

In the
Supreme Court of Ohio

PHILIP J. CHARVAT,	:	Case Nos. 2006-1647
	:	2006-1855
Plaintiff-Appellant,	:	
	:	On Appeal from the
v.	:	Franklin County
	:	Court of Appeals,
THOMAS N. RYAN, D.D.S., <i>et al.</i> ,	:	Tenth Appellate District
	:	
Defendants-Appellees.	:	Court of Appeals Case
	:	No. 05AP-1331

**MERIT BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF PLAINTIFF-APPELLANT PHILIP J. CHARVAT**

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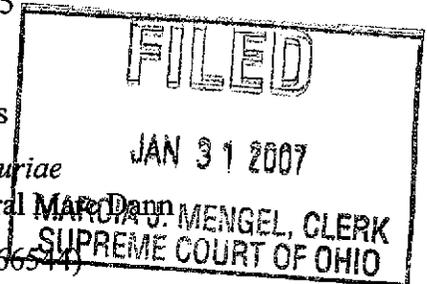


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INTRODUCTION

This case turns on the common-law maxim that ignorance of the law is no excuse. No one here, including Defendant-Appellee Thomas Ryan, denies that Ryan broke the law. Specifically, Ryan violated both state and federal consumer protection laws—namely, the Ohio Consumer Sales Practices Act (CSPA) and the federal Telephone Consumer Protection Act (TCPA)—when he had pre-recorded voice-message telemarketing calls made to the home of Plaintiff-Appellant Phillip Charvat. Ryan’s calls to Charvat violated both laws in several ways: for example, the messages did not identify the caller and did not provide contact information. Ryan admits that he broke the law, and he even admits that he “intended” his acts, and that he acted “knowingly” and “purposely.” That is, Ryan does not say that his equipment malfunctioned in calling Charvat’s home, and he does not say that his messages inadvertently omitted the required information. Nevertheless, Ryan insists that he should pay only the minimum damages under each law, and that he should not pay attorney fees under the CSPA or treble damages under the TCPA, because, Ryan says, *he did not specifically know that his acts constituted a violation of the CSPA and TCPA*. In other words, he says he knew what he was doing, but he did not know that such acts were against the law. Thus, he says, he does not trigger the CSPA provision that allows for attorney fees for “knowingly” violating the CSPA, and, he says, he does not trigger the TCPA’s similar provision allowing treble damages when a defendant “knowingly” violates the TCPA.

The Court should reject Ryan’s appeal to ignorance, and it should once again remind lawbreakers that ignorance of the law is no excuse. That is, the Court should hold that the “knowingly” standard in both laws is satisfied because Ryan knowingly committed the acts at issue, and it does not matter whether he also knew that those acts were against the law.

The CSPA issue here is especially simple, as the Court has already resolved this precise issue in Charvat’s favor, and the contrary result below was a plain mistake. See *Einhorn v. Ford*

Motor Co. (1990), 48 Ohio St. 3d 27, 30. In *Einhorn*, the Court held “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.” *Id.* Indeed, the Court in *Einhorn* specifically cited the “common-law maxim that ignorance of the law is no excuse.” *Id.* Despite *Einhorn*’s clarity, the trial court here took the opposite view, as it expressly said that the law requires “actual awareness that an act was a violation of the CSPA.” See Entry Granting Defendant’s Motion for Summary Judgment (“Com. Pl. Op.”) at 6, Appx. 55.

The appeals court responded to the trial court’s mistake with a different mistake of its own. The appeals court properly cited *Einhorn* and acknowledged that a defendant need not know that it violated the CSPA to trigger attorney fees. But the appeals court mistakenly refused to recognize that the trial court had misstated the law; it instead treated the case as if the trial court had gotten the law right but had nevertheless exercised its discretion against awarding fees. But the trial court plainly erred in misstating the law, and this Court should correct that error.

In a similar manner, the Court should also hold that Ryan “knowingly” violated the federal TCPA when he knowingly committed the acts that constituted the violation; Charvat need not prove that Ryan knew his acts were against the law. Just as this Court did in *Einhorn*, the U.S. Supreme Court has held, as a general rule, that a “knowingly” standard requires only that a defendant commits his acts knowingly; he need not know that his acts violate the law. *Bryan v. United States* (1998), 524 U.S. 184, 193.

Consequently, the Court should reverse the decision below and hold that a defendant acts “knowingly,” under both the CSPA and the TCPA, when he knowingly commits acts that constitute a violation, regardless of his knowledge of the law.

STATEMENT OF AMICUS INTEREST

Ohio Attorney General Marc Dann acts as Ohio's chief law officer. R.C. 109.02. Accordingly, he has a strong interest in ensuring rigorous and consistent enforcement of federal and Ohio consumer protection laws, including those involving telephone solicitations. As the people's lawyer, Attorney General Dann is responsible for ensuring that Ohio's citizens are given the full protection of the laws. As the State's lawyer, the Attorney General has a responsibility to enforce the will of the General Assembly in passing legislation and the Governor in signing that legislation into law.

STATEMENT OF THE CASE AND FACTS

The facts in this case—both the facts regarding Ryan's violations and the procedural facts—are more fully stated in Charvat's brief. See Charvat Br. at 1-6. The Attorney General, as *amicus*, highlights key facts as follows.

A. Ryan violated the CSPA and the TCPA in several ways, and Charvat sued.

On December 9, 2003, Philip J. Charvat received an automated telemarketing call consisting of a pre-recorded message regarding the opportunity to receive information about dental health and dental services. See *Charvat v. Ryan* (10th Dist.), 168 Ohio App. 3d, 2006-Ohio-3705 ("App. Op.") ¶2. The message did not identify the sponsoring business, nor did it provide contact information, such as a phone number or address for the business. *Id.* at ¶3. Charvat determined that Ryan, a dentist, sponsored the calls. Charvat sent Ryan a letter, on December 22, 2003, requesting a copy of Ryan's "Do Not Call Maintenance Policy." *Id.* at ¶2. Ryan never responded to Charvat's letter. *Id.* On January 20, 2004, Charvat sued Ryan in the Franklin County Court of Common Pleas, alleging multiple violations of Ohio's Consumer Sales Practices Act and the federal Telephone Consumer Protection Act. Ryan admitted that he placed

the calls, that the calls did not include required information, that the calls satisfied several other provisions of one or both laws, and that the calls were made knowingly and purposely. *Id.* at ¶6.

B. The trial court refused to consider awarding attorney fees, as it held that such fees first required a showing that Ryan actually knew that his acts violated the CSPA.

Ryan admitted that he violated the CSPA and TCPA, but sought summary judgment against, among other things, Charvat's claim for attorney fees. Although the common pleas court granted Ryan's Motion for Summary Judgment, dismissing all but three of Charvat's claims, it did find that Ryan violated both the state and federal laws. See Com. Pl. Op. at 4-6, Appx. 53-55. In particular, the court found Charvat had established one TCPA violation based on Ryan's automated telephone call, one TCPA violation based on Ryan's failure to provide Charvat with a copy of their "Do Not Call Maintenance Policy," and one, undefined, CSPA violation. *Id.*

Charvat sought fees under R.C. 1345.09(F), which says that a court "may award to the prevailing party . . . a reasonable attorney's fee" in cases in which a defendant "has knowingly committed an act or practice that violates" the CSPA. In rejecting the request, the trial court said this on the fees issue:

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.

Id. at 6, Appx. 55 (emphasis added). As the emphasized text shows, the trial court held that attorney fees could be considered only if the court first found that Ryan knew that his acts constituted a violation of the CSPA. The trial court found that Ryan did not have such specific knowledge ("neither of these conditions apply" *Id.*), so it did not go on to consider an award of fees.

C. The trial court found that Ryan did not know that his acts violated the federal TCPA, so the trial court rejected Charvat’s request for treble damages.

The trial court also decided, in the same summary judgment entry that rejected Charvat’s request for attorney fees under the CSPA, that Ryan should pay only the minimum statutory damages per violation under the TCPA, as opposed to the treble damages that Charvat sought. *Id.* at 5, Appx. 54. Charvat sought treble damages under 47 U.S.C. §227(b)(3), which allows a court to triple the damages if the court finds that a TCPA violation was “knowing” or “willful.” The complete trebling provision reads as follows:

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.

47 U.S.C. §227(b)(3).

The trial court found that Ryan’s violations were not knowing or willful, based on the trial court’s view of what each term required. The court cited an earlier Tenth District Court of Appeals decision for the proposition that a defendant must know that his acts violate the law, and that it is not enough that a defendant knowingly commit an act: “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 a violation of a *regulation* when making the telephone call for purposes of the treble damages provision.” Com. Pl. Op. at 5, Appx. 54 (emphasis in original); quoting *Charvat v. Colorado Prime, Inc.* (10th Dist.), 1998 Ohio App. Lexis 4292. The trial court also said that Ryan’s violations were not willful, either, so it rejected Charvat’s treble damages request. *Id.*

D. The Tenth District Court of Appeals affirmed the denial of attorney fees under the CSPA; on the TCPA issue, the appeals court held that “knowingly” required a defendant to know that his acts violated the law, but it remanded for the trial court to reweigh the knowing/willful status for each separate violation.

On appeal, the Tenth District Court of Appeals agreed with the trial court in part, but disagreed in part, on both the CSPA and TCPA issues. It issued its original opinion on July 20, 2006, and it issued an additional opinion in response to Charvat’s Application to Reconsider and Motion to Certify (a conflict). See App. Op.; *Charvat v. Ryan* (10th Dist.), 2006-Ohio-4592 (“Recon. App. Op.”).

On the CSPA issue regarding attorney fees, the appeals court seemed to agree with Charvat’s reading of the law, but disagreed with Charvat in how it read the trial court’s opinion. The appeals court did not expressly note, and thus did not expressly agree or disagree with, the trial court’s statement that “[k]nowledge’ means actual awareness that an act was a violation of the CSPA.” See Com. Pl. Op. 6, Appx. 55. However, the appeals court’s original opinion cited and quoted this Court’s *Einhorn* decision for the proposition that “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.” App. Op. at ¶49, quoting *Einhorn*, 48 Ohio St. 3d 27, syllabus (emphasis added). In its supplemental opinion, the appeals court further clarified that the “knowing” standard required only that a defendant commit an act knowingly; the standard did not require a defendant to know that the act violated the law: “It is true that pursuant to the holding in *Einhorn*, ‘a supplier can be liable for attorney fees even if it was not aware that its conduct violated the CSPA, as long as it intentionally engaged in the conduct.’” Recon. App. Op. at ¶13, quoting *Pep Boys – Manny, Moe & Jack of Delaware, Inc. v. Vaughn* (10th Dist.), 2006 Ohio App. Lexis 592, 2006-Ohio-698, ¶33, citing *Einhorn*.

Although the appeals court restated the law as this Court set forth in *Einhorn*, it did not describe the trial court's description of the law as right or wrong. Instead, the appeals court said that an attorney fees award was a matter of trial court discretion, and it did not find that the trial court here had abused its discretion. Specifically, it stated:

Nothing in R.C. Chapter 1345, or in the applicable precedent requires the trial court to award attorney fees when the violation involved is a knowing one. Though suppliers are subject to liability for attorney fees when they intentionally engage in conduct that constitutes a violation of the CSPA, there is no mandate that trial courts award attorney fees in every such situation.

App. Op. at ¶13. Thus, the appeals court affirmed the trial court's denial of attorney fees, but only because it framed the issue solely as one of trial court discretion.

On the TCPA issue, the appeals court's holding regarding the "knowingly" standard is unclear, as the court focused primarily on the alternate "willfully" prong. First, on the "knowingly" issue, the appeals court quoted the trial court, which in turn had quoted the Tenth District's earlier decision in *Colorado Prime*. App. Op. at ¶31. That earlier decision required actual knowledge of a legal violation, not just knowledge of the facts amounting to the violation. See *id.* After quoting that language, however, the appeals court did not seem to say whether it agreed or disagreed with that view as to the meaning of *knowingly*. Instead, the appeals court immediately went on to the issue of whether Ryan's violations were *willful*. Because that term, too, was addressed in *Colorado Prime*, and because the appeals court here went on to further discuss that case, it seems that perhaps the appeals court viewed the knowing and willful terms as interchangeable, so that it was addressing both together. However, in the appeals court's supplemental opinion, it characterized the original opinion's paragraph 31 as having held that "knowingly" required knowledge of a legal violation. See Recon. App. Op. at ¶19. But in the

original opinion, the court’s discussion seemed to focus on the “willful” test, without a separate conclusion as to whether treble damages were triggered here by any knowing violations.

On the willfulness issue, the appeals court said that willfulness required a culpable state of mind, but it nevertheless remanded for another reason. On yet another issue, the trial court had found that one telephone call could constitute only one violation. The appeals court, however, reversed on that point, finding that one call could include multiple violations, such as a failure to identify the caller, calling without prior approval, and so forth. App. Op. at ¶28. In addition, Ryan’s failure to send Charvat a do-not-call policy was a violation independent of the call. *Id.* Because the appeals court broke down the violations in this way, it concluded that the trial court had to reconsider willfulness by considering each separate TCPA violation for potential willfulness. *Id.* at ¶35. But the appeals court did not say that each violation needed to be reweighed to see if it was committed knowingly. See *id.*

E. The appeals court certified a conflict, and this Court accepted the conflict and accepted additional questions on discretionary review.

In addition to applying for reconsideration, Charvat separately moved the appeals court to certify a conflict on the meaning of “knowingly” under the TCPA. The appeals court agreed that its view conflicted with the Sixth District’s decision in *Reichenbach v. Financial Freedom Ctrs., Inc.* (6th Dist.), 2004 Ohio App. Lexis 5622, 2004-Ohio-6164. Recon. App. Op. at ¶22. The appeals court certified the following question 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 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.

Id. This Court accepted the certified conflict (Case No. 2006-1855). Charvat also sought review of three additional questions in a discretionary appeal (Case No. 2006-1647), and the Court

granted review of the second and third propositions of law. See *11/29/2006 Case Announcements*, 2006-Ohio-6171. The second concerned the meaning of “willfully” in the TCPA, for purposes of trebling damages, while the third concerned the meaning of “knowingly” under the CSPA, for purposes of awarding attorney fees.

The Attorney General now files this amicus in support of Charvat on the certified conflict question regarding “knowingly” under the TCPA (now his Proposition 1 in his merits brief, and our Proposition 2 below) and on the issue of “knowingly” under the CSPA (now his Proposition 3, and our Proposition 1 below).

ARGUMENT

Amicus Curiae Attorney General’s Proposition of Law No. 1:

A defendant “knowingly” violates Ohio’s Consumer Sales Practices Act, thus allowing a court to award reasonable attorney fees, when the defendant knowingly commits an act that violates the CSPA; the defendant need not know that his conduct violates the law. (Einhorn v. Ford Motor Co. (1990), 48 Ohio St. 3d 27, reaffirmed and applied).

The Court has already spoken on this issue and need only correct a mistake. In *Einhorn v. Ford Motor Co.*, 48 Ohio St. 3d at 30, the Court expressly held “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 Tenth District Court of Appeals properly cited *Einhorn* as controlling authority in its opinion, but the court misunderstood the trial court’s error. For the reasons stated below, the Court should continue to stand by *Einhorn*, and it should re-affirm that the Consumer Sales Practices Act allows for reasonable attorneys fees where a defendant intentionally did the act or practice that violates the CSPA, and a plaintiff need not show that a defendant knew that his acts amounted to a CSPA violation.

- A. As *Einhorn* held, a defendant “knowingly” violates the CSPA, thus allowing a court to award reasonable attorney fees, when the defendant knowingly commits an act that violates the CSPA; the defendant need not know that his conduct violates the law.**

In *Einhorn*, the Court already determined the appropriate standard for “knowingly,” as used in R.C. 1345.09. That standard is met when a defendant intentionally undertakes the act or practice that violates the CSPA. *Id.* The Court observed that requiring proof that the supplier had knowledge that his act violated the CSPA “would deny attorney fees to consumers even though the supplier might have blatantly violated the Consumer Sales Practices Act.” *Id.*

As *Einhorn* explained, such a reading of the text best reflects both its plain meaning and its intended purpose. If the citizens of the state of Ohio are to be protected by the strong consumer protection law that the General Assembly passed in 1972 as the Consumer Sales Practices Act, then the private enforcement of that law must be available to consumers in a way that will allow Ohio consumers to seek the protections of that law. The General Assembly determined that the best way to ensure the actual—and not constructive—availability of this remedy to consumers was by allowing for “a reasonable attorney’s fee” for “work reasonably performed” when a “supplier has knowingly committed an act or practice that violates” the CSPA. R.C. 1345.09(F). In *Parker v. I&F Insulation Company, Inc.*, the Court recognized that the CSPA’s purposes “include making private enforcement of the CSPA attractive to consumers who otherwise might not be able to afford or justify the cost of prosecuting an alleged CSPA violation.” 89 Ohio St. 3d 261, 268, 2000-Ohio-151. This Court further provided that such prosecutions have the additional beneficial effect of “work[ing] to discourage CSPA violations in the first place via the threat of liability for damages and attorney fees.” *Id.*

Here, no one can reasonably dispute that *Einhorn* already settled this precise issue, and indeed, the appeals court properly understood that *Einhorn* was the law—but the appeals court went astray in refusing to recognize that the trial court had misstated the law. That refusal was a

mistake, as it seems hard to deny that the trial court’s statement of the law flatly contradicted what this Court said in *Einhorn*. The trial court’s full discussion of the issue was this:

Finally, R.C. 1345.09 provides the Court with discretion in award 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.

Com. Pl. Op. at 6, Appx. 55 (emphasis added). This view of “knowingly” plainly contradicts *Einhorn*, and the appeals court should have reversed the trial court for making a mistake of law. The appeals court pointed to the trial court’s discretion in awarding fees, but the trial court’s understanding of “knowingly” is a misstatement of the law—a misapplication of *Einhorn*’s standard—not an exercise of the trial court’s discretion. The appeals court apparently believed that the trial court had, in step one, determined that a violation had been committed “knowingly,” and, in step two, exercised its discretion to refuse to award attorney fees. This misconception is reflected in the appeals court’s opinion denying reconsideration, in which the appeals court stressed that “nothing in R.C. Chapter 1345, or in the applicable precedent *requires* the trial court to award attorney fees *when the violation involved is a knowing one.*” App. Op. at ¶13 (emphasis added). By referring to the discretion allowed “when” the violation is first found to be a knowing one, the appeals court implied that this was such a case. But the trial court never reached step two; it never exercised its discretion in refusing to award attorneys fees. Rather, by its reading of the “knowingly” standard, the trial court determined, in step one, that Charvat was not eligible as a matter of law to receive attorney fees from Ryan to begin with.

The trial court’s error here was a legal one, so the appeals court should have reviewed that legal error—the misinterpretation of “knowingly”—*de novo*. The Tenth District erred in

applying an abuse of discretion standard, so it erred when it concluded “[w]e do not perceive an abuse of discretion in the trial court’s denial of attorney fees in this case.” App. Op. at ¶51. The Court has long held that purely legal issues are reviewed de novo, and it should do so again here, and reverse the appeals court’s mistake and the trial court’s underlying mistake. See *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St. 3d 107, 108, 1995-Ohio-221 (citing *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1992), 64 Ohio St. 3d 145, 147).¹

In sum, the CSPA issue is, quite simply, indisputable, unless Ryan can persuade the Court to overrule *Einhorn* (and if he tries, the Court should say no). The Court should reverse, and it should remand to the trial court instructions to use the proper standard for determining whether attorneys fees are permitted: that a plaintiff need only prove that a defendant intentionally did that act or practice that violates the CSPA, regardless of whether he shows that the defendant knew he was breaking the law.

B. The Court should remand this matter to the trial court with instructions to follow *Einhorn* and determine whether Ryan intentionally did the act or acts that violate the CSPA, and the trial court may then exercise discretion in awarding fees.

The Attorney General stresses the last point above: the Court should remand the case for resolution of the fees issue without deciding the ultimate fees issue at this stage. The issue before this Court is not whether attorney fees are ultimately appropriate in this case. Rather, the issue before the Court is whether the standard for *seeking* attorney fees, i.e., the test for whether a

¹ The Attorney General notes that, in distinguishing between de novo review and the abuse of discretion standard, we do not seek to reopen Charvat’s original Proposition No. 1 from the jurisdictional stage, which also concerned the de novo and abuse standards. His proposition, which the Court did not accept for review, was based on the case’s procedural posture, as he argued that de novo review was required because the case was decided on a summary judgment motion. In our view, the relevant issue is not whether the case was decided at a particular procedural stage, but instead, the standard of review turns on what is being reviewed. Here, the trial court’s mistake was a legal one, so regardless of the procedural step, it warranted de novo review in the appeals court, and it warrants de novo review by this Court.

plaintiff has even properly invoked the trial court's discretion to award fees, can be misstated by a trial court and then affirmed under the guise of deferring to trial court discretion. The Court should set the trial court straight on what *Einhorn* held, and it should reverse the appeals court's misunderstanding of when it should or should not defer to trial courts. As the Fifth District held, "application of an erroneous legal standard for the award of attorney fees under R.C. 1345.09(F)(2)" presents an appropriate situation for an appellate court to remand to the trial court with directions to conduct proceedings on a plaintiff's claim for statutory attorney fees. *Smith v. Palm Harbor Homes, Inc.* (5th Dist.), 2006 Ohio App. Lexis 5814, 2006-Ohio-5863, ¶35. The trial court can then decide whether to award fees here, and if so, in what amount.

Amicus Curiae Attorney General's Proposition of Law No. 2:

To establish a "knowing" violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §227, for purposes of allowing treble damages under §227(b)(3), a plaintiff need only prove the defendant had knowledge of the facts constituting the offense.

The issue of "knowing" under the TCPA, for purposes of trebling damages, should be decided in the same way that the Court has addressed "knowing" CSPA violations, and for the same reason: because ignorance of the law is no excuse. Just as the Court has held that a defendant knowingly violates the CSPA when it commits the acts constituting a violation, thus allowing for attorney fees, so, too, should the Court hold that a violation of the Telephone Consumer Practices Act is "knowing," thus allowing for treble damages, whenever a defendant knowingly commits the act that violates the TCPA—regardless of whether the defendant knows that the act is a violation of the law. Further, if the Court concludes, as it should, that Ryan's admissions here amount to an admission of a "knowing" violation, then the Court need not separately address the "willful" issue. A knowing violation alone triggers treble damages, so neither this Court nor the lower courts need also find that the violations were willful as well.

The federal TCPA's plain text shows that a violation need not be "willful" and "knowing" before treble damages are allowed; either a "willful" or "knowing" violation can be cause for the trial court, in its discretion, to triple damages. See 47 U.S.C. §227(b)(3). And as the Tenth District stated below, "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[v. United States]* (1998), 524 U.S. 184, 193]." App. Op. at ¶34. The appeals court was right in noting this distinction, which was also noted by the Sixth District in the conflict case. See *Reichenbach*, 2004-Ohio-6164 at ¶¶37-40. However, the appeals court in this case somehow, despite noting that the knowing standard was lower than the willful standard, merged the two standards into the higher willful standard.

The appeals court below also cited its earlier *Colorado Prime* case, which did state an incorrect standard for a knowing violation, requiring knowledge that an act did violate the law. In *Colorado Prime*, the Tenth District had held that "[a] defendant must affirmatively know that it is violating a regulation when making the [unlawful] telephone call—for purposes of the treble damages provision." *Colorado Prime*, 1998 Ohio App. Lexis 4292 *10. The appeals court below confused matters, however, when, after citing this discussion of "knowing" from *Colorado Prime*, went on to contrasting *Colorado Prime*'s discussion of "willful" with the *Reichenbach* decision. The appeals court concluded that "[a]pplying 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) [of a TCPA provision] was not willful." App. Op. at ¶35.

Although the appeals court's supplemental opinion denying Charvat's application to reconsider says that the court had already considered both the "willfully" and "knowingly"

elements of 47 U.S.C. §227(b)(3), the original decision does not demonstrate any full consideration of the independent “knowing” alternative. By merging the standards together, the decision below eliminates a plaintiff’s ability to seek treble damages solely for a “knowing” violation, without having to also satisfy the willful standard. See Recon. App. Op. at ¶8, ¶10.

The Court should correct the appeals court’s errors in two ways. First, it should clarify that a plaintiff can seek treble damages if it shows that a violation was knowing, without having to also show willfulness. Second, the Court should hold that the “knowing” requirement may be satisfied under the TCPA in the same way that it may be satisfied under the CSPA: by showing that the defendant knowingly committed the act constituting a violation, without needing to show that the defendant knew he was breaking the law.

After all, the TCPA, like the CSPA, is a remedial statute, and should be interpreted accordingly. Further, the plain text here supports a lesser standard for knowing than for willful, as raising knowing to *be the same as willful* would essentially read the “knowingly” term out of the statute, as plaintiffs would always need to show willfulness. That would improperly narrow the remedial reach of the statute’s treble damages provision to those cases in which a “culpable state of mind” can be proven. See *Reichenbach*, 2004-Ohio-6164, at ¶37.

In sum, in accord with the United States Supreme Court’s discussion of “knowingly” and “willfully” in *Bryan* and the Sixth District’s holding in *Reichenbach*, the Attorney General urges this Court to reverse the Tenth District’s decision insofar as it eliminates an independent meaning for “knowingly” in 47 U.S.C. 227(b)(3). The Court should allow for Charvat, and any plaintiff, to seek treble damages under the TCPA for a violation committed “knowingly,” regardless of whether the violation is also willful. Further, such a knowing violation exists when a plaintiff shows the defendant knowingly committed the act or acts that violate the TCPA. This

view will allow plaintiffs to make full use of this important consumer protection law, and it will hold lawbreakers more accountable for their acts. Equally important, it will again remind lawbreakers that ignorance of the law is no excuse.

CONCLUSION

For the above reasons, this Court should reverse and remand with instructions that a knowing violation of the CSPA, for purposes of awarding reasonable attorney fees, has occurred where the plaintiff proves that the defendant intentionally did that act or acts the violate the CSPA, and a knowing violation of the TCPA, for purposes of awarding treble damages, has occurred where the plaintiff demonstrates that the defendant had knowledge of the facts constituting the offense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Marc Dann in Support of Plaintiff-Appellant Philip J. Charvat was served by U.S. mail this 31st day of January, 2007, upon the following counsel:

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