -- for purposes of the treble damages provision. Furthermore, this court finds no congressional intent indicating that knowingly should be interpreted to encompass "should have known" and finds that this interpretation would be inconsistent with the plain meaning of knowingly.

Charvat v. Colorado Prime (Sept. 17, 1998), 10th Dist. No. 97APG09-1277, 1998 Ohio App. LEXIS 4292, at *10-11. (Emphasis sic.)

{¶32} The trial court found that the foregoing language requires "a culpable state of mind" and that "[t]he pleadings are void (sic) of any allegation that the Defendant acted with a culpable state of mind." The court went on to conclude that, "[t]he Defendant, a dentist engaged in the profession of providing dental services, made one telephone call to the Plaintiff, which was not a knowing and willful violation of the law; therefore, treble damages are not warranted." (Entry Granting Defendants' Motion for Summary Judgment, at 5.)

{¶33} Appellant urges us to follow the case of *Reichenbach v. Financial Freedom Ctrs., Inc.*, 6th Dist. No. L-03-1357, 2004-Ohio-6164. That case also involved TCPA violations through the use of prerecorded messages. The *Reichenbach* court explicitly rejected application of this court's *Colorado Prime* standard for determining willfulness. The court distinguished *Colorado Prime*, which involved a portion of the statute under which more than one telephone call is required to establish a TCPA violation, from cases involving prerecorded messages, in which a cause of action can accrue after only one prerecorded message has been sent.

{¶34} The *Reichenbach* court explained that where a violation can occur with the sending of a single prerecorded message, "[p]resumably, such a violation could arise without the sender's knowledge, because subsection (b) contains no provision for the implementation of 'reasonable practices and procedures' to avoid violating the statutory restrictions on pre-recorded telephone calls [like the requirement that telemarketers employ a Do Not Call Maintenance Policy]." Id. at ¶40. The court went on to conclude, "[t]he fact that the threshold for a violation under subsection (b) is so low, coupled with the lack of an affirmative defense and the provision that both 'willful' and 'knowing' violations

can result in an award of treble damages, leads to the conclusion that the definition of 'knowingly,' as articulated in *Bryan* [*v. United States* (1998), 524 U.S. 184, 118 S.Ct. 1939, 141 L.Ed.2d 197] is more applicable in this context." Ibid. In *Bryan*, the United States Supreme Court determined that, in contrast to a "willful" violation, which requires a culpable state of mind, "the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." *Bryan*, supra, at 193.

{¶35} We decline appellant's invitation to reject our own precedent in favor of the reasoning employed in *Reichenbach*. We are unconvinced that the standard articulated in *Colorado Prime* should be applied only in cases involving Section 227(c)(5), Title 47, U.S.Code. Applying the *Colorado Prime* standard for willfulness to this case, we fail to perceive an abuse of discretion in the trial court's finding that the violation of subsection (b) was not willful. However, because the trial court did not find that appellees' violations of Section 64.1200(b)(1) and (2), Title 47, C.F.R., constituted separate "violations" for purposes of awarding statutory damages, it did not consider whether or not those violations were "willful." On remand, the trial court must explicitly set forth its findings as to whether appellees willfully or knowingly violated the regulations prescribed under subsection (b), with respect to each of the violations identified herein as a basis for a separate award of damages, including violation of Section 64.1200(d)(1), Title 47, C.F.R. Accordingly, appellant's third assignment of error is sustained in part and overruled in part.

{¶36} In appellant's fourth, fifth, and seventh assignments of error, he argues that each and every separate violation of the TCPA constitutes a separate violation of the

CSPA, and the trial court erred in finding the existence of only one CSPA violation and awarding statutory damages therefor in the amount of $200.

{¶37} Appellant directs our attention to the case of *Crye v. Smolak* (1996), 110 Ohio App.3d 504, 674 N.E.2d 779, in which this court noted that the majority of Ohio courts have found that where separate acts result in violations of multiple rules promulgated under the CSPA, the consumer is entitled to $200 per violation. Id. at 512. Appellant argues that this result is consistent with the notion that "[t]he [CSPA] is a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed pursuant to R.C. §1.11." *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29, 548 N.E.2d 933.

{¶38} Appellees argue that even if their single telephone call constitutes multiple violations of the TCPA, the trial court has discretion to determine that because these violations emanate from the same "transaction" they constitute only one violation of the CSPA. Appellees point out that the *Crye* court also said that the general rule of awarding $200 per violation does not preclude a court from finding that when multiple violations of the CSPA emanate from the same transaction, only $200 should be awarded.

{¶39} We begin by observing that under the CSPA, "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction." R.C. 1345.02(A). A "consumer transaction" is defined, for purposes of the CSPA, as "a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, *or solicitation to supply any*

of these things." R.C. 1345.01(A). (Emphasis added.) Under this definition, appellees' TCPA violations constitute violations of the CSPA because the violations arose out of a solicitation to an individual for the sale of dental services, which are services that are primarily for personal, family or household purposes.

{¶40} We also observe that in the cases cited by appellees in which courts have held it appropriate to impose only a single CSPA damage award for multiple CSPA rule violations emanating from the same transaction, the courts found that the rules violated were similar in that they were directed at preventing the same harm, and/or that the defendant's acts or omissions had in fact resulted in only one injury. See, e.g., *Couto v. Gibson* (Feb. 26, 1992), 4th Dist. No. 1475; *Buchanan v. Stiving* (Apr. 25, 1994), 5th Dist. No. 93-CA-75. Where, however, multiple TCPA violations arise from dissimilar rules directed to preventing distinct harms, and where such violations indeed result in multiple harms, separate CSPA damage awards should be made for each TCPA violation.

{¶41} In the present case, appellant argues in his fourth, fifth and seventh assignments of error, respectively, that appellees' violations of Section 64.1200(b)(1) and (2), Title 47, C.F.R. and Section 64.1200(d)(1), Title 47, C.F.R., each constitute a separate violation of R.C. 1345.02(A). We agree that appellees' violations of Section 64.1200(b)(1) and (2), Title 47, C.F.R., caused a separate and distinct injury from that caused by the placement of the call itself, in violation of Section 227(b), Title 47, U.S.Code. Thus, appellant is entitled to a CSPA-based damage award in addition to that which the trial court awarded for the TCPA violation occasioned by placement of the call.

{¶42} However, Section 64.1200(b)(1) and (2), Title 47, C.F.R., are both directed at preventing the same harm, to wit: rendering the called party without means to contact

the caller in order to stop future violative calls; moreover, appellees' violations of these two regulations in fact caused a single injury. Thus, appellant is entitled to only one CSPA-based award of damages for these two violations.

{¶43} Finally, we agree with appellant that violation of Section 64.1200(d)(1), Title 47, C.F.R., constitutes the violation of a separate regulation whose purpose is distinct from that of Section 64.1200(b)(1) and (2), Title 47, C.F.R. We also agree that appellees' violation of Section 64.1200(d)(1), Title 47, C.F.R., caused a separate and distinct harm. Thus, appellant is entitled to a separate damage award under the CSPA based on this TCPA violation. In sum, we hold that appellant is entitled to a total of three CSPA awards of $200 each: one award for appellees' violation of Section 227(b), Title 47, U.S.Code, one award for appellees' violations of Section 64.1200(b)(1) and (2), Title 47, C.F.R., and one award for appellees' violation of Section 64.1200(d)(1), Title 47, C.F.R.

{¶44} For the foregoing reasons, then, appellant's fourth and fifth assignments of error are sustained in part and overruled in part, and his seventh assignment of error is sustained.

{¶45} In his sixth assignment of error appellant argues that appellees' failure to state, at the beginning of the call, that the purpose of the call was to make a sale constituted a violation of Ohio Adm.Code 109:4-3-11(A)(3) and (4). But a review of the record reveals that the trial court never passed upon that issue.

{¶46} Appellant's complaint alleges that appellees failed to state, at the beginning of the call, that the purpose of the call was to make a sale (Complaint, at ¶58), but appellees specifically denied this allegation. (Answer, at ¶3.) When appellees sought summary judgment on appellant's CSPA claims, the sole basis therefor was that

appellees are exempt from the provisions of the CSPA. Thus, when the trial court entered summary judgment it was never presented with, and never passed upon, the question whether genuine issues of fact exist as to whether appellees' December 9, 2003 telephone call, in fact failed to state, at the beginning of the call, that the purpose of the call was to make as sale. Moreover, the trial court also did not decide the issue of whether this would constitute a violation of the CSPA.

{¶47} "It is axiomatic that issues not passed upon in the court below are not properly before an appellate court on appeal." *Logan v. Liquor Control Comm.* (Aug. 11, 1994), 10th Dist. No. 93APE12-1744, 1994 Ohio App. LEXIS 3525, at *4, citing *Moats v. Metropolitan Bank of Lima* (1974), 40 Ohio St.2d 47, 49-50, 69 O.O.2d 323, 319 N.E.2d 603. See, also, *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St. 3d 78, 81, 679 N.E.2d 706. Accordingly, we decline to address appellant's sixth assignment of error.

{¶48} In appellant's eighth and final assignment of error he argues that the trial court erred in granting appellees' motion for summary judgment with respect to appellant's claim for attorney fees under the CSPA.

{¶49} "Pursuant to R.C. 1345.09(F)(2), a trial court may award a consumer reasonable attorney fees when a supplier in a consumer transaction intentionally committed an act or practice which is deceptive, unfair or unconscionable." *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 548 N.E.2d 933, syllabus.

{¶50} Appellant argues that because appellees have admitted that they "knowingly" and "purposely" called appellant with a prerecorded message (Answer, at 1), the trial court erred in refusing to award appellant attorney fees. Appellee argues that even if it knowingly and purposely, or, in the verbiage employed in *Einhorn*, "intentionally"

committed a violation of the CSPA, the matter of attorney fees is still committed to the sound discretion of the trial court, and the trial court in the present case did not abuse its discretion. We agree.

{¶51} In the recent case of *Pep Boys – Manny, Moe & Jack of Delaware, Inc. v. Vaughn*, 10th Dist. No. 04AP-1221, 2006-Ohio-698, we held, "[t]he decision to grant or deny attorney fees under R.C. 1345.09(F) is discretionary. Thus, an appellate court will not disturb the trial court's decision to grant attorney fees absent an abuse of discretion." Id. at ¶32. (Citations omitted.) As we noted earlier, the term abuse of discretion connotes more than an error of law or judgment; it implies the court's attitude was arbitrary, unreasonable, or unconscionable. *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.* (1995), 72 Ohio St.3d 464, 465, 650 N.E.2d 1343. We do not perceive an abuse of discretion in the trial court's denial of attorney fees in this case. Accordingly, appellant's eighth assignment of error is overruled.

{¶52} In summary, appellant's first, second and seventh assignments of error are sustained, his third, fourth and fifth assignments of error are sustained in part and overruled in part, and his sixth and eighth assignments of error are overruled. The judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this cause is hereby remanded to that court for further proceedings consistent with law and with this opinion.

Judgment affirmed in part; reversed in part and cause remanded.

PETREE and FRENCH, JJ., concur.

FINAL APPEALABLE ORDER

TERMINATION NO. 12
BY SS 12-7-05

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

PHILIP J. CHARVAT,	:	
	:	
Plaintiff,	:	
	:	CASE NO. 04 CV# 01-0600
v.	:	
	:	JUDGE GREGORY S. PETERSON
THOMAS N. RYAN, D.D.S. et al,	:	
	:	
Defendants.	:	

ENTRY

GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED May 10, 2004

Decided this 7th day of December, 2005.

This matter is before the Court on the motion of Defendants Thomas N. Ryan D.D.S. and Thomas N. Ryan D.D.S. Inc. for summary judgment, filed May 10. 2004. Plaintiff filed a memorandum contra on July 18, 2005 and Defendants filed a reply on August 11, 2005. The time for briefing has expired and the motion is now considered submitted to the Court for decision pursuant to Loc. R. 21.01.

Summary Judgment Procedure

When considering a motion for summary judgment, a court must determine if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, 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 the moving party is entitled to judgment as a matter of law." Civ.R. 56(C). "The moving party has the burden of showing that there is no genuine issue as to any material fact as to critical issues." *Stockdale v. Baba*, 153 Ohio App. 3d 712, 2003-Ohio-4366, 795 N.E.2d 727, at ¶23. When a party moves a court for summary judgment and supports its motion pursuant to Civ.R. 56, "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response *** must set forth specific facts showing that there is a genuine issue for trial." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio

St. 2d 64, 375 N.E.2d 46.

As a procedural device "to terminate litigation and avoid a formal trial," summary judgment must be awarded with caution. *Norris v. Ohio Std. Oil Co.* (1982) 70 Ohio St. 2d 1, 2, 433 N.E.2d 615. All doubts and evidence must be construed against the moving party. *Stockdale,* 2003-Ohio-4366, at ¶31. Accordingly, "[s]ummary judgment may not be rendered unless it appears that reasonable minds can come to but one conclusion and that conclusion is adverse to the parties against whom this motion is made." *Id.* at ¶32.

Facts of the Case

Plaintiff, Philip Charvat, a resident of Franklin County, has filed this action to recover damages for violations of the Telephone Consumer Protection Act ("TCPA") and the Ohio Consumer Sales Protection Act ("CSPA"). Defendant Dr. Thomas Ryan practices dentistry and providing dental goods and services in Franklin County. Defendants have conceded that they violated the TCPA. The facts are undisputed.

On December 9, 2003, Defendants used automated dialing equipment to leave Plaintiff the following message:

> Hello. This is a public health service announcement concerning the dental health of citizens in our community. This is not a commercial solicitation. You'll not be asked to purchase anything, and you may request all of this information to be mailed to your home free of charge so you may review it. You must give permission to hear this message by pressing the 1 key on your phone, or you may press the 2 key to be removed from any future public service announcements. To participate in this free announcement concerning the dental health of our community, please press the 1 key now, or this call will disconnect in 5 seconds.
> (Touch tone sound of 1 being pressed.)
> Thank you. As a free community service, local area doctors have designed a free report that you may receive that can answer any questions you may have concerning dental health. You can have that smile that you always wanted to have. With advances in cosmetic dentistry, there is no reason that you shouldn't be happy with your smile. Your smile is an important tool in everyday life. If you do not like the smile you have, now you can find out how to change that quickly, easily, and with absolutely no pain. Now you can actually laugh at the dentist's office. The goal is to see a dentist with the right combination of expert care and total dedication to patient comfort. Not happy with your smile? You can receive a free report that explains it all from a local area dentist who has donated his time for you. To make a free appointment to discuss these options, please leave your name, phone number, and the best time to call you so we may provide you with

> this free report and information. At the tone, please state your name, your telephone number, and the best time to reach you so that one of our assistants can you give you a call back.

On December 22, 2003, Plaintiff sent Defendants a letter demanding a copy of Defendants' 'Do Not Call Maintenance Policy.' Defendants never responded to this letter. The Defendant is seeking relief under the TCPA and the CSPA.

Application of Law

1. TCPA

Plaintiff's cause of action under the TCPA is found under Section 227, Title 47, U.S. Code. This statute provides that "[i]t shall be unlawful for any person *** to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party ***." Section 227(b)(1)(B), Title 47, U.S. Code. A person who receives an unauthorized call may "bring in an appropriate court of that State an action based on a violation of this subsection or the regulations prescribed under this subject to enjoin such violation, an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each violation, whichever is greater, or both such actions." Section 227(b)(3), Title 47, U.S. Code. The Court has discretion, if it finds that "the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection" to "increase the amount to of the award to an amount equal to not more than 3 times the amount available."

As to the TCPA, the parties present two issues for the Court to decide: First, what constitutes a violation of the statute in relation to the statute's award of $500 in damages as it relates to *each* violation? And second, is the Plaintiff entitled to treble damages?

As to the number of violations, Plaintiff contends that Defendants' unauthorized call constitutes four violations of the TCPA because the call violated four subsections of the TCPA

and its related regulations. Plaintiff contends that Defendants call, in addition to violating Section 227(b)(1)(B), Title 47, U.S.C., also violates: Section 64.1200(b)(1), Title 47, C.F.R., requiring that any artificial or prerecorded telephone message shall state the identity of the business making the call; Section 64.1200(b)(2), Title 47, C.F.R., requiring the prerecorded message to provide an address and telephone number of the entity making the call; and Section 64.1200(d), requiring an entity making a prerecorded call to have a written "Do Not Call Maintenance Policy." In support of its argument that Plaintiff should be granted remedies for each violation of the TCPA, Plaintiff cites cases that provide that the five hundred dollar remedy is a minimum thereby implicitly authorizing additional remedies. See e.g., *Jemiola v. XYZ Corp.*, 126. Ohio Misc. 2d 68, 2003-Ohio-7321, 802 N.E.2d 745; *ESI Egonomic Solutions, LLC v. United Artists Theatre Circuit Inc.* (Ariz.App. 2002), 50 P.3d 844. Alternatively, Defendants argue that each call in its entirety is one violation.

The TCPA prohibits a party from "initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B)." Section 227(b)(1)(B), Title 47, U.S.C. The violation is the delivery of the message. As the TCPA authorizes a Court to award treble damages, the language in the cases cited by Plaintiff does not suggest that the TCPA authorizes multiple awards for each solicitation but rather treble damages for a violation if they are warranted. As such, the $500 statutory award would be minimum with treble damages being a maximum. Accordingly, each delivery constitutes one violation. As is conceded by the Defendant, the Defendants call was a violation of the TCPA; which entitles Plaintiff to the five hundred dollar ($500) statutory remedy for the December 9, 2003 telephone call. See Section 227(b)(3)(B), Title 47, U.S.C.

The Defendant's failure to supply the Plaintiff with a copy of they "Do Not Call Maintenance Policy" has recently been held by the Sixth District Court of Appeals to be an

additional or separate violation of the TCPA. *Reichenbach v. Chyung Holdens LLC*, (2004) 159 Ohio App. 3d 79, 823 N.E.2d 29. Accordingly, Plaintiff is entitled to recover the five hundred ($500) statutory remedy for the failure of the defendant to have a "Do Not Call Maintenance Policy" or to send it to the Plaintiff. Section 227(b)(3)(B), Title 47, U.S.C.

As to the treble damages provision, the Court of Appeals of Ohio, Tenth District, Franklin County, has determined, in interpreting this specific statute and this specific provision, that "to knowingly violate the *regulations* as required by Section 227(c)(5), Title 47, U.S.C., a defendant must do more than make a telephone call. A defendant must affirmatively know it is violation of a *regulation* when making the telephone call for purposes of the treble damages provision." *Charvat v. Colorado Prime, Inc.* (1998), Ohio App. LEXIS 4292. Furthermore, as "knowingly" merely requires proof of knowledge of the facts that constitute the offense, a "willful" violation requires a culpable state of mind. The pleadings are void of any allegation that the Defendant acted with a culpable state of mind. As the treble damages provision is discretionary rather than automatic upon the finding of a violation, it is hard to conceive of a situation less appropriate for treble damages. The Defendant, a dentist engaged in the profession of providing dental services, made one telephone call to the Plaintiff, which was not a knowing and willful violation of the law; therefore, treble damages are not warranted.

2. *CSPA*

Plaintiff is entitled to recover under the CSPA. The CSPA prohibits a supplier from committing "an unfair or deceptive act or practice in connection with a consumer transaction." R.C. 1345.01. The CSPA provides that a plaintiff can file an action

> [w]here the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02 or 1345.03 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the revised Code." R.C. 1345.09

Under the CSPA, "the consumer may rescind the transaction or recover, but not in a class action, three times the amount of his actual damages or two hundred dollars, whichever is greater, or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended." Id. A violation of the TCPA is a violation of the CSPA. *Charvat v. Direct Connect Digital*, (2003) 03CVH-05-5265. In accordance with 1345.05(A)(3), the Attorney General has made *Charvat v. Direct Connect Digital* available for public inspection.[1] As it is undisputed that Defendants violated the TCPA, Plaintiff is entitled to judgment for two hundred dollars ($200) under the CSPA.

Finally, R.C. 1345.09 provides the Court with discretion in awarding attorney fees to the prevailing party "if either of the following apply: (1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith; (2) The supplier has knowingly committed an act or practice that violates this chapter." R.C. 1345.09(F). "Knowledge" means actual awareness that an act was a violation of the CSPA. R.C. 1345.01(E). The Court finds that neither of these conditions apply to the instant action.

Accordingly, and for the foregoing reasons, it is hereby

ORDERED that Defendants' Motion for Summary Judgment is hereby GRANTED. It is further

[1] Both of the parties reference the Telephone Sales Solicitation Act in their briefs. R.C. 4719.14 and 4719.06. The Defendant would be exempt from the requirements of these statutes; however, this exemption would not excuse his violation of the CSPA or the TCPA.

ORDERED that judgment is hereby rendered for Plaintiff against Defendants Thomas N. Ryan, DDS, and Thomas N. Ryan DDS Inc., jointly and severally, in the amount of one thousand dollars ($1000) for two violations of the TCPA and in the amount of two hundred dollars ($200) for violating the CSPA for a total amount of twelve hundred dollars ($1200).

IT IS SO ORDERED.

GREGORY S. PETERSON, JUDGE

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*** CURRENT THROUGH P.L. 109-481, APPROVED 1/12/2007 ***
*** WITH GAPS OF 109-476 THROUGH 109-480 ***

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
COMMON CARRIERS
COMMON CARRIER REGULATION

47 USCS § 227

§ 227. Restrictions on use of telephone equipment

(a) Definitions. As used in this section--
(1) The term "automatic telephone dialing system" means equipment which has the capacity--
(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
(B) to dial such numbers.
(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that--
(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and
(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)[)].
(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.
(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.
(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment.
(1) Prohibitions. It shall be unlawful for any person within the United States, or any person

outside the United States if the recipient is within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless--

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through--

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 [enacted July 9, 2005] if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions. The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission

determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if--

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes--

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if--

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only--

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not

necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)

(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall--

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on the date of the enactment of the Junk Fax Prevention Act of 2005 [enacted July 9, 2005].

(3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights.

(1) Rulemaking proceeding required. Within 120 days after the date of enactment of this section [enacted Dec. 20, 1991], the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall--

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations. Not later than 9 months after the date of enactment of this section [enacted Dec. 20, 1991], the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted. The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall--

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations

prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method. If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall--

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action. A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State--

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b). The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b).

(d) Technical and procedural standards.

(1) Prohibition. It shall be unlawful for any person within the United States--

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone

facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines. The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after the date of enactment of this section clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems. The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that--

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Effect on State law.

(1) State law not preempted. Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases. If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(f) Actions by States.

(1) Authority of States. Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action

on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $ 500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts. The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission. The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process. Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers. For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings. Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation. Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) Definition. As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(g) Junk fax enforcement report. The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include--

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to section 503 [47 USCS § 503] during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to section 503 [47 USCS § 503] during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)--

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to section 503 [47 USCS § 503] during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)--

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery--

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.

History:

(June 19, 1934, ch 652, Title II, § 227, as added Dec. 20, 1991, ♦ P.L. 102-243, § 3, ♦ 105 Stat. 2395; Oct. 28, 1992, ♦ P.L. 102-556, Title IV, § 402, ♦ 106 Stat. 4194; Oct. 25, 1994, ♦ P.L. 103-414, Title III, § 303(a)(11), (12), ♦ 108 Stat. 4294.)

(As amended Dec. 16, 2003, ♦ P.L. 108-187, § 12, ♦ 117 Stat. 2717; July 9, 2005, ♦ P.L. 109-21, §§ 2(a)-(g), 3, ♦ 119 Stat. 359, 362.)

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TITLE 13. COMMERCIAL TRANSACTIONS -- OHIO UNIFORM COMMERCIAL CODE
CHAPTER 1345. CONSUMER SALES PRACTICES

ORC Ann. 1345.01 (2006)

§ 1345.01. Definitions

As used in sections 1345.01 to 1345.13 of the Revised Code:

(A) "Consumer transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. "Consumer transaction" does not include transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers, except for transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers; transactions between certified public accountants or public accountants and their clients; transactions between attorneys, physicians, or dentists and their clients or patients; and transactions between veterinarians and their patients that pertain to medical treatment but not ancillary services.

(B) "Person" includes an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or other legal entity.

(C) "Supplier" means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer. If the consumer transaction is in connection with a residential mortgage, "supplier" does not include an assignee or purchaser of the loan for value, except as otherwise provided in section 1345.091 [1345.09.1] of the Revised Code. For purposes of this division, in a consumer transaction in connection with a residential mortgage, "seller" means a loan officer, mortgage broker, or nonbank mortgage lender.

(D) "Consumer" means a person who engages in a consumer transaction with a supplier.

(E) "Knowledge" means actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness.

(F) "Natural gas service" means the sale of natural gas, exclusive of any distribution or ancillary service.

(G) "Public telecommunications service" means the transmission by electromagnetic or other means, other than by a telephone company as defined in section 4927.01 of the Revised Code, of signs, signals, writings, images, sounds, messages, or data originating in this state regardless of actual call routing. "Public telecommunications service" excludes a system, including its construction, maintenance, or operation, for the provision of telecommunications service, or any portion of such service, by any entity for the sole and exclusive use of that entity, its parent, a subsidiary, or an affiliated entity, and not for resale, directly or indirectly; the provision of terminal equipment used to originate telecommunications service; broadcast transmission by radio, television, or satellite broadcast stations regulated by the federal government; or cable television service.

(H) "Loan officer" has the same meaning as in section 1322.01 of the Revised Code, except that it does not include an employee of a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; an employee of a subsidiary of such a bank, savings bank, savings and loan association, or credit union; or an employee of an affiliate that (1) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (2) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration.

(I) "Residential mortgage" or "mortgage" means an obligation to pay a sum of money evidenced by a note and secured by a lien upon real property located within this state containing two or fewer residential units or on which two or fewer residential units are to be constructed and includes such an obligation on a residential condominium or cooperative unit.

(J) "Mortgage broker" has the same meaning as in section 1322.01 of the Revised Code, except that it does not include a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; a subsidiary of such a bank, savings bank, savings and loan association, or credit union; an affiliate that (1) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (2) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration; or an employee of any such entity.

(K) "Nonbank mortgage lender" means any person that engages in a consumer transaction in

connection with a residential mortgage, except for a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; a subsidiary of such a bank, savings bank, savings and loan association, or credit union; or an affiliate that (1) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (2) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration.

(L) For purposes of divisions (H), (J), and (K) of this section:

(1) "Control" of another entity means ownership, control, or power to vote twenty-five per cent or more of the outstanding shares of any class of voting securities of the other entity, directly or indirectly or acting through one or more other persons.

(2) "Credit union service organization" means a CUSO as defined in 12 C.F.R. 702.2.

History:

134 v H 103 (Eff 7-14-72); 138 v S 212 (Eff 7-18-80); 138 v H 1078 (Eff 4-9-81); 142 v S 264 (Eff 7-26-88); ♦ 148 v H 177. Eff 5-17-2000; ♦ 151 v S 185, § 1, eff. 1-1-07.

47 USCS § 227
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TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
COMMON CARRIERS
COMMON CARRIER REGULATION

47 USCS § 227

§ 227. Restrictions on use of telephone equipment

***

(b) Restrictions on use of automated telephone equipment.
(1) Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

***

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

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TITLE 47 -- TELECOMMUNICATION
CHAPTER I -- FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B -- COMMON CARRIER SERVICES
PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS
SUBPART L -- RESTRICTIONS ON TELEMARKETING, TELEPHONE SOLICITATION, AND FACSIMILE ADVERTISING

47 CFR 64.1200

§ 64.1200 Delivery restrictions.

***

(b) All artificial or prerecorded telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated, and

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.

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47 CFR 64.1200

§ 64.1200 Delivery restrictions.

***

(d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

***

(4) Identification of sellers and telemarketers. A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

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47 CFR 64.1200

§ 64.1200 Delivery restrictions.

***

(d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(1) Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

ORC Ann. 1345.09
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TITLE 13. COMMERCIAL TRANSACTIONS -- OHIO UNIFORM COMMERCIAL CODE
CHAPTER 1345. CONSUMER SALES PRACTICES

ORC Ann. 1345.09 (2006)

§ 1345.09. Private remedies

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(F) The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:

***

(2) The supplier has knowingly committed an act or practice that violates this chapter.

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TITLE 13. COMMERCIAL TRANSACTIONS -- OHIO UNIFORM COMMERCIAL CODE
CHAPTER 1345. CONSUMER SALES PRACTICES

ORC Ann. 1345.02 (2006)

§ 1345.02. Unfair or deceptive consumer sales practices prohibited

(A) No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

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TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
COMMON CARRIERS
COMMON CARRIER REGULATION

47 USCS § 227

§ 227. Restrictions on use of telephone equipment

***

(b) Restrictions on use of automated telephone equipment.

***

(3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

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TITLE 13. COMMERCIAL TRANSACTIONS -- OHIO UNIFORM COMMERCIAL CODE
CHAPTER 1345. CONSUMER SALES PRACTICES

ORC Ann. 1345.09 (2006)

§ 1345.09. Private remedies

For a violation of Chapter 1345. of the Revised Code, a consumer has a cause of action and is entitled to relief as follows:

(A) Where the violation was an act prohibited by section 1345.02, 1345.03, or 1345.031 [1345.03.1] of the Revised Code, the consumer may, in an individual action, rescind the transaction or recover the consumer's damages.

(B) Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02, 1345.03, or 1345.031 [1345.03.1] of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, but not in a class action, three times the amount of the consumer's actual damages or two hundred dollars, whichever is greater, or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.

(C) (1) Except as otherwise provided in division (C)(2) of this section, in any action for rescission, revocation of the consumer transaction must occur within a reasonable time after the consumer discovers or should have discovered the ground for it and before any substantial change in condition of the subject of the consumer transaction.

(2) If a consumer transaction between a loan officer, mortgage broker, or nonbank mortgage lender and a customer is in connection with a residential mortgage, revocation of the consumer transaction in an action for rescission is only available to a consumer in an individual action, and shall occur for no reason other than one or more of the reasons set forth in the "Truth in Lending

Act," 82 Stat. 146 (1968), 15 U.S.C. 1635, not later than the time limit within which the right of rescission under section 125(f) of the "Truth in Lending Act" expires.

(D) Any consumer may seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates this chapter.

(E) When a consumer commences an individual action for a declaratory judgment or an injunction or a class action under this section, the clerk of court shall immediately mail a copy of the complaint to the attorney general. Upon timely application, the attorney general may be permitted to intervene in any private action or appeal pending under this section. When a judgment under this section becomes final, the clerk of court shall mail a copy of the judgment including supporting opinions to the attorney general for inclusion in the public file maintained under division (A)(3) of section 1345.05 of the Revised Code.

(F) The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:

(1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith;

(2) The supplier has knowingly committed an act or practice that violates this chapter.

History:

134 v H 103 (Eff 7-14-72); 137 v H 681. Eff 8-11-78; ♦ 151 v S 185, § 1, eff. 1-1-07.

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CHAPTER 5. WIRE OR RADIO COMMUNICATION
COMMON CARRIERS
COMMON CARRIER REGULATION

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47 USCS § 227

§ 227. Restrictions on use of telephone equipment

***

(b) Restrictions on use of automated telephone equipment.

(1) Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless--

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through--

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 [enacted July 9, 2005] if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions. The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if--

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes--

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to

provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if--

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only--

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)

(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall--

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on the date of the enactment of the Junk Fax Prevention Act of 2005 [enacted July 9,

2005].

(3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

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*** CURRENT THROUGH P.L. 109-481, APPROVED 1/12/2007 ***
*** WITH GAPS OF 109-476 THROUGH 109-480 ***

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
COMMON CARRIERS
COMMON CARRIER REGULATION

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47 USCS § 227

§ 227. Restrictions on use of telephone equipment

***

(b) Restrictions on use of automated telephone equipment.

***

(3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

***

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

Philip J. Charvat, Plaintiff-Appellant, (Cross-Appellee), v. Colorado Prime, Inc., Defendant-Appellee, (Cross-Appellant).

No. 97APG09-1277

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1998 Ohio App. LEXIS 4292

September 17, 1998, Rendered

PRIOR HISTORY: [*1] APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Judgment affirmed.

COUNSEL: Philip J. Charvat, pro se.

Thompson, Hine & Flory LLP, Thomas E. Lodge, Scott A. Campbell and Paul Giorgianni, for appellee, (cross-appellant).

JUDGES: REILLY, J. BOWMAN, J., concurs. BRYANT, J., concurs in part and dissents in part. REILLY, J., retired, of the Tenth Appellate District, assigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.

OPINION BY: REILLY

OPINION: (REGULAR CALENDAR)

OPINION

REILLY, J.

The present appeal involves issues regarding interpretation and application of *Section 227, Title 47, U.S.Code*, a provision of The Telephone Consumer Protection Act.

Plaintiff-appellant, Philip Charvat, brought an action against defendant-appellee, Colorado Prime, in the Small Claims Division of the Franklin County Municipal Court for money damages based on defendant's violation of *Section 227(c)(5), Title 47, U.S.Code*'s prohibition against calling a person at his residence more than one time within any twelve-month period after the person has requested not to receive future telephone solicitations from the solicitor or entity. Plaintiff demanded judgment against [*2] defendant in the sum of $ 2,000.

The case came on for hearing before a magistrate in the Small Claims Division of the Franklin County Municipal Court. The magistrate made findings of fact and conclusions of law and rendered judgment for plaintiff against the defendant for $ 1,000, plus court costs and interest. On objections from the magistrate's decision, the municipal court adopted the magistrate's findings of fact, overruled plaintiff's objections, sustained in part and overruled in part defendant's first objection, and overruled defendant's second objection. The court concluded that since defendant called plaintiff twice within one year and each call contained at least one violation of the regulations, plaintiff was entitled to $ 500 for the telephone call in breach of the regulations and reduced plaintiff's judgment from $ 1,000 to $ 500. The court

also found that defendant had failed to assert a valid affirmative defense in response to its violation of *Section 64.1200(e)(2)(vi), Title 47, C.F.R.*

Plaintiff-appellant, Philip Charvat, has appealed the decision of the trial court and defendant-appellee, Colorado Prime, has cross-appealed.

Plaintiff asserts the following five [*3] assignments of error in support of his appeal:

"FIRST ASSIGNMENT OF ERROR

"The trial Court erred in failing to award Plaintiff damages for the found violations of regulations within the Defendant's first call to Plaintiff.

"SECOND ASSIGNMENT OF ERROR

"The trial Court erred in failing to consider mens rea 'knowingly' pursuant to Federal and State definition and thereby failed to award prescribed punitive damages. The trial court further erred in sustaining Defendant's allegation of the statutory affirmative defense for violations of law, when, as a matter of law, Defendant is precluded from having met the burdens necessary to sustain it under these conditions, and the Court must award statutory compensatory damages.

"THIRD ASSIGNMENT OF ERROR

"The trial Court erred in awarding damages based on the number of calls with violations instead of the number of C.F.R. violations within the calls.

"FOURTH ASSIGNMENT OF ERROR

"The trial Court erred in failing to sanction the Defendant or take other action regarding the Defendant's counsel, when the Plaintiff [*4] showed with uncontested evidence that the Defendant's witness testified, in the presence of Defendant's counsel, to alleged facts that were shown to be untrue.

"FIFTH ASSIGNMENT OF ERROR

"The trial Court erred in failing to grant Plaintiff's request for a new trial when the Plaintiff showed the Defendant's witness testified to alleged facts that were shown to the trial Court to be untrue."

Section 227(c)(5), Title 47, U.S.Code provides, in part:

"(5) Private right of action. A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may *** bring in an appropriate court of that State -- --

" ***

"(B) an action to recover for actual monetary loss from such a violation, or to receive up to $ 500 in damages for each such violation, whichever is greater ***

" ***

"It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent [*5] telephone solicitations in violations of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph."

The regulations prescribed under *Section 227(c)(5), Title 47, U.S.Code* are located at *Section 64.1200(e), Title 47, C.F.R.* and provide, in part:

"(e) No person or entity shall initiate any telephone solicitation to a residential telephone subscriber:

"(1) Before the hour of 8 a.m. or after 9 p.m. *** and

"(2) Unless such person or entity has instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

"(i) *Written policy.* Persons or entities making telephone solicitations must have a written policy, available upon demand, for maintaining a do-not-call list.

"(ii) *Training* [*6] *of personnel engaged in telephone solicitation.* Personnel engaged in any aspect of telephone solicitation must be in-

formed and trained in the existence and use of the do-not-call list.

"(iii) *Recording, disclosure of do-not-call requests.* If a person or entity making a telephone solicitation *** receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made. ***

"(iv) *Identification of telephone solicitor.* ***

"(v) *Affiliated persons or entities.* ***

"(vi) *Maintenance of do-not-call lists.* A person or entity making telephone solicitations must maintain a record of a caller's request not to receive future telephone solicitations. A do not call request must be honored for 10 years from the time the request is made."

Defendant uses telemarketing to sell its products. On October 17, 1995, an employee of defendant made a telephone sales call to plaintiff at his home. Plaintiff told defendant's employee he did not [*7] want to be called again and requested that a copy of defendant's "do-not-call" policy be mailed to him. Defendant failed to send a copy of its "do-not-call" policy to plaintiff.

On or about November 22, 1995, defendant entered plaintiff's phone number on its local do-not-call list. Defendant has a written procedure instructing all telemarketing managers to send a copy of the names of people who had asked to be placed on defendant's do-not-call list to the corporate telemarketing department on a weekly basis. For unknown reasons, defendant's national headquarters did not receive plaintiff's number.

On September 20, 1996, an employee of defendant placed a telephone sales call to plaintiff. During this call, the employee admitted that her training had not covered the do-not-call list. Once again, plaintiff asked to be sent a copy of defendant's do-not-call policy; however, no policy was sent.

The magistrate found that defendant had a thorough and effective procedure for handling do-not-call requests at its national headquarters. At trial, defendant acknowledged that plaintiff's phone number was on its local do-not-call list. Defendant explained that the second call was made from [*8] a new local office which had "washed" its list of names for the September 20th calling session through all list checkers available from national headquarters, but had not "washed" the list through its local do-not-call list.

Because it has the potential to moot parts of plaintiff's appeal, defendant's cross-appeal will be addressed first. Defendant presents the following assignment of error on cross-appeal:

"ASSIGNMENT OF ERROR

"The trial Court erred in holding, based on undisputed facts, that

> Colorado Prime's procedures did not satisfy the requirements of the statutory affirmative defense of *47 U.S.C. § 227*(c)(5)."

In support of its position, defendant argues that isolated breakdowns in a telemarketer's procedures are entitled to coverage under *Section 227(c)(5), Title 47, U.S.Code*'s affirmative defense and that when it found defendant had not proven an affirmative defense in the present case, the trial court effectively imposed strict liability on defendant for the "isolated breakdown" in its system. Despite the fact that plaintiff's number was entered on a local do-not-call list in November of 1995, it was not on defendant's national [*9] do-not-call list almost a year later. Despite two separate requests by plaintiff to receive a copy of defendant's written policy for maintaining a do-not-call list, as of the date of trial, plaintiff still had not received a copy. Defendant's failure to execute properly two of its practices and procedures on two separate occasions involving the same person does not satisfy *Section 227(c)(5), Title 47, U.S.Code*'s affirmative defense requirement that a defendant's practices and procedures be implemented with due care.

Defendant's assignment of error on cross-appeal is overruled.

Plaintiff's first assignment of error raises the issue of whether the first call may be considered when calculating damages or whether only subsequent calls within any twelve-month period are to be considered when awarding damages. This court has recently ruled on this issue in *Charvat v. ATW, Inc., dba Air-Tite Windows, Inc., 1998 Ohio App. LEXIS 1709* (Apr. 21, 1998), Franklin App. No. 97APG09-1163, unreported *(1998 Opinions 1277)*. Writing for the court, Judge Lazarus held that the intent of *Section 227(c)(5), Title 47, U.S.Code* is not to create liability beginning with the first call and that a plaintiff is not entitled to [*10] damages for violations prior to the second call.

Plaintiff's first assignment of error is overruled.

In his second assignment of error, plaintiff raises two separate issues. First, plaintiff asserts that the trial court erred when it found no evidence that defendant's actions were "knowing" in the context of *Section 227(c)(5), Title 47, U.S.Code* and did not award plaintiff treble damages. The trial court found that because defendant did not affirmatively know at the time the second telemarketing call was made to plaintiff that it was in violation of *Section 227(c)(5), Title 47, U.S.Code*, the call was not made "knowingly" in the context of *Section 227(c)(5), Title 47, U.S.Code*'s treble damages provision. Plaintiff contends that the trial court applied an incorrect definition of "knowingly."

This court finds that the trial court properly determined that to knowingly violate the *regulations* as required by *Section 227(c)(5), Title 47, U.S.Code*, a defendant must do more than make a telephone call. A defendant must affirmatively know it is violating a *regulation* when making the telephone call -- -- for purposes of the treble damages provision. Furthermore, this court finds no [*11] congressional intent indicating that knowingly should be interpreted to encompass "should have known" and finds that this interpretation would be inconsistent with the plain meaning of knowingly.

Second, plaintiff asserts that *Section 227(c)(5), Title 47, U.S.Code*'s affirmative defense is available only when treble damages are at issue and may not be asserted when compensatory damages are at issue. Although the trial court considered the merits of defendant's affirmative defense argument, it found that defendant had not asserted a valid affirmative defense. Had this court sustained defendant's cross-appeal, plaintiff would have a prejudicially affected substantial interest. However,

because this court overruled the cross-appeal, the trial court's alleged error resulted in no injury to a substantial interest of plaintiff. Accordingly, this issue is moot and not properly raised on appeal. *Ohio Contract Carriers Assn., Inc. v. Public Utilities Commission of Ohio (1942), 140 Ohio St. 160, 163, 42 N.E.2d 758.*

For the above reasons, plaintiff's second assignment of error is overruled.

In his third assignment of error, plaintiff argues that damages under *Section 227(c)(5), Title 47,* [*12] *U.S.Code* should be awarded based on the number of violations of *Section 64.1200(e), Title 47, C.F.R.* The trial court determined that compensation is to be awarded based on the number of telephone calls containing at least one violation of a regulation a person receives after making a do-not-call request.

Plaintiff argues that, pursuant to the last antecedent rule, "for each such violation" in *Section 227(c)(5)(B), Title 47, U.S.Code* refers to the preceding language "in violation of the regulations." Defendant argues that "for each such violation" refers to "telephone call."

This court finds that the language at issue is amenable to more than one interpretation. Consideration of the last antecedent rule does not solve the problem. "Such" could be argued to refer to the entire noun phrase "telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection" or, alternatively, to the prepositional phrase "in violation of the regulations" contained within the noun phrase.

The purpose of *Section 227(c)(5), Title 47, U.S.Code* is to prevent repeated telemarketing calls to a person who has asked the telemarketer to [*13] stop calling; the regulations exist to serve this purpose. Based on the role the regulations serve, this court finds that "such" refers to telephone calls in violation of the regulations. Therefore, compensation should be based on the number of telephone calls in violation of the regulations.

For the above reasons, plaintiff's third assignment of error is overruled.

In his fourth assignment of error, plaintiff asserts that the trial court erred when it did not direct defendant to correct false testimony in the record. Plaintiff alleges that defense witness Debbie McMillan falsely testified that defendant had violated *Section 227(c)(5), Title 47, U.S.Code*'s re-call violations three times. Plaintiff contends that the record contains undisputed evidence that defendant had made well over three *telephone calls* in violation of do-not-call requests.

Defendant's proposed amendments to plaintiff's *App.R. 9(C)* statement reviews the testimony of Ms. McMillan and includes her testimony that defendant "had failed to honor do-not-call requests on only three occasions, including Charvat's request." (*Proposed Amendment* at 3.) The magistrate found that defendant acknowledged "that it [*14] has failed to honor do-not-call requests on only three occasions, including the case herein."

Because the record contains no transcript, this court does not know if plaintiff specifically asked Ms. McMillan how many *telephone calls* were made to people who had requested that they be placed on defendant's do-not-call list or if his question could have been understood to ask how many *people's* do-not-call requests had not been honored. Consequently, the record does not establish that defendant's witness testified falsely. Therefore, the trial court committed no error. Plaintiff's fourth assignment of error is overruled.

In his fifth assignment of error, plaintiff asserts that the trial court erred when it did not grant a new trial based on plaintiff's evidence that Ms. McMillan had provided false testimony.

This court has already found that there is no evidence in the record that Ms. McMillan provided false testimony. In turn, plaintiff did not file a *Civ.R. 59* motion for a new trial. Plaintiff's fifth assignment of error is overruled.

Accordingly, plaintiff's five assignments of error on appeal and defendant's cross-assignment of error on appeal are overruled and the [*15] judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BOWMAN, J., concurs.

BRYANT, J., concurs in part and dissents in part.

REILLY, J., retired, of the Tenth Appellate District, assigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.

CONCUR BY: BRYANT (In Part)

DISSENT BY: BRYANT (In Part)

DISSENT: BRYANT, J., concurring in part and dissenting in part.

Being unable to agree with the majority's disposition of appellant's first and third assigned errors, I respectfully dissent in part.

Appellant's first assignment of error asserts the trial court erred in failing to award damages for appellee's first phone call placed to him. His third assignment of error asserts the trial court erred in failing to award him damages for each violation of the regulations promulgated pursuant to *Section 227, Title 47, U.S.Code.*

Section 227(c)(5), Title 47, U.S.Code states:

" *** A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may *** bring in an appropriate [state] [*16] court ***

"(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

"(B) an action to recover for actual monetary loss from such a violation, or to receive up to $ 500 in damages for each such violation, whichever is greater, or

"(C) both such actions."

Unquestionably, the statute could be clearer. Nonetheless, in my opinion, the statute requires "more than one telephone call within any 12-month period" as a predicate to bringing a private cause of action. Once that predicate is met, however, the wronged individual may recover for "each such violation." The confusion in the statute arises out of the words "such violation," as the reference is less than clear.

Section 227(c)(5)(A), Title 47, U.S.Code helps to clarify the ambiguity. It specifies that an action may be based on a "violation of the regulations" prescribed under the subsection, and allows an action to enjoin "each such violation." In that sentence "such violation" refers back to "a violation of the regulation." Similarly, when Section 227(c)(5)(B) refers to an

action based on "such a violation" and allows monetary damages [*17] for "each such violation," in my opinion it too refers to the language of Section 227(c)(5)(A), "violation of the regulations."

As a result, while two telephone calls within any twelve-month period are the necessary prerequisite to bringing an action under Section 227(c)(5), once that predicate is met, the statute allows a recovery for each violation of the regulations, including the first telephone call. Not only, then, are both telephone calls compensable under Section 227(c)(5)(B), but violation of the regulations likewise is compensable. To hold otherwise renders large sections of the regulations largely unenforceable through a private cause of action, which itself constitutes an effective means of enforcing the statutory and regulatory provisions.

For the foregoing reasons, I would sustain appellant's first and third assignments of error. Agreeing with the majority's disposition of the remaining assignments of error, however, I concur in part and dissent in part.

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*** CURRENT THROUGH P.L. 109-481, APPROVED 1/12/2007 ***
*** WITH GAPS OF 109-476 THROUGH 109-480 ***

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
GENERAL PROVISIONS

47 USCS § 151

§ 151. Purposes of Act; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

History:

(June 19, 1934, ch 652, Title I, § 1, ✦ 48 Stat. 1064; May 20, 1937, ch 229, § 1, ✦ 50 Stat. 189; Feb. 8, 1996, ✦ P.L. 104-104, Title I, Subtitle A, § 104, ✦ 110 Stat. 86.)

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*** CURRENT THROUGH P.L. 109-481, APPROVED 1/12/2007 ***
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TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SPECIAL PROVISIONS RELATING TO RADIO
GENERAL PROVISIONS

47 USCS § 312

§ 312. Administrative sanctions

***

(f) "Willful" and "repeated" defined. For purposes of this section:
(1) The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

Michael Hahn et al., Plaintiffs-Appellants, v. John Doe, Doing Business as 84 Lumber & Home Center et al., Defendants-Appellees.

No. 94APE07-1024 (REGULAR CALENDAR)

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1995 Ohio App. LEXIS 1057

March 23, 1995, Rendered On

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

SUBSEQUENT HISTORY: Subsequent appeal at, Sub nomine at *Hahn v. Satullo, 156 Ohio App. 3d 412, 2004 Ohio 1057, 806 N.E.2d 567, 2004 Ohio App. LEXIS 942* (Ohio Ct. App., Franklin County, 2004)

PRIOR HISTORY: APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Judgment affirmed in part and reversed in part; case remanded.

COUNSEL: Fusco, Smith & Mathews, and Michael J. Fusco, for appellants.

Crabbe, Brown, Jones, Potts & Schmidt, Steven B. Ayers, and Lynne K. Schoenling, for appellee 84 Lumber & Home Center.

Thompson, Hine & Flory, William B. Leahy, and Michael J. Holleran, for appellee Domtar, Inc.

JUDGES: BRYANT, J. YOUNG and TYACK, JJ., concur.

OPINION BY: BRYANT

OPINION: OPINION

BRYANT, J.

Plaintiffs-appellants, Michael and Marie Hahn, appeal from a judgment of the Franklin County Court of Common Pleas awarding them $ 42,152 on their claims for breach of warranty and violation of the Consumer Sales Practices Act, R.C. Chapter 1345 ("CSPA"), against defendants-appellees, 84 Lumber Company (d.b.a. 84 Lumber & Home Center), Pierce-Hardy Real Estate, Inc., and 84 Associates, Inc. (collectively, "84 Lumber"), but denying their post-trial motions for treble damages and attorney fees. 84 Lumber and third-party defendant, Domtar, Inc. ("Domtar"), cross-appeal from the judgment. [*2]

On December 14, 1991, plaintiffs visited an 84 Lumber & Home Center located in Pickerington, Ohio, to purchase drywall for the home they were building. Plaintiffs there observed a display of "Gold Bond" brand drywall in front of the store. After consulting the store manager about the quality of Gold Bond drywall and being told that it was "first quality," plaintiffs ordered three hundred twelve foot sheets of one-half inch drywall for next day delivery and

tendered a check in the amount of $ 1,638.07 to 84 Lumber as a deposit on the order. On December 15, 1991, 84 Lumber delivered three hundred sheets of drywall to plaintiffs' construction site, where plaintiffs' drywall contractor accepted it.

After the drywall had been professionally hung, plaintiffs primed it themselves to prepare it for painting. During the application of the primer, plaintiffs discovered that the surface of much of the drywall was covered with indentations, ridges, ripples and waves which had not been readily visible prior to applying the primer. In the course of investigating the defects in the drywall, plaintiffs also discovered that while some of the drywall was Gold Bond brand, all of the defective drywall [*3] was Domtar brand. Plaintiffs immediately notified 84 Lumber that they had discovered not only defects in the drywall, but that the defective drywall was Domtar rather than Gold Bond.

Following an inspection of the drywall by a Domtar representative, 84 Lumber offered plaintiffs' $ 3,100 to cover the cost of having the defective drywall "skim coated" to correct the surface imperfections. On the advice of several experts, plaintiffs rejected the offer and requested that 84 Lumber pay to have the defective drywall removed and replaced with Gold Bond drywall. 84 Lumber refused plaintiffs' request.

On April 20, 1992, plaintiffs filed suit alleging that 84 Lumber violated the CSPA and breached express and implied warranties in connection with plaintiffs' purchase of drywall. 84 Lumber filed a third-party complaint seeking indemnification or contribution from Domtar. Although plaintiffs sought leave to file a second amended complaint n1 asserting their claims for breach of warranty and violation of the CSPA directly against Domtar, the trial court denied plaintiffs' motion.

n1 Plaintiffs filed their first amended complaint on July 16, 1992, for the purpose of joining various entities related to 84 Lumber.

[*4]

Beginning on October 20, 1993, plaintiffs' claims and 84 Lumber's third-party claims were tried to a jury. At the close of plaintiffs' case, 84 Lumber moved for a directed verdict on plaintiffs' claims for breach of warranty, which the trial court denied. Ultimately, the jury returned a verdict for plaintiffs in the amount of $ 42,152. By interrogatory, the jury indicated that $ 21,060 of the damages awarded to plaintiffs was attributable to 84 Lumber's violation of the CSPA. The jury also awarded 84 Lumber $ 10,530 in contribution on its claim against Domtar; by interrogatory, the jury attributed the entire $ 10,530 to violation of the CSPA.

Following return of the jury's verdict, plaintiffs filed post-trial motions seeking treble damages and attorney fees for 84 Lumber's violation of the CSPA. The trial court denied both motions and entered judgment in accordance with the jury's verdict. Domtar moved for judgment notwithstanding the jury's verdict on 84 Lumber's claim for contribution. The trial court overruled Domtar's motion.

Plaintiffs appeal, assigning the following errors:

> "I. WHEN THE JURY FOUND THAT DEFENDANT-APPELLEE, IN ITS CONSUMER TRANSACTIONS WITH PLAINTIFFS-APPELLANTS [*5] HAD ENGAGED IN AN UNFAIR OR DECEPTIVE ACT/PRACTICE AND OHIO COURT DECISIONS DECLARING SUCH ACT/PRACTICE TO BE UNFAIR OR DECEPTIVE UNDER OHIO CODE SECTION

1345.02 WERE AVAILABLE FOR PUBLIC INSPECTION UNDER *O.R.C. SECTION 1345.05(A)(3)* PRIOR TO DEFENDANT'S ACTS, THE TRIAL COURT ERRED IN DENYING PLAINTIFFS-APPELLANTS' POST-TRIAL MOTION FOR TREBLE DAMAGES.

"II. THE TRIAL COURT ERRED IN REFUSING TO PERMIT THE JURY, RATHER THAN THE COURT, TO DETERMINE WHETHER DEFENDANTS-APPELLEES 'KNOWINGLY' VIOLATED THE CONSUMER SALES PRACTICES ACT (*O.R.C. SECTION 1345.01, ET SEQ.*) AND IN REFUSING TO INSTRUCT THE JURY ON THIS ISSUE.

"III. THE TRIAL COURT ERRED IN DENYING PLAINTIFFS-APPELLANTS' MOTION FOR REASONABLE ATTORNEYS' FEES HOLDING THAT DEFENDANTS-APPELLEES DID NOT 'KNOWINGLY' COMMIT AN ACT OR PRACTICE THAT VIOLATES THE CONSUMER SALES PRACTICES ACT.

"IV. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON CERTAIN ACTS THAT CONSTITUTE VIOLATIONS OF THE CONSUMER SALES PRACTICES ACT.

"V. THE TRIAL COURT ERRED IN DENYING PLAINTIFFS-APPELLANTS LEAVE TO FILE A SECOND AMENDED COMPLAINT."

84 Lumber cross-appeals, assigning the following [*6] errors:

"I. THE TRIAL COURT ERRED IN REFUSING TO GRANT 84 LUMBER'S MOTION FOR DIRECTED VERDICT ON APPLICATION OF THE U.C.C.

"II. THE JURY ERRED IN AWARDING CONTRIBUTION IN FAVOR OF 84 LUMBER AGAINST THIRD-PARTY DEFENDANT DOMTAR GYPSUM RATHER THAN FULL INDEMNIFICATION.

"III. JURY INSTRUCTIONS BY THE TRIAL COURT WERE IN ERROR."

Domtar cross-appeals, assigning the following errors:

"I. THE TRIAL COURT INCORRECTLY DENIED DOMTAR

JUDGMENT AS A MATTER OF LAW UPON ITS MOTION FOR A DIRECTED VERDICT MADE AT THE CLOSE OF 84 LUMBER'S CASE.

"II. THE TRIAL COURT INCORRECTLY DENIED DOMTAR JUDGMENT AS A MATTER OF LAW UPON IS [*sic*] MOTION FOR A DIRECTED VERDICT MADE AT THE CLOSE OF ALL EVIDENCE.

"III. THE TRIAL COURT INCORRECTLY DENIED DOMTAR JUDGMENT AS A MATTER OF LAW UPON IS [*sic*] MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT."

Prior to addressing the parties' assignments of error, we note that 84 Lumber has not appealed the jury's verdict finding that it violated the CSPA. Thus, for purposes of addressing the various assignments and cross-assignments of error, we begin with that violation as the underlying [*7] premise.

In their first assignment of error, plaintiffs allege that the trial court erred in denying their motion for treble damages for 84 Lumber's violation of the CSPA.

In response to a series of interrogatories, the jury found that 84 Lumber had violated *R.C. 1345.02(B)* of the CSPA in connection with its sale of drywall to plaintiffs by representing that the drywall it sold them was "of a particular grade, style, prescription, or model" when it was not. The jury apparently relied on evidence at trial which revealed that 84 Lumber represented to plaintiffs that the drywall it was selling plaintiffs was "first quality" when in fact the drywall delivered to plaintiffs had indentations, ridges, ripples and waves. The jury awarded plaintiffs $ 21,060 in actual damages for the violation of *R.C. 1345.02(B)*, and plaintiffs moved to treble the award pursuant to *R.C. 1345.09(B)*.

R.C. 1345.09(B) conditions the availability of treble damages upon a violation of *R.C. 1345.02* or *1345.03* and a showing that the violation was either (1) an act or practice declared to be deceptive or unconscionable by a rule adopted by the Attorney General pursuant to *R.C. 1345.05(B)(2)* prior to the commission [*8] of the violation in question, or (2) an act or practice determined to violate *R.C. 1345.02* or *1345.03* by a previous Ohio court decision, provided the decision had been made available for public inspection by the Attorney General pursuant *R.C. 1345.05(A)(3)* prior to the commission of the violation in question. See *Mid-America Acceptance Co. v. Lightle (1989), 63 Ohio App.3d 590, 579 N.E.2d 721; Sinkfield v. Strong (1987), 34 Ohio Misc.2d 19, 21, 517 N.E.2d 1051.*

In their motion for treble damages, plaintiffs did not argue that 84 Lumber's violation of *R.C. 1345.02(B)(2)* was an act or practice declared to be deceptive or unconscionable by a rule adopted by the Attorney General pursuant to *R.C. 1345.05(B)(2)*. Rather, plaintiffs presented three Ohio court decisions which had been made available for public inspection by the Attorney General prior to 84 Lumber's commission of the CSPA violation at issue, and which, according to plaintiffs, determined the act or practice engaged in by 84 Lumber to be a violation of *R.C. 1345.02* or *1345.03*: *Clyde's Carpet, Inc. v. Banas* (Oct. 11, 1990), Maumee M.C. No. CV-90-F-315, unreported; *State ex rel. Celebrezze v. Elliott* (Mar. 13, [*9] 1990), Tuscawaras C.P. No. 89CV-10-0355, unreported; and *State ex rel. Celebrezze v. Moore*

(Apr. 30, 1987), Franklin C.P. No. 86CV-02-1297, unreported.

In *Clyde's Carpet*, the seller represented that carpeting installed in a consumer's home was the same carpeting previously ordered by the consumer, when in fact the carpeting installed was different than the carpeting ordered. At trial, the seller's conduct was found to have violated *R.C. 1345.02(B)(5)*'s prohibition against "representing *** that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not *** ." In relying upon *Clyde's Carpet*, plaintiffs continue to assert that 84 Lumber violated the CSPA by representing that it had supplied Gold Bond brand drywall in accordance with its previous representation, when it had not. The jury, however, expressly rejected that allegation by responding "no" to jury interrogatory "C," which states:

> "Do you find, by a preponderance of the evidence, that 84 Lumber represented that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of [*10] a supplier in furnishing similar merchandise of *equal or greater value* as a good faith substitute is not unfair or deceptive as intended under the Consumer Sales Practices Act?" (Emphasis *sic.*)

Rather, the jury found that 84 Lumber had violated a different part of *R.C. 1345.02(B)* by representing that the drywall it sold to plaintiffs was of a particular grade, style, prescription, or model when it was not. Thus, the act or practice found to violate *R.C. 1345.02* or *1345.03* in *Clyde's Carpet* is different than the deceptive act or practice the jury found in this case.

The *Elliott* decision does, like the instant case, involve a finding that the defendants represented that the items or goods sold by them through consumer transactions were a particular standard, quality, grade or model, when they were not. In *Elliott* the defendants, owners of an appliance repair shop, represented that appliances they sold were new or in working order, knowing that they were not. In contrast, plaintiffs presented no evidence in the present case that 84 Lumber knew that the drywall it delivered to plaintiffs was not in conformance with its representations. Indeed, the evidence [*11] indicates that the defects were undiscoverable prior to the drywall being primed. As a result, *Elliott* does not place 84 Lumber on notice that its actions constituted a violation of the CSPA.

Finally, the *Moore* decision involves a default judgment, and therefore contains neither detailed findings of fact, nor an explicit conclusion of law setting forth the provision or provisions of the CSPA which were violated. Thus, we are unable to determine the nature of the act or practice which was determined to violate the CSPA in *Moore*.

Plaintiffs having failed to show that 84 Lumber's violation of the CSPA was an act or practice determined to violate *R.C. 1345.02* or *1345.03* by a previous Ohio court decision, their post-trial motion for treble damages was properly denied by the trial court. Plaintiffs' first assignment of error is overruled.

Plaintiffs' second and third assignments of error will be addressed together, as they both raise the issue of whether the trial court properly denied plaintiffs' post-trial motion for attorney fees.

R.C. 1345.09(F)(2) provides as follows:

> "(F) The court may award to the prevailing party a reasonable attor-

> ney's fee limited to the [*12] work reasonably performed, if ***
>
> " ***
>
> "(2) The supplier has *knowingly* committed an act or practice that violates this chapter." (Emphasis added.)

In the course of preparing the jury instructions, the trial court ruled, over plaintiffs' objection, that the issue of whether 84 Lumber had "knowingly" committed an act or practice that violated the CSPA was for the court, not the jury to decide. When plaintiffs moved for attorney fees following the jury verdict finding that 84 Lumber had violated the CSPA, the trial court denied the motion, finding that "there is absolutely no evidence that 84 Lumber knew or should have known that these particular batches of drywall were defective."

In their second assignment of error, plaintiffs challenge the trial court's refusal to instruct the jury on the issue of whether 84 Lumber acted "knowingly" in violating the CSPA. "A determination that a supplier has 'knowingly' committed a deceptive act, so as to justify an award of attorney fees [under *R.C. 1345.09(F)(2)*], is solely within the province of the court." *Dotson v. Brondes Motor Sales, Inc. (1993), 90 Ohio App.3d 206, 208, 628 N.E.2d 137.* The trial [*13] court acted properly when it refused to instruct the jury on that issue.

Plaintiffs' third assignment of error contests the trial court's finding that 84 Lumber did not act "knowingly" in violating the CSPA. In *Einhorn v. Ford Motor Co. (1990), 48 Ohio St.3d 27, 30, 548 N.E.2d 933,* the Supreme Court held that the term "knowingly" in *R.C. 1345.09(F)(2)* " *** means that the supplier need only intentionally do the act that violates the Consumer Sales Practices Act. The supplier does not have to know that his conduct violates the law for the court to grant attorney fees." Plaintiffs argue that by requiring them to show that 84 Lumber knew that the drywall was defective, the trial court required them to show that 84 Lumber knew that it was violating the CSPA.

Here, the evidence is uncontroverted that although 84 Lumber represented to plaintiffs that its drywall was "first quality," the drywall delivered to plaintiffs was defective. In order to satisfy the "knowingly" standard of *R.C. 1345.02(F)(2)* as interpreted in *Einhorn*, plaintiffs had to show not only that 84 Lumber "intentionally" delivered drywall, but that it knew the drywall delivered to plaintiffs did not conform [*14] with its earlier representation. The record contains no evidence that 84 Lumber had such knowledge. In fact, the evidence suggests that 84 Lumber fully intended to deliver "first quality" drywall and failed to do so only because it obtained a defective lot of drywall from Domtar, an otherwise reputable drywall manufacturer. Thus, the trial court correctly denied plaintiffs' motion for attorney fees on the grounds that 84 Lumber had not "knowingly" committed an act or practice that violated the CSPA.

Plaintiffs second and third assignments of error are overruled.

In their fourth assignment of error, plaintiffs allege that the trial court erred in refusing to instruct the jury on several CSPA violations.

At trial, plaintiffs requested jury instructions on CSPA violations committed under *R.C. 1345.02(B)(1), 1345.02(B)(2), 1345.02(B)(5),* and *1345.02(B)(10)* and *Ohio Adm.Code 109:4-3-03(B)(1), 109:4-3-03(B)(3), 109:4-3-07, 109:4-3-09(A)(1)* and *109:4-3-09(B)*. The trial court agreed to instruct the jury on the statutory violations set forth in *R.C.*

1345.02(B), but refused to instruct the jury on any of the violations set forth in the various Administrative Code provisions, finding the [*15] Administrative Code provisions were duplicative of the statutory violations.

The administrative rules on which the trial court refused to give jury instructions were promulgated pursuant to *R.C. 1345.05(B)(2)*, n2 and set forth substantive violations of the CSPA which are in addition to the violations set forth in *R.C. 1345.02(B)*. See *Mid-America Acceptance Co., supra, at 598-599*. Further, "it is the duty of a trial court to submit an essential issue to the jury when there *is* sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue *** ." *O'Day v. Webb (1972), 29 Ohio St.2d 215, 280 N.E.2d 896*, paragraph four of the syllabus. (Emphasis *sic*.) See, also, *Murphy v. Carrollton Mfg. Co. (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828*. The issue, then, is whether the record contains evidence from which reasonable minds might find that 84 Lumber violated any of the Administrative Code provisions on which plaintiffs requested jury instructions. *Carrollton Mfg. Co., supra.*

n2 *R.C. 1345.05(B)(2)* provides in part, as follows:

"(B) The attorney general may:

" ***

"(2) Adopt, amend, and repeal substantive rules defining with reasonable specificity acts or practices that violate *sections 1345.02* and *1345.03 of the Revised Code*. *** "

[*16]

Plaintiffs have identified evidence in the record to support only their claim that the trial court erred in refusing to instruct the jury on *Ohio Adm.Code 109:4-3-07*, which provides:

"It shall be a deceptive act or practice in connection with a consumer transaction for a supplier to accept a deposit unless the following conditions are met:

"(A) The deposit obligates the supplier to refrain for a specified period of time from offering for sale to any other person the goods in relation to which the deposit has been made by the consumer if such goods are unique; provided that a supplier may continue to sell or offer to sell goods on which a deposit has been made if he has available sufficient goods to satisy [*sic*] all consumers who have made deposits;

"(B) All deposits accepted by a supplier must be evidenced by dated receipts stating the following information:

"(1) Description of the goods, (including model, model year, when appropriate, make, and color);

"(2) The cash selling price;

"(3) Allowance on the goods to be traded in, if any;

"(4) Time during which the option is binding;

"(5) [*17] Whether the deposit is refundable and under what conditions; and

"(6) Any additional costs such as delivery charges.

"(C) For the purposes of this rule 'deposit' means any amount of money tendered or obligation to pay money incurred by a consumer as a deposit, refundable or nonrefundable option, or as partial payment for goods or services."

Plaintiffs presented evidence at trial that 84 Lumber accepted a deposit of $ 1,638.07 on plaintiffs' drywall order. (Tr. Vol. I, pp. 15-16; Tr. Vol. IV, p. 252.) Plaintiffs testified that 84 lumber did not give them a receipt at the time it accepted their deposit as required by *Ohio Adm.Code 109:4-3-07(B)*. (Tr. Vol. I, p. 16; Tr. Vol. IV, p. 253.) Although the 84 Lumber employee who waited on plaintiffs testified that he was in the habit of giving a receipt under the rule to all customers who made a deposit, he was unable to say whether he had actually given plaintiffs such a receipt. (Tr. Vol. IV, pp. 251-252.) Although defendant's evidence precluded a directed verdict for plaintiffs on the receipt issue, plaintiffs' evidence was sufficient to warrant a jury instruction under *Ohio Adm.Code 109:4-3-07(B)*. Thus, [*18] the trial court should have instructed the jury on that provision.

Although plaintiffs have recovered their total actual damages under *R.C. 1345.02(B)(2)*, *R.C. 1345.09(B)* provides for a minimum award of $ 200 for a CSPA violation under a rule adopted by the Attorney General. Thus, the trial court's failure to instruct the jury on *Ohio Adm.Code 109:4-3-07(B)* cannot be deemed harmless. Accordingly, we sustain plaintiffs' fourth assignment of error to the extent indicated; although any recovery under the rule on this record is limited to $ 200, plaintiffs are entitled to have a jury determine whether defendant violated *Ohio Adm.Code 109:4-3-07(B)*.

Plaintiffs' fifth assignment of error asserts that the trial court erred in denying their motion for leave to file a second amended complaint alleging claims for breach of warranty and violation of the CSPA directly against Domtar. Relying on *Peterson v. Teodosio (1973), 34 Ohio St.2d 161, 297 N.E.2d 113*, plaintiffs contend that their motion was proper because it presented "a claim upon which relief may be granted and no reason otherwise justifying denial of the motion is disclosed." *Id.* at paragraph six of the syllabus. While plaintiffs [*19] correctly note the guidance the Supreme Court provided to trial courts in *Peterson*, the Supreme Court in *Wilmington Steel Products, Inc. v. Cleve. Elec. Illum. Co. (1991), 60 Ohio St.3d 120, 573 N.E.2d 622*, cautioned that reliance upon the *Peterson* holding is inappropriate when a motion to amend is not timely filed. *Id.* at 850; see, also, *DiPaolo v. DeVictor (1988), 51 Ohio App.3d 166, 170, 555 N.E.2d 969.*

In reviewing the trial court's decision denying plaintiffs' motion for leave to amend their complaint, we are limited to determining whether the trial court's decision is an abuse of discretion. *Wilmington Steel Products, supra, at 122.* "An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary." *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd. (1992), 63 Ohio St.3d 498, 506, 589 N.E.2d 24.*

In the present case, the trial court denied as untimely plaintiffs' motion for leave to file a second amended complaint. The record reveals that plaintiffs filed their motion for leave to amend on April 9, 1993, almost a year after they filed their [*20] original complaint, and more than nine months from the time that 84 Lumber filed its third-party complaint bringing Domtar into the action. The facts underlying plaintiffs' proposed amended complaint are the same as those underlying its original complaint; plaintiffs were aware of those facts well before they sought to file a second amended complaint, leaving unexplained their delay in seeking to amend.

Even if, however, plaintiffs' delay was not unreasonable, plaintiffs have not been prejudiced by the trial court's failure to allow their proposed amendment. Plaintiffs have recovered their total actual damages from 84 Lumber for violation of the CSPA and breach of warranty, and plaintiffs have not asserted that they are precluded from bringing a separate claim against Domtar for violation of the Magnuson-Moss Warranty Act.

Given the foregoing, the record discloses no reversible error in denying plaintiffs' motion for leave to file a second amended complaint. Plaintiffs' fifth assignment of error is overruled.

84 Lumber's first assignment of error alleges that the trial court erred in overruling its motion for a directed verdict on plaintiffs' claims for breach of warranty. "A motion [*21] for a directed verdict presents a question of law, not a question of fact, 'even though in deciding such a motion it is necessary to review and consider the evidence.'" *Grau v. Kleinschmidt (1987), 31 Ohio St.3d 84, 90, 509 N.E.2d 399* (quoting *Ruta v. Breckenridge-Remy Co. (1982), 69 Ohio St.2d 66, 430 N.E.2d 935,* paragraph one of the syllabus). Where the record contains sufficient evidence to permit reasonable minds to differ on an essential issue, the trial court must submit that issue to the fact finder for consideration. *O'Day, supra, at 220.* "Conversely, it is also the duty of a trial court to withhold an essential issue from the jury when there *is not* sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue." *Id.* (Emphasis *sic.*)

At the close of plaintiffs' case, 84 Lumber moved for a directed verdict on plaintiffs' claims for breach of warranty. In its motion, 84 Lumber argued that reasonable minds could find only that plaintiffs had neither "rejected" the drywall within a reasonable time after its delivery, nor "revoked" their acceptance of the drywall prior to installing it; that plaintiffs' [*22] claims for breach of warranty thus were barred under *R.C. 1302.65* (*U.C.C. 2-607*) and *R.C. 1302.66(B)* (*U.C.C. 2-608*[2]).

Under *R.C. 1302.65(B)*, acceptance of good does "not of itself impair any other remedy provided by sections 1302.01 to 1302.98, inclusive, of the Revised Code for non-conformity." Plaintiffs' failure to reject the drywall, then, did not bar plaintiffs from pursuing damages for breach of warranty pursuant to *R.C. 1302.26* [*U.C.C. 2-313*], 1302.27 [*U.C.C. 2-314*], or 1302.28 [*U.C.C. 2-315*].

Similarly, plaintiffs' warranty claims are not barred under the notice provisions of *R.C. 1302.65(C)(1)* which require that a buyer "must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." Here, plaintiffs presented uncontroverted evidence that the defects in the drywall were not readily discoverable until after the drywall had been installed and primed, and that they notified 84 Lumber within a day of discovering the defects, thereby meeting the notice requirement of *R.C. 1302.65(C)(1)*. (Tr. Vol. I, pp. 29-31.)

Finally, *R.C. 1302.66(B)* merely prevented plaintiffs from seeking to revoke [*23] their acceptance of the drywall after they had brought about a "substantial change in the condition of the goods"; it does not prevent plain-

tiffs from pursuing their warranty claims. Thus, plaintiffs' warranty claims were not, as 84 Lumber alleged in its motion for a directed verdict, dependent upon proof of plaintiffs' rejection or revocation of the drywall, and the trial court properly overruled 84 Lumber's motion for a directed verdict. 84 Lumber's first assignment of error is overruled.

84 Lumber's second assignment of error and Domtar's three assignments of error will be discussed jointly, as all raise the issue of 84 Lumber's right to indemnification or contribution from Domtar. 84 Lumber's second assignment of error alleges that the trial court erred in awarding $ 10,530 in contribution, rather than full indemnification to 84 Lumber on its third-party claim against Domtar. Domtar's first, second and third assignments of error together allege that the trial court erred in failing to enter judgment as a matter of law in favor of Domtar on 84 Lumber's claim for contribution or indemnification.

After the jury returned its verdict awarding 84 Lumber contribution in the amount of [*24] $ 10,530 against Domtar, the trial court submitted the following supplemental interrogatories to the jury:

> "Of the $ 10,530 you have awarded from Domtar to 84 Lumber:
>
> "(1) What portion, if any, do you assess to the Consumer Sales Practices Act violation?
>
> "(2) What portion, if any, do you assess to the violations of the express or implied warranties?"

The jury responded "$ 10,530" to the first interrogatory and "$ 0" to the second interrogatory. In answering the second interrogatory as it did, the jury expressly rejected 84 Lumber's claim for indemnification or contribution arising out of a breach of an express or an implied warranty. n3 *Vescuso v. Lauria (1989), 63 Ohio App.3d 336, 339-340, 578 N.E.2d 862.* As a result, 84 Lumber's entitlement to indemnification or contribution, if any, must arise out of a CSPA violation.

> n3 84 Lumber has not challenged the jury's response to the second supplemental interrogatory on the ground that it is not supported by competent, credible evidence or that it was the result of passion or prejudice, and it will therefore not be disturbed.

[*25]

In order for 84 Lumber to be entitled to either indemnification or contribution, Domtar must be liable in whole or in part for plaintiffs' damages arising out of the CSPA. See *Travelers Indemnity Co. v. Trowbridge (1975), 41 Ohio St.2d 11, 13, 14, 321 N.E.2d 787.* In order to be liable for damages under the CSPA, one must be a "supplier" as the term is defined in *R.C. 1345.01(C)*, which provides:

> "(C) 'Supplier' means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not he deals directly with the consumer."

Although *R.C. 1345.01(C)* specifies that one may be a "supplier" without dealing directly with a consumer, it also provides that a party have some connection to a consumer transac-

tion, beyond merely manufacturing a product, in order to be liable for a violation of the CSPA. See *Haynes v. George Ballas Buick-GMC Truck* (Dec. 21, 1990), Lucas App. No. L-89-168, unreported.

Here, Domtar had no contact whatsoever with plaintiffs. Plaintiffs received no sales brochures or other literature from Domtar and did not see any advertising by Domtar. In fact, the evidence indicates [*26] that plaintiffs were completely unaware of the existence of Domtar at the time of their drywall purchase. Domtar was not a "supplier" of the drywall purchased by plaintiffs, it cannot be held liable for damages under the CSPA on this record, and it is not responsible either in whole or in part for the damages awarded against 84 Lumber for violation of the CSPA.

84 Lumber's second assignment of error is overruled, but Domtar's first, second and third assignments of error are sustained to the extent indicated.

In its third assignment of error, 84 Lumber asserts that the trial court's jury instructions were erroneous in several respects.

Initially, 84 Lumber alleges that the trial court erred in failing to instruct the jury on the issues of notice, acceptance, rejection and revocation as they pertain to plaintiffs' breach of warranty claims. The court, whether or not an instruction on such issues was necessary, did instruct the jury on each of those issues. (Tr. Vol. I, pp. 250-252.)

84 Lumber next argues that the trial court erred in failing to instruct the jury that because plaintiffs assumed the role of general contractor in the construction of their home, they must be held to [*27] a higher standard of care in inspecting goods than an ordinary person. 84 Lumber has failed to cite, and we have failed to locate, any cases holding that plaintiffs, in the circumstances of this case, are required to exercise a greater degree of care than the ordinary person in inspecting goods for defects under either the Uniform Commercial Code or the CSPA.

Finally, 84 Lumber argues that the trial court erred in failing to specifically instruct the jury that Domtar must indemnify 84 Lumber if it determined that the drywall was defective and that 84 Lumber had no active fault for such defect. However, the trial court's instruction on indemnification included both a discussion of defect and of passive and active fault. (Tr. Vol. I, pp. 256, 259.)

The record disclosing no error in the trial court's jury instructions concerning the issues 84 Lumber raises, 84 Lumber's third assignment of error is overruled.

Having overruled plaintiffs' first, second, third and fifth assignments of error and 84 Lumber's first, second and third assignments of error, but having sustained plaintiff's fourth and Domtar's first, second and third assignments of error to the extent indicated, we affirm [*28] in part and reverse in part the judgment of the trial court and remand this matter to the trial court for further proceedings in accordance herewith.

Judgment affirmed in part and reversed in part; case remanded.

YOUNG and TYACK, JJ., concur.