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.	:	

REPLY BRIEF OF APPELLANT PHILIP J. CHARVAT

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FILED
APR 09 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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3 Norman J. Singer, Sutherland on Statutory Construction §60.01 (5th ed. 1992) 5

SUPPLEMENTAL STATEMENT OF FACTS

In the Statement of Facts section of their Merit Brief, Appellees stray from the relevant facts in this appeal. They attempt to characterize Appellant – the recipient of Appellees' unlawful telemarketing call – in a bad light by inappropriately: (1) suggesting that Appellant should be held to a different legal standard because he has successfully pursued lawsuits against other telemarketing law violators (Appellees' Merit Brief, pp. 1, 5); and (2) discussing Appellant's rejection of Appellees' insubstantial settlement offer conveyed several months into the litigation between the parties (Appellees' Merit Brief, p. 2).

In regard to the first of these claims, Appellees refer this Court to a ruling issued by a Franklin County Court of Common Pleas judge in an unrelated case. (Appellees' Merit Brief, pp. 1, 5) In that ruling, the trial court inappropriately castigated Appellant, and stayed indefinitely his lawsuit against a telemarketer that had made multiple unlawful calls to Appellant's home, merely because he has brought similar claims against other telemarketers while having chosen not to participate in the national Do-Not-Call registry. It is troubling that Appellees chose to make special note of the trial court's ruling in *Charvat v. Dish TV Now, Inc., et al.*, Franklin County Common Pleas Court Case No. 04CVH12-12064 (Appellees' Appdx. 1)[1], but neglected their obligation to advise this Court that the trial court's ruling was subsequently vacated by the Tenth District Court of Appeals when it issued a writ of procedendo five months ago in *State ex rel. Charvat v. Frye*, 2006 Ohio 5947.[2] In rebuking the trial court and overruling every one of his objections, the appeals court adopted the magistrate's conclusion that the trial court had

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[1] Citations herein to items included within the Appendix to the Merit Brief of Appellees are designated by "(Appellees' Appdx. _)".

[2] *State ex rel. Charvat v. Frye*, 2006 Ohio 5947, which originated in the Franklin County Court of Appeals as an action in procedendo, is currently on appeal before this Court in *State ex rel. Charvat v. Frye*, Case No. 06-2275.

abused its discretion in staying Mr. Charvat's lawsuit simply because he had exercised his prerogative not to sign up on the national Do-Not-Call registry. *State ex rel. Charvat v. Frye*, *supra* at ¶21.

Appellees also claim that they had someone call the "Ohio Attorney General's Office" before they embarked upon their unlawful telemarketing campaign, and that person allegedly received some form of informal, verbal approval of Appellees' planned telemarketing campaign. (Appellees' Merit Brief, p. 1) However, Appellees never offered any admissible evidence to support this claim, so there is no way of knowing what was supposedly discussed between whom and when. Moreover, it must be noted that the Ohio Attorney General does not provide advisory opinions to private citizens over the telephone.

Thus, the unassailable fact remains that Appellee Ryan, who first studied dentistry for several years and then presumably sat for and passed a rigorous examination administered by the state before opening his dental practice, did nothing of substance to research the legality of using automated equipment to call thousands of Ohio consumers at their homes to play his prerecorded advertising message developed to drum up more business.

Appellees also argue that Appellant's arguments concerning the appropriate definitions of "knowingly" and "willfully" under the federal Telephone Consumer Protection Act of 1991, 47 U.S.C. §227, *et seq.* ("TCPA")(Appellant's Appdx. 57),[3] should not be adopted because the basis for awarding treble damages has "vanished" over time. (Appellees' Merit Brief, p. 2) However, there is no evidence before this Court to suggest that telemarketing law violations have diminished over the last 16 years. In fact, Appellees' own claimed ignorance of these laws and admitted failure to comply with them 12 years after their enactment contradict Appellees'

[3] Citations herein to items included within the Appendix to the Amended Merit Brief of Appellant are designated by "(Appellant's Appdx. _)".

contention that these laws have outlived their usefulness. Regardless, whether or not the TCPA and its regulations *should* remain in effect is a matter for Congress to decide, not the myriad of courts among the 50 states.

ARGUMENT

In their Merit Brief, Appellees combine their arguments regarding the definitions of "knowing" and "willful" under the TCPA. (Appellees' Merit Brief, pp. 3-5) They also concede that this Court's definition of "knowing" under the Consumer Sales Practices Act ("CSPA"), R.C. §1345.09(F)(2), as articulated in *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St. 3d 27, remains correct; however they contend that the appeals court below correctly applied the definition in finding for Appellees. (Appellees' Merit Brief, pp. 3, 6-7)

Appellant sees no purpose to be served in rearguing his Proposition of Law No. 1; however, Appellant respectfully submits the following in reply to Appellees' arguments concerning the appropriate definition of "willfully" under the TCPA (Proposition of Law No. 2) and whether the appeals court below properly *applied* the proper definition of "knowingly" to Appellant's CSPA claims.

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.

Appellant respectfully submits that the appeals court erred in citing and relying upon its own prior decision in *Charvat v. Colorado Prime* (Sept. 17, 1998), Franklin App. No. 97APG09-1277, unreported, at *10-11, and ruling 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 ***." (Appellant's Appdx. 87) In doing so, as did the trial court below, the

appeals court failed to apply the proper definition of the term "willful" in its analysis of Appellant's TCPA claims.

As Appellant noted in his Amended Merit Brief, at page 12, the term "willful" is defined in the Communications Act of 1934, as amended, 47 U.S.C. §151, *et seq.* (Appellant's Appdx. 91), at Section 312(f)(1)(Appellant's 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.)

In its Merit Brief, Appellees completely disregard this statutory provision and Appellant's corresponding argument concerning its obvious application here. However, the provision exists nonetheless, and it has been cited and relied upon by the Federal Communications Commission ("FCC") in issuing opinions.

In another case arising under the TCPA, *Charvat v. Dispatch Consumer Services, Inc.* (2002), 95 Ohio St.3d 505, this Court accepted review of a slightly different issue – interpreting the undefined term "established business relationship" for purposes of determining whether a telemarketer-defendant's calls to the consumer-plaintiff were exempt from the TCPA and its regulations. In that case, this Court made clear that the courts should defer to the FCC's opinions, interpretations and rule-making authority. *Charvat v. Dispatch Consumer Services, Inc., supra* at 508-511.

Significantly, the FCC recently issued an Opinion letter that is entirely consistent with Congress' statutory definition of "willful" set forth in 47 U.S.C. §312(f)(1). In responding to a consumer's inquiry made directly under the TCPA, the FCC defined "willful" as follows:

> "[T]he term 'willful' mean[s] simply that the 'acts or omissions are committed knowingly, It is not pertinent whether or not the *** acts or omissions are intended to violate the law. [citation omitted]'"

See July 27, 1999 Opinion letter from Glenn T. Reynolds, Acting Chief, Enforcement Division, Common Carrier Bureau, Federal Communications Commission, to Robert Biggerstaff. (Supp. Appdx. 1)[4]

Thus, the administrative agency charged with the interpretation of the TCPA has provided specific guidance with respect to a key issue raised in this appeal: the definition of "willful." Appellant respectfully submits that, because the appeals court's July 20, 2006 Opinion completely ignored the FCC's interpretation of the term "willful," it clearly erred. See *Connecticut Dept. of Income Maint. v. Heckler* (1985), 471 U.S. 524; see also *Charvat v. Dispatch Consumer Services, Inc., supra.*

This is especially true because the TCPA is a remedial statute that must be construed liberally in favor of consumers. As the United States First Circuit Court of Appeals observed, in *Hogar Agua Y Vida En El Desierto, Inc. v. Jorge Suarez-Medina* (1st Cir. 1994), 36 F.3d 177, 181:

> "**We employ traditional tools of statutory interpretation, particularly the presumption that ambiguous language in a remedial statute is entitled to a generous construction consistent with its reformative mission**. *See*, e.g., *Cia. Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404, 428-29 (1st Cir. 1985) (noting that this canon of construction represents an "especially reliable and legitimate" indicator of congressional intent); see generally 3 Norman J. Singer, Sutherland on Statutory Construction §60.01 (5th ed. 1992)." (Emphasis added.)

[4] Citations herein to items included within the Supplemental Appendix, attached hereto, are designated by "(Supp. Appdx. _)".

As a remedial statute, the TCPA must be interpreted broadly. *Logan v. Davis* (1914), 233 U.S. 613, 58 L.Ed. 1121, at syllabus ("A remedial statute is to be construed liberally so as to effectuate the purpose of the legislative body enacting it ***. *United States v. Southern Pacific Railroad Co.* [(1902)], 184 U.S. 49."); see also *Saperstein v. Hager* (7th Cir. 1999), 188 F.3d 852, 857; *Herman v. RSR Security Services*, 172 F.3d 132, 139 (2nd Cir. 1999)."); *Industrial Commission v. Phillips* (1926), 114 Ohio St. 607, 622; *Baker v. Carpenter* (1903), 69 Ohio St. 15, 22-23; *Jemiola v. XYZ Corp.* (Cuyahoga C.P. 2003), 126 Misc.2d 68, 73.

These legal principles clearly apply to Section 227(b) of TCPA, and support a broad, remedial interpretation of this provision. As such, Appellant urges this Court to reverse and remand the lower courts' rulings with instructions to apply the following standard to Appellant's TCPA claims:

> "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."

<u>Proposition of Law No. 3</u>: 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.

In their Merit Brief, Appellees make the same basic analytical mistake as the appeals court below did: they pay lip service to the controlling nature of this Court's ruling in *Einhorn v. Ford Motor Company* (1990), 48 Ohio St.3d 27, but then disregard its holding in arguing that Appellees were properly granted summary judgment in regard to Appellant's claims that Appellees "knowingly" violated the CSPA. (Appellees' Merit Brief, pp. 6-7)

This Court made clear the correct definition of "knowingly" under the CSPA 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.)

Significantly, prior to the issuance of its erroneous July 20, 2006 Opinion below, the Tenth District Court of Appeals had also *cited* and *followed 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, 1995), Franklin App. No. 94APE07-1024, unreported at ¶13. (Appellant's Appdx. 98)

Appellant cited both *Einhorn* and *Hahn* in his brief and reply brief submitted to the appeals court below. However, 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). In overruling Appellant's assignment of error as to the trial court's rejection of Appellant's claims that Appellees' "knowingly" violated the CSPA, the appeals court essentially rubber-stamped its approval of the trial court's ruling, *even though the trial court made clear that it was applying the wrong definition* of "knowingly" when it ruled:

> "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 that neither of these conditions apply to the instant action." (Emphasis added.)

(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 at p. 6; Appellant's Appdx. 55)

In their Merit Brief, Appellees make no attempt to reconcile the trial and appeals' courts' rulings that a supplier knowingly violates that CSPA only if it has "actual awareness that an act was a violation of the CSPA" with this Court's explicit pronouncement in *Einhorn* that "[t]he supplier does not have to know that his conduct violates the law for the court to grant attorney fees." *Einhorn v. Ford Motor Company, supra* at 30. Any attempt to do so would have proven ineffective anyway; such opposite conclusions cannot be reconciled.

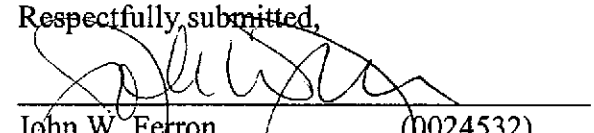
When a trial court errs in regard to the law, it is the court of appeals' responsibility to correct that error upon its de novo review. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St. 3d 107, 108, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1992), 64 Ohio St. 3d 145, 147. Because the court of appeals failed to do so, this Court should reverse and remand this matter to the trial court with instructions to apply the following standard to Appellant's CSPA claims:

> "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."

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 and Judgment for further proceedings consistent with this Court's ruling.

Respectfully submitted,



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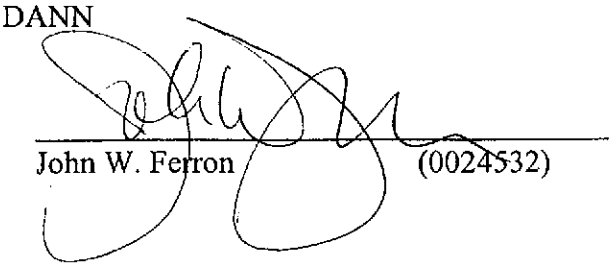

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

July 27, 1999

Robert Biggerstaff
P.O. Box 614
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Dear Mr. Biggerstaff:

I am writing in response to your June 22, 1999, letter requesting that the Commission clarify a provision of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (TCPA). Specifically, in your letter you note that the TCPA provides for trebled damages if a defendant has "willfully or knowingly" violated the statute or the Commission's rules.[1] Your letter requests that the Commission clarify the phrase "willfully or knowingly" as utilized in section 227(c)(5).

The Commission has not defined the phrase "willfully or knowingly" in the context of the TCPA. Congress and the Commission, however, have defined the terms "willfully" and "knowingly" in other contexts. For example, section 312(f)(1) of the Communications Act of 1934, as amended, (Act), 47 U.S.C. § 312(f)(1), defines the word "willful" as "the conscious and deliberate commission or omission of [an] act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act."[2] In examining the definition of "willful" outside its use in section 312, the Commission has explained that an intent to do wrong is not required to find willfulness.[3] Applying that standard, the Commission has stated that the term "willful" has been interpreted to mean simply that "the acts or omissions are committed knowingly. It is not pertinent whether or not the [. . .] acts or omissions are intended to violate the law."[4]

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1 47 U.S.C. § 227(c)(5).

2 47 U.S.C. § 312(f)(1).

3 *See Liability of Midwest Radio-Television Inc., Memorandum Opinion and Order*, 45 F.C.C. 1137, 1140-41, at paras. 8-11 (1963) (explaining that the word "willfully" as used in section 503(b) of the Act does not require that the actor knew he was acting wrongfully; it requires only that the actor knew he was doing the acts in question).

4 *Media General Cable of Fairfax County, Notice of Apparent Liability for Forfeiture*, 13 FCC Rcd 11868, 11870, para. 7 (1998).

The term "knowingly" has not been defined by the Commission in the TCPA context. The Commission, however, has discussed the word "knowingly" in other contexts. For example, the Commission defined "knowingly" as used in section 223(b)(1) of the Act, 47 U.S.C. § 223(b)(1), as "knew or should have known."[5] In other cases, the Commission has defined "knowingly" as equivalent to "willful."[6]

We hope that this information is helpful. This is an informal staff opinion issued pursuant to authority delegated in sections 0.91 and 0.291 of the Commission's rules.[7]

Sincerely,

Glenn T. Reynolds
Acting Chief, Enforcement Division
Common Carrier Bureau
Federal Communications Commission

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5 *Audio Enterprises, Inc., Notice of Apparent Liability for Forfeiture*, 3 FCC Rcd 7233, 7237, para. 29 (1988) (stating that the definition of "knowingly" used by the Commission is consistent with Congressional intent).

6 *See Liability of Outlet Communications, Inc. and Atlin Communications, Inc., Memorandum Opinion and Order*, 7 FCC Rcd 632, 633, para. 13 (1992); *see also Midwest*, 45 FCC Rcd at 1139, para. 8; *see also George E. Cameron Jr. Communications, Memorandum Opinion and Order*, 93 F.C.C. 2d 789, 792 n.7 (1983).

7 47 C.F.R. §§ 0.91, 0.291.