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COURT OF APPEALS
DIVISION II

No. 34195-6-II

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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY Am
DEPUTY

E. JOHN BENSON, D/B/A ELITE CELLULAR,
Appellant,

v.

OREGON PROCESSING SERVICE, INC. an Oregon corporation;
DANIEL J. MARTIN, individually, and the marital community
comprised of DANIEL J. and DIANE M. MARTIN,

Respondents.

APPELLANT'S REPLY BRIEF

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I. Introduction

Plaintiff/Appellant E. John Benson (“Benson”) appeals the trial court’s determination that Defendant/Respondent Daniel J. Martin’s (“Martin”) bulk email spamming activities did not violate RCW 19.190. Benson asserts that Martin initiated, or in the alternative assisted in initiating, the transmission of bulk commercial electronic mail messages (referred to herein as “commercial emails” and, alternatively, as “spam emails”) in violation of RCW 19.190.020. It is Benson’s position on appeal that the uncontested findings of the trial court compel the conclusion, as a matter of law, that Martin violated RCW 19.190.020. If this Court concludes that Martin’s conduct indeed violated RCW 19.190, then Benson seeks remand to the trial court for entry of judgment in his favor. In that regard, Benson requests this Court, based upon the uncontested facts, to grant the following relief: 1) conclude Martin violated RCW 19.190.020 and RCW 19.190.030; 2) calculate Benson’s damages in accordance with RCW 19.190 and RCW 19.86; and 3) remand to the trial court for entry of judgment.

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II. Argument

A. Standard of Review Issues

Benson does not contest the trial court's findings of fact, except to the extent, as provided in Benson's Opening Brief, the trial court erroneously labeled some conclusions of law as findings of fact. Benson is not requesting this Court to "determine issues of fact" as Martin states in his Respondent Brief at pages 16 and 17. Rather, based upon the uncontested facts, Benson requests this Court to reverse the trial court's conclusions of law regarding Martin's liability, calculate Benson's damages, and remand this matter solely for the purpose of entry of judgment consistent with this Court's decision.

Under RAP 12.2, "appellate courts are authorized to affirm, modify or reverse a trial court order without further proceedings, when doing so would be a useless act or a waste of judicial resources." Dependency of A.S. v. Safouane, 101 Wn. App. 60, 72, 6 P.3d 11 (2000). Further, pursuant to RAP 12.2, this Court has the broad discretion to "take any other action as the merits of the case and the interest of justice may require." RAP 12.2. The de novo review and the relief which Benson is seeking from this Court are not extraordinary in any way.

B. Martin Violated RCW 19.190.020(1)(a) as a Matter of Law.

1. The 251 Spam Emails Martin Sent to Benson Misrepresented and Obscured Information in Their Points of Origin and Transmission Paths.

The trial court erroneously concluded Martin did not violate RCW 19.190.020(1)(a) based on its interpretation of the terms “misrepresent” and “obscure.” (CP 41). The trial court concluded that because Benson was able to discover, through a “Whois” search, that OPS was the registrant of the domain names contained in the 251 spam emails Benson had received, these spam emails could not have been obscured or misrepresented. (CP 42-43). This conclusion is not supported by the uncontested facts or a plain reading of RCW 19.190.

In drafting RCW 19.190, the Legislature chose to impose liability on spam emailers misrepresenting or obscuring any information in identifying the “point of origin” or the “transmission path” of spam emails. RCW 19.190.020(1)(a). The trial court’s uncontested findings of fact establish that the points of origin and transmission paths of the 251 spam emails at issue were misrepresented and obscured. Benson’s simple and cost-effective attempts to reply to each of these spam emails were returned to

him or, in Martin's own words, the replies went into a "black hole." (CP 36). As a result of the misrepresented and obscured information in the points of origin and transmission paths of the 251 spam emails, Benson was required to utilize more sophisticated and time-consuming methods of locating the origin of the spam emails. (RP 36). However, the ability of Benson to locate the origin of the spam emails does not change the fact that information in the points of origin and transmission paths of the spam emails was misrepresented and obscured in violation of RCW 19.190.020(1)(a).

Notably, RCW 19.190.020(1)(a) includes within its ambit spam emailers who misrepresent or obscure "**any** information in identifying the point of origin or the transmission path." RCW 19.190.020(1)(a) (emphasis added). Therefore, liability attaches when **any** information is misrepresented or obscured in the point of origin or transmission path of spam. Again, the fact that Benson could not effectively and efficiently reply to any of the 251 spam email addresses OPS and Martin used, establishes that some portion of the point of origin and transmission path information of the 251 spam emails was misrepresented or obscured. Thus, the

spam emails Martin initiated the transmission of to Benson violated RCW 19.190.020.

Further, although "point of origin" and "transmission path" are not defined in RCW 19.190, "internet domain name" is defined.

RCW 19.190.010. An "internet domain name" is:

[A] globally unique, hierarchical reference to an internet host or service, assigned through centralized internet naming authorities, comprising a series of character strings separated by periods, with the right-most string specifying the top of the hierarchy.

RCW 19.190.010(10). RCW 19.190.020 prohibits the misrepresentation or obscuring of any information in identifying the point of origin or the transmission path of a spam email. However, the trial court's conclusions of law (erroneously labeled as findings) that the spam emails did not violate RCW 19.190 were based on Benson's ability to determine the origin of the spam emails by utilizing the internet domain name. (CP 43). Under the plain language of RCW 19.190.020, a spammer's use of a correct domain name does not thereby absolve a spammer from liability for misrepresenting or obscuring the "point of origin" or "transmission path" of a spam email. RCW 19.190.020. Had the Legislature intended this result, RCW 19.190.020 could have been drafted with reference to the internet domain name rather than the point of

origin or transmission path. The scope of RCW 19.190.020 is not so limited, however, and the actions of Martin violated this statute.

2. Martin Constitutes an Initiator of the 251 Spam Emails Pursuant to RCW 19.190.010(1) and (7).

In Respondent's Brief at pages 11 and 12, Martin argues that Benson "misstates" the definition of initiating the transmission of a spam email and Martin contests the use of the statutory definition of "assist the transmission" to help define the activities which constitute initiating the transmission of a spam email.

The phrase "initiate the transmission" is partly defined in RCW 19.190.010(7). In short, this statute provides that the initiation of the transmission occurs with the original sender of an electronic mail message rather than the action by the intermediary – i.e. any "intervening interactive computer service" or "wireless network" which "may handle or retransmit the message." RCW 19.190.010(7).

However, the action of initiating the transmission is also part of the definition of "assist the transmission" in RCW 19.190.010(1). The action of "assisting" necessarily requires that there be two actors – a principal or initiator and a person who provides some assistance to such principal or initiator. In this regard, RCW 19.190.010(1) first provides that "'assist the transmission' means actions taken by a

person to provide substantial assistance or support.” (Id.). This is the action of the assister. This statute then provides: “[W]hich enables any person to formulate, compose, send, originate, initiate, or transmit a commercial electronic mail message.” (Id.). This person who is “enabled” is the initiator, or, in the words of the statute, the person who “formulate[s], compose[s], send[s], originate[s], initiate[s], or transmit[s]” the spam. (Id.). Finally, the statute provides, in part, as follows: “[W]hen the person providing the assistance [i.e. the assister] knows or consciously avoids knowing that the initiator of the commercial electronic mail message [i.e. the principal or initiator] . . . is engaged, or intends to engage, in ay practice that violates the consumer protection act.” (Id.). Looking to this expansive statutory definition regarding who constitutes an “initiator” and who constitutes an “assister” is appropriate and, moreover, compelled.

In applying this expansive definition to the facts here, who was the originator or the entity or person who brought this activity into being? That was Oregon Processing Service, Inc. or OPS. It was OPS which owned the domain names “swordfishmedia.com,” “swordfishmedia.biz,” “mydailyoffer.com,” and “topofferz.net” which were used to send the 251 spam emails. (CP 35).

Who was the formulator or inventor of the 251 spam emails – i.e. who was the person who affirmatively went out and obtained almost all of the offers and acquired all the email addresses to which spam was sent? That was Martin. Martin acquired all of the 40 to 50 million email addresses to which spam was sent and Martin obtained almost all of the offers and campaigns that were run. (CP 37-38). In addition, Martin made the majority of decisions about what spam campaigns and offers would be run. (Id.). Without Martin performing these crucial roles, no spam campaigns would have been available to send.

Who was the composer of the spam emails or the person who put them together so they could be sent? That was Chuck Martin and, to some extent, John Doshier. (CP 38).

Who was the initiator of the 251 spam emails or, in other words, who gave the instruction that they be sent out? That was Martin. (CP 37-38).

Who sent out the 251 spam emails, or, in other words, who caused the spam to be routed to Benson – i.e. the person who hit the send button? That was Chuck Martin and, again, to some extent, John Doshier. (CP 38).

Who transmitted or passed the 251 spam emails along to Benson? That is the intervening interactive computer service or wireless network, which service or network is not liable unless it had certain knowledge defined in RCW 19.190.010(7).

Thus, based upon the broad definition of "initiator" contained in RCW 19.190.010(1) and (7), Martin is liable under RCW 19.190 for his actions in initiating the transmission of the 251 spam emails to Benson.

3. Martin also Assisted OPS in Transmitting the 251 Commercial Emails to Benson's Two Email Addresses.

Based upon the facts and analysis provided immediately above, this Court need not address Martin's assistance in initiating the transmission of the 251 spam emails to Benson in order to conclude that Martin is liable under RCW 19.190. However, because Martin also contests his assistance liability, it will be briefly addressed below.

It is uncontroverted that Martin provided the following instrumental assistance and support to OPS: 1) Martin acquired the 40 to 50 millions email addresses to which the spam was sent; 2) Martin acquired almost all of the offers or campaigns that were run; 3) Martin financed OPS's operations; and 4) Martin provided his house

to OPS to use as its principal place of business at no charge. (CP 36-38, Ex. "K," p. 72). This assistance was instrumental in enabling OPS, and its agents, to initiate the 251 spam emails to Benson.

The evidence further establishes that, in light of Martin's involvement in the affairs of OPS, he must have known or, at the very least, consciously avoided knowing that OPS was engaged in practices that violated the Washington Consumer Protection Act ("CPA"). Most telling is Martin's failure to consult with an attorney regarding any aspect of his business until after being served with the original summons and complaint in this action. (CP 38). The following actions of Martin also satisfy RCW 19.190.010(1) and RCW 19.190.020: 1) at the time Martin began actively operating OPS, he had approximately five years of internet marketing experience (Ex. "K," pp. 9, 12, 15-17, 20); 2) it was Martin's idea to use OPS to engage in the business of internet marketing (CP 37); 3) Martin would obtain almost all of the campaigns or offers OPS would run and simply hand them over to his inexperienced stepson Charles Martin and instruct Charles that he thought "this will work, try this" (CP 37-39); 4) Charles Martin and John Doshier had limited relevant business experience before working for OPS and Martin just figured that because John Doshier had worked for an email software

company for approximately one year, John “ought to know, you know, what’s required.” (CP 39). This last statement acknowledges the existence of particular requirements applicable to a spamming business. Yet, inexplicably, Martin expended no effort to determine what the requirements might be and whether OPS was in compliance with them. These facts demonstrate not only Martin’s conscious avoidance of knowing of OPS’s violations of the CPA, but also his reckless disregard as to whether OPS was operating lawfully.

Here, as in U.S. v. McAllister, 747 F.2d 1273 (9th Cir. 1984), Martin “made a conscious effort to avoid acquiring the required knowledge” applicable to his conduct. McAllister, 747 F.2d at 1275. Thus, Martin is also liable for assisting OPS in initiating the transmission of the 251 spam emails to Benson.

C. Martin’s Proposed Interpretation of RCW 19.190 Would Undermine the Policies Underlying the Act.

Martin also argues in his Respondent Brief at page four that RCW 19.190 only requires that a spam email recipient be able to identify the sender of spam email so the recipient can request that the spam emails be stopped. This contention is not supported by RCW 19.190.

Bulk commercial spam emailers have an opportunity to identify individuals who do not wish to receive spam before they send a single spam email by checking the WAISP website. In addition, RCW 19.190.020 provides that a spammer is imputed with the knowledge that he or she is sending deceptive spam to a Washington resident if the resident's residency information is available from the resident's internet domain name registrant. Here, Benson's residency information was available in accord with RCW 19.190.020. (CP 34).

Martin's assertion that the Legislature's primary concern is in providing spam recipients an opportunity to identify the spam's sender and request that the email be stopped, reflects a backward assessment of the Legislature's goals. RCW 19.190 only addresses the burdens on spam emailers, not spam email recipients. Thus, an interpretation of RCW 19.190 that places the responsibility on the spam recipient to avoid wrongs committed by spammers flatly contradicts RCW 19.190. RCW 19.190.020 provides no defense to a spammer who provides his or her address, phone number, or an unsubscribe link in an email that violates RCW 19.190.020. Martin offers no statutory basis for his contrary position.

Martin's interpretation of RCW 19.190 is also wholly at odds with the policies established in State v. Heckel, 143 Wn.2d 824, 24 P.3d 404 (2001). In enacting RCW 19.190, the Legislature was concerned with the cost-shifting achieved by advertisers who prevent spam recipients from promptly and effectively responding to spam. Heckel, 143 Wn.2d at 836. This cost-shifting forces spam recipients to use their time and resources to deal with the unwanted receipt of deceptive commercial emails. (Id.). Thus the concern in enacting RCW 19.190 is not the mere identification of the spam emailer, but the **prompt** and **effective** identification of the spam emailer and a prompt and effective means of communicating with such party.

Here, but for Martin misrepresenting or obscuring information in the points of origin and transmission paths of the 251 spam emails, Benson could have promptly and effectively replied to the spam. Instead, Martin asks Benson to make a long distance phone call or send a letter. It is also important to note that because Benson could not merely reply to Martin's 251 spam emails, Benson was required to use additional time and several more steps to locate the source of the spam. It is this very expenditure of time that is prohibited by RCW 19.190.020. Heckel, 143 Wn.2d at 836.

Those methods of dealing with spam that require considerable time or, even worse, direct financial expense on the part of spam recipients cannot possibly accomplish the Legislature's goals. Heckel, 143 Wn.2d at 835-36. Martin's interpretation of RCW 19.190 would accomplish the implausible result of permitting a spammer like Martin, who should not have sent deceptive emails to Benson in the first instance, to escape liability by turning attention to the individuals sought to be protected by RCW 19.190.020 and requiring such recipients to spend more of their time and money to address the spam. As the Court stated in Heckel, "When a spammer distorts the point of origin or transmission path of the message, email recipients cannot promptly and effectively respond to the message (and thereby opt out of future mailing); their efforts to respond take time, cause frustration, and compound the problems that ISPs face in delivery and storing the bulk messages." Heckel, 143 Wn.2d at 835-36.

Here, if the Court were to hold that inclusion of a long distance phone number or a physical address in a spam email would satisfy RCW 19.190's prohibition of the cost-shifting of advertising, the costs to email recipients would be tremendous. In examining the 251 emails sent to Benson, the cost of responding to

each of these spam emails via letter would have been \$92.87. Although, this outcome is troubling, the testimony established that Martin managed between 40 and 50 million email addresses to which he sent deceptive spam. (CP 38). If 40 million recipients of one of these spam emails sent a reply to Martin via mail requesting to be removed from his spam list, the cost would have been \$14.8 million collectively (40 million x 37¢). And, it should be remembered that Martin initiated the transmission of hundreds of millions of such spam emails. The Legislature was not concerned with merely providing a spam recipient with any means of responding to spam but a prompt and effective means. Martin's interpretation would permit a spammer to avoid liability even if he only provided the recipient with cumbersome and costly means of addressing the spam.

RCW 19.190 must be interpreted to give effect to the goals of the Legislature in enacting the statute. Martin's proposed interpretation of RCW 19.190 would undermine the policies underlying this act. In addition, Martin is unable to offer any case law or other support for the contention that the statute should be interpreted in the manner proposed.

D. **The Doctrine of Mitigation of Damages Is Not Applicable to a Violation of RCW 19.190.**

1. **Benson Was Under No Duty to Mitigate His Damages.**

In Respondent's Brief at pages eight through eleven, Martin argues that Benson's causes of action must be dismissed because Benson failed to mitigate his damages. Martin supports this assertion by pointing out that the telephone number and address of OPS were included in the spam emails as of December 6, 2003, as well as an unsubscribe link. This argument has no merit.

It is technically "inaccurate to say that an injured party has a 'duty' to take reasonable steps to avoid further damages." Walker v. Transamerica Title Ins. Co., Inc., 65 Wn. App. 399, 406 n.7, 828 P.2d 621 (1992). Moreover, a "plaintiff cannot be sued for breach of this supposed "duty," though he does suffer a reduction of damages if he fails to minimize his damages." (Id.). However, the duty to mitigate damages is not absolute. Sutton v. Shufelberger, 31 Wn. App. 579, 581, 643 P.2d 920 (1982). Mitigation is only a defense if the defendant can point to the existence of a duty on the part of the plaintiff to mitigate. Fed. Deposit Ins. Corp. v. Crosby, 774 F. Supp. 584, 587 (W.D. Wash. 1991). "[A] plaintiff has no 'duty' to mitigate when the defendant has equal opportunity to do

so.” Walker, 65 Wn. App. at 405-06. The plaintiff is only obligated to “act as a reasonable person would.” Bullard v. Bailey, 91 Wn. App. 750, 760, 959 P.2d 1122 (1998).

Here, assuming, for the sake of argument only, that Martin is correct in alleging that Benson had some obligation to mitigate his damages, such obligation would not operate to bar Benson’s present actions. When applicable, that is not how the doctrine operates. Rather, after determining that Martin is liable under RCW 19.190, the Court would face the issue of what effect the failure to meet such obligation would have on the amount of Benson’s damages. Such failure to meet this alleged obligation would not result in dismissal of Benson’s actions. See Walker, 65 Wn. App. at 406 n.7.

Here, Martin offers no specific basis for concluding that Benson is under a duty to mitigate his damages in the context of RCW 19.190. Further, Martin had an equal opportunity to mitigate the damages, or not cause any damages, by checking the WAISP website. It was a reasonable attempt on Benson’s part to mitigate his damages by registering his email addresses on such website. (CP 35; RP 28-29). By doing so Benson published his desire not to receive any spam email. Also, Benson’s Washington residency

information was available since 2000 from his internet domain name registrant and he replied to all 251 spam emails he received from Martin and requested to be removed from Martin's spam list. (CP 34, 36). Pursuant to RCW 19.190.020(2), Martin is imputed with the knowledge that Benson was a Washington resident to whom emails violating RCW 19.190.020 should not be sent. Under these circumstances, it cannot be concluded that Benson is foreclosed from recovery because he failed to take additional efforts to keep Martin from sending him spam.

2. **Application of the Doctrine of Mitigation of Damages Is Inconsistent With the Policies Underlying RCW 19.190.**

Mitigation is inconsistent with the policy considerations embodied by RCW 19.190. The Court in Heckel observed that spam emailers succeed in transferring the cost of their advertising, "from deceptive spammers to business and e-mail users". Heckel, 143 Wn.2d at 835-36. The costs analyzed in Heckel include the time, effort, and frustration spam recipients must expend to deal with deceptive commercial email. (Id.). Initiating the transmission of deceptive spam in violation of RCW 19.190 is akin "to sending junk mail with postage due or making telemarketing calls to someone's pay-per-minute cellular phone." (Id.). With respect to

Martin's activities here, these costs are potentially tremendous in light of the 40 to 50 million email addresses he repeatedly initiated the transmission of spam to. (CP 38). Martin now argues that it is the recipient of spam who should spend the time and effort to stop these unwanted emails. The effect of Martin's position is to shift the cost of spam advertising from the advertisers who stand to gain from the activity to businesses and individuals. This makes no sense within the context of RCW 19.190.

Martin's argument that Benson is to blame for failing to mitigate his damages is inconsistent with RCW 19.190. Mitigation in the manner proposed by Martin substantially undermines the goals of the Legislature in enacting RCW 19.190 and places greater additional burdens on the recipients of deceptive spam. This burden belongs on the initiators of spam email and not on the recipients, which RCW 19.190 seeks to protect.

III. Conclusion

The actions of Martin and OPS discussed herein result in their liability under RCW 19.190.020 as initiators. The Court should reject Martin's defense based upon including an unsubscribe link, contact address, and/or contact phone number in any of the 251 spam emails and any argument that Benson in some way failed to

mitigate his damages, because these defenses would only apply to the issue of Benson's damages and these defenses would undermine the policies underlying RCW 19.190. Specifically, Benson requests the following relief: 1) conclude Martin violated RCW 19.190.020 and RCW 19.190.030; 2) calculate Benson's damages in accordance with RCW 19.190 and RCW 19.86;¹ and 3) remand to the trial court for entry of judgment.

Respectfully submitted this 23rd day of August 2006.

MCGAVICK GRAVES, P.S.

By 
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Attorneys for Appellant Benson

¹ Specifically, Benson requests \$500.00 for each spam email which violated RCW 19.190, three times the damages Benson is entitled to recover under RCW 19.190.040(1) for each spam email pursuant to RCW 19.86.090, prejudgment and post-judgment interest at the maximum amount allowable by law, costs and disbursements incurred, and reasonable attorney fees pursuant to RCW 19.190.030, RCW 19.86, and RAP 18.1

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STATE OF WASHINGTON
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No. 34195-6-II
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E. JOHN BENSON, d/b/a Elite Cellular

Appellant,

vs.

OREGON PROCESSING SERVICE,
INC., an Oregon corporation; DANIEL J.
MARTIN, individually, and the marital
community comprised of DANIEL J. and
DIANE M. MARTIN,

Respondents.

DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am a resident of the state of Washington, over the age of eighteen years, not a party or interested in the above entitled action, and competent to be a witness herein.

On the date given below, I caused to be served via e-mail and U.S. Mail, postage pre-paid, a copy of Appellant's Reply Brief on:

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(Counsel for Respondents)

DATED this 23rd day of August, 2006.

By: Anita K. Acosta
Anita K. Acosta

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