

In the  
**Supreme Court of Ohio**

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

---

**REPLY BRIEF OF *AMICUS CURIAE*  
OHIO ATTORNEY GENERAL MARC DANN  
IN SUPPORT OF PLAINTIFF-APPELLANT PHILIP J. CHARVAT**

---

JOHN W. FERRON\* (0024532)

*\*Counsel of Record*

LISA A. WAFER (0074034)

Ferron & Associates, LPA

580 North Fourth Street, Suite 450

Columbus, Ohio 43215

614-228-5225

614-228-3255 fax

[jferron@ferronlaw.com](mailto:jferron@ferronlaw.com)

Counsel for Plaintiff-Appellant

Philip J. Charvat

MATTHEW T. GREEN\* (0075408)

*\*Counsel of Record*

JOHN C. MCDONALD (0012190)

STEPHEN J. SMITH (0001344)

Schottenstein Zox & Dunn Co., LPA

250 West Street

Columbus, Ohio 43215

614-462-2700

614-462-5135 fax

[mgreen@szd.com](mailto:mgreen@szd.com)

Counsel for Defendants-Appellees

Thomas N. Ryan, D.D.S., *et al.*

MARC DANN (0039425)

Attorney General of Ohio

ELISE PORTER\* (0055548)

Acting Solicitor General

*\*Counsel of Record*

ROBERT J. KRUMMEN (0076996)

STEPHEN P. CARNEY (0063460)

Deputy Solicitors

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

[eporter@ag.state.oh.us](mailto:eporter@ag.state.oh.us)

Counsel for *Amicus Curiae*

Ohio Attorney General Marc Dann

BRIAN M. ZETS (0066544)

Wagenfeld Levine

8000 Walton Parkway, Suite 200

Columbus, Ohio 43054

614-741-8900

614-741-8950 fax

[bzets@wagenfeldlevine.com](mailto:bzets@wagenfeldlevine.com)

Counsel for Defendants-Appellees

Thomas N. Ryan, D.D.S., *et al.*

**FILED**

APR 09 2007

MARCIA J. MENGEL, CLERK  
SUPREME COURT OF OHIO

## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
ARGUMENT.....	2
A. As Ryan correctly concedes, <i>Einhorn</i> held that attorney fees are available for CSPA violations when the defendant knowingly commits an act that violates the CSPA, even if the defendant did not know that the act violated the CSPA. ....	2
B. The trial court misapplied the <i>Einhorn</i> standard, so this case should be remanded with instructions to properly consider Charvat’s claim for attorney fees. ....	3
C. The definition of “knowingly” in the federal Telephone Consumer Protection Act must reflect congressional intent, not purported Ohio practice. ....	5
CONCLUSION.....	7
CERTIFICATE OF SERVICE.....	unnumbered

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy</i> (2006), 126 S. Ct. 2455.....	6
<i>The Abbotsford</i> (1878), 98 U.S. 440.....	6
<i>Bryan v. United States</i> (1998), 524 U.S. 184.....	6
<i>Charvat v. Ryan</i> (10th Dist.), 168 Ohio App. 3d, 2006-Ohio-3705 .....	4
<i>Cooper Industries, Inc. v. Aviall Services, Inc.</i> (2004), 543 U.S. 157.....	6
<i>Einhorn v. Ford Motor Co.</i> (1990), 48 Ohio St. 3d 27 .....	<i>passim</i>
<i>Kepner v. U.S.</i> (1904), 195 U.S. 100.....	6
<i>Nationwide Mut. Fire Ins. Co. v. Guman Brothers Farm,</i> 73 Ohio St. 3d 107, 1995-Ohio-221 .....	5
<i>Ohio Bell Tel. Co. v. Pub. Util. Comm.</i> (1992), 64 Ohio St. 3d 145 .....	5
<i>U.S. v. Merriam</i> (1923), 263 U.S. 179.....	6
<b>Constitutional Provisions, Statutes, and Rules</b>	
R.C. Chapter 1345.09.....	2, 4, 7
Ohio Consumer Sales Practices Act, R.C. 1345 .....	<i>passim</i>
Telephone Consumer Protection Act, 47 U.S.C. §227 .....	<i>passim</i>

## INTRODUCTION

The briefing thus far has narrowed the scope of issues before the Court, as the parties now agree on a critical legal proposition: that Ohio's Consumer Sales Practices Act ("CSPA") allows for attorney fees whenever a defendant knowingly commits an act that violates the CSPA, even if the defendant did not specifically know that the act constituted a CSPA violation. As our opening brief explained, the Court already established this principle in *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St. 3d 27, 30. See Merit Br. of *Amicus Curiae* Ohio Attorney General Marc Dann in Support of Plaintiff-Appellant Philip J. Charvat ("AG Br.") at 10; see also Amended Merit Br. of Appellant Philip J. Charvat ("Charvat Br.") at 13. In response, Defendant-Appellee Ryan has, to his credit, chosen to concede the legal principle, as he expressly says he "would not object to this Court reaffirming its prior decision in *Einhorn*." Merit Br. of Appellees Thomas N. Ryan DDS, Inc. and Dr. Thomas N. Ryan ("Ryan Br.") at 7. Thus, the Court need not revisit *Einhorn*, as it should follow the parties' agreed urging and reaffirm that attorney fees are available whenever a defendant knowingly commits an act that violates the CSPA.

The Court should, however, reject Ryan's attempt to preserve the judgment below, in which the trial court denied Charvat a chance at attorney fees solely because the trial court mistakenly applied an anti-*Einhorn* standard. Ryan argues that the fee-denial may remain undisturbed because, he says, the trial court exercised discretion in denying fees. But the trial court expressly did not exercise its discretion; it got the law wrong and thought that fees could not be considered here. The Court should reverse and remand, so that Charvat can have his fee request considered under the right legal rule.

Finally, the Court should also reverse and remand on Charvat's request for treble damages under the federal Telephone Consumer Protection Act ("TCPA"). That law allows for damages to be trebled whenever a defendant acts knowingly or willfully. Ryan is wrong when he says that

the law uses one joint standard of “knowingly or willfully”; each term has an independent meaning. He is also wrong to suggest that Ohio-specific law governs the meaning of a federal statute. The Court should reject Ryan’s view and remand for the trial court to consider whether Ryan acting “knowingly” under the TCPA.

In sum, the Court should set the law right, so that consumers are fully protected by both Ohio’s consumer protection law and the federal telemarketing law, and it should remand both the state and federal claims to apply the right law to Charvat’s facts.

### ARGUMENT

**A. As Ryan correctly concedes, *Einhorn* held that attorney fees are available for CSPA violations when the defendant knowingly commits an act that violates the CSPA, even if the defendant did not know that the act violated the CSPA.**

The parties agree that the Court in *Einhorn* already held that attorney fees are available under R.C. 1345.09, the fee provision of Ohio’s Consumer Sales Practices Act, whenever a defendant knowingly commits an act or practice that violates the CSPA; the defendant need not specifically know that his acts violated the CSPA. See *Einhorn*, 48 Ohio St. 3d at 30. As the Court explained in *Einhorn*, requiring proof that a defendant had knowledge that his act violated the CSPA “would deny attorney fees to consumers even though the [defendant] might have blatantly violated the Consumer Sales Practices Act.” *Id.* Our opening brief fully explained this standard, and Plaintiff-Appellant Charvat explained the proper *Einhorn* standard as well. See AG Br. at 10-12; see also Charvat Br. at 13.

To his credit, Ryan fully concedes that *Einhorn* is the controlling law, and he does not at all ask the Court to revisit the established principle that attorney fees are available based on a knowing act, without requiring that a defendant know that his act broke the law. As Ryan puts it, he “concedes that, pursuant to *Einhorn*, a defendant ‘does not have to know that his conduct violates the law for the court to grant attorneys fees’ pursuant to R.C. 1345.09(F).” Ryan Br. at

6. Ryan further explains that he does not ask the Court to revisit or reverse *Einhorn*, as he “would not object to this Court reaffirming its prior decision in *Einhorn*.” Ryan Br. at 7.

In light of the parties’, and *Amicus*’s, firm agreement that *Einhorn* remains good law, the Court need not revisit the issue. It should simply restate that attorney fees are available under the CSPA whenever a defendant knowingly commits an act that violates the CSPA, and a plaintiff seeking fees need not show that a defendant specifically knew that he was breaking the law.

**B. The trial court misapplied the *Einhorn* standard, so this case should be remanded with instructions to properly consider Charvat’s claim for attorney fees.**

The agreed-upon resolution of *Einhorn*’s applicability should lead to an agreed-upon reversal and remand as a practical matter, because the trial court here explained the law in a way that conflicts with *Einhorn*. It said that it would not consider attorney fees unless Charvat could show that Ryan knew he was violating the CSPA, and it said that Charvat could not clear that higher hurdle here. While Ryan admits in the abstract that a grant of attorney fees does not require actual knowledge of a legal violation, he never concedes that the trial court adopted this mistaken view. Instead, he argues that the trial court somehow exercised discretion in denying fees, so in his view, this Court can correct the legal mistake but leave the resulting denial of fees in place. Ryan Br. at 7. But as explained below, Ryan’s view is untenable, and the Court should reverse and remand, so that the trial court can reconsider Charvat’s fee application under the proper *Einhorn* standard.

That *Einhorn* controls is not disputed, but what is disputed is how the trial court’s misstatement of the law affects this case. Ryan does not directly comment on whether the trial court misstated the law, as he instead focuses on the Tenth District’s decision. Ryan notes that the appeals court “correctly recognized *Einhorn* as the controlling authority,” and he cites the appeals court’s statement that the trial court retained discretion on whether to actually award

attorney's fees. Ryan Br. at 7. Up to that point, Ryan and the Tenth District are right, as fees were available under *Einhorn*, and the trial court had discretion whether to actual award them. But both Ryan and the appeals court are wrong to then leap to the conclusion that the trial court's denial of fees here was proper, on the idea that "the trial court did not abuse its discretion." *Id.*

Ryan's argument, and the appeals court's affirmance, would be correct if the trial court properly had stated the law of *Einhorn* and had nevertheless exercised its discretion in denying fees—but that is not what happened. The trial court's complete discussion demonstrates it misread R.C. 1345.09(F) and ignored *Einhorn's* guidance, as it mistakenly thought that the CSPA required knowledge of the law, and it denied fees solely for that reason:

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). Thus, the trial court adopted the view that *Einhorn* explicitly rejected—a view that requires the defendant's knowledge of the law before attorney fees may be awarded. This plainly contradicts *Einhorn* and misstates the law.

Instead of reversing this legal error, the court of appeals misread the lower court's decision. Applying an abuse of discretion standard, the Tenth District held that "[w]e do not perceive an abuse of discretion in the trial court's denial of attorney fees in this case." *Charvat v. Ryan* (10th Dist.), 168 Ohio App. 3d, 2006-Ohio-3705 ("App. Op.") at ¶51. In so doing, the appellate court treated this case as if the trial court had (1) stated the *Einhorn* standard properly, (2) concluded that a "knowing" violation occurred, thus triggering Charvat's eligibility for fees under *Einhorn*, and (3) determined that, on those facts, attorney fees were not warranted. But, as the trial court's

opinion shows, this was not the case. Rather, as our opening brief explained, the appellate court failed to recognize that the trial court “never exercised its discretion in refusing to award attorneys fees.” AG Br. at 11. Instead, the trial court’s legal error led it to conclude that Charvat was categorically ineligible for fees. Since the trial court never exercised its discretion in the first place, the appellate court erred in affirming a non-existent exercise of discretion.

Ryan does not at all respond to the appellate court’s error in misreading what the trial court did, even though *Amicus* pointed it out. See *id.* Instead, Ryan tries to have it both ways. He concedes that *Einhorn* provides the standard for attorney-fee awards here, yet he seeks to retain the benefit of a ruling that was based on the wrong legal standard. The trial court’s treatment of the fee request here cannot be squared with *Einhorn*. The trial court’s error should have been reversed by the appeals court, and since it was not, this Court should reverse.

The trial court’s error was a legal one, so the Court should apply—and the appeals court should have applied—de novo review, not an abuse of discretion standard. 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). Applying that standard, the Court should reverse and remand with instructions to apply *Einhorn*, so the trial court may correct its underlying mistake.

**C. The definition of “knowingly” in the federal Telephone Consumer Protection Act must reflect congressional intent, not purported Ohio practice.**

Ryan’s approach to defining the TCPA’s “willfully or knowingly” standard asks the Court to answer the wrong question. Ryan invites the Court to consider the “standard *Ohio* should adopt for 47 U.S.C. § 227(b)(3).” Ryan Br. at 4 (emphasis added). To support his case, he cites to a distinction in *Ohio law* between acts that are *malum in se* and those that are *malum prohibitum*. *Id.* at 3-4. He also argues that the definitions “adopted for a *federal* . . . statute

should not be persuasive to the standard *Ohio* should adopt” for the TCPA. *Id.* at 4 (emphasis added). But he is wrong because the TCPA is a federal consumer protection statute and its meaning is based on congressional intent and federal law, not Ohio practice.

It is not the Court’s role to determine an Ohio-specific definition of “willfully or knowingly.” Instead, the Court must interpret the TCPA—a federal statute—to reflect a uniform national standard for the meaning of “willfully or knowingly”—a standard that Congress enacted against the backdrop of federal, not Ohio, law. When interpreting the TCPA, the Court should begin with the plain language of the statute and well-established canons of statutory construction. See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy* (2006), 126 S. Ct. 2455, 2459.

The TCPA provides courts with discretion to award treble damages if “the court finds that the defendant willfully *or* knowingly violated” the relevant portion of the statute. 47 U.S.C. § 227(b)(3) (emphasis added). The use of the disjunctive “or” plainly indicates Congress’s intent to allow treble damages in two separate situations—first, when the defendant *willfully* violates the statute, or, second, when the defendant *knowingly* violates the statute. The Court must give each term a separate meaning to uphold the “settled rule that [a court] must, if possible, construe a statute to give every word some operative effect.” *Cooper Industries, Inc. v. Aviall Services, Inc.* (2004), 543 U.S. 157, 167. In contrast, Ryan’s approach ignores the plain language of the statute by treating “willfully or knowingly” as a single standard.

A proper reading of the statute looks to federal law for accepted definitions of the words in question. If a word has an accepted definition, then Congress is presumed to have adopted that definition. See *U.S. v. Merriam* (1923), 263 U.S. 179, 187, citing *Kepner v. U.S.* (1904), 195 U.S. 100, 124, and *The Abbotsford* (1878), 98 U.S. 440, 444. The term “willfully” is defined as requiring knowledge on the part of the actor that his acts are unlawful. *Bryan v. United States*,

(1998) 524 U.S. 184, 191. In contrast, the term “knowingly” “merely requires proof of knowledge of the facts that constitute the offense.” *Id.* at 193. By giving the terms “willfully or knowingly” their separate, accepted meanings, the Court can best carry out its role in interpreting a federal statute.

For these reasons, the Court should reverse the decision of the appellate court and interpret the TCPA consistent with established practices of statutory construction.

### CONCLUSION

For the above reasons and the reasons set forth in *Amicus's* opening brief, the Court should reverse and remand with instructions that a knowing violation of R.C. 1345.09 has occurred where the plaintiff proves that the defendant intentionally did the act or acts that violate the CSPA, and a knowing violation of the 47 U.S.C. §227, as distinct from a willful violation, has occurred where the plaintiff demonstrates that the defendant had knowledge of the facts constituting the offense.

Respectfully submitted,

MARC DANN (0039425)  
Attorney General of Ohio



ELISE PORTER\* (0055548)

Acting Solicitor General

*\*Counsel of Record*

ROBERT J. KRUMMEN (0076996)

STEPHEN P. CARNEY (0063460)

Deputy Solicitors

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

eporter@ag.state.oh.us

Counsel for *Amicus Curiae*

Ohio Attorney General Marc Dann

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Reply Brief of Amicus Curiae Ohio Attorney General Marc Dann in Support of Plaintiff-Appellant Philip J. Charvat was served by U.S. mail this 9th day of April, 2007, upon the following counsel:

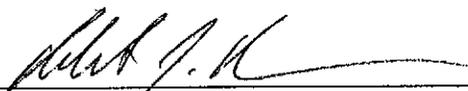
John W. Ferron  
Lisa A. Wafer  
Ferron & Associates, LPA  
580 North Fourth Street, Suite 450  
Columbus, Ohio 43215

Counsel for Plaintiff-Appellant  
Philip J. Charvat

Matthew T. Green  
John C. McDonald  
Stephen J. Smith  
Schottenstein Zox & Dunn Co., LPA  
250 West Street  
Columbus, Ohio 43216

Brian M. Zets  
Wagenfeld Levine  
8000 Walton Parkway, Suite 200  
Columbus, Ohio 43054

Counsel for Defendants-Appellees  
Thomas N. Ryan, D.D.S., *et al.*

  
\_\_\_\_\_  
Robert J. Krummen  
Deputy Solicitor