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COURT OF APPEALS

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STATE OF WASHINGTON

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No. 34195-6-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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 OPENING BRIEF

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I. Assignments of Error

1. Finding of Fact No. 5 provides as follows: "While it is questionable whether the early e-mails received by Plaintiff included information for recipients to unsubscribe, at least by December 6th, 2003, the unsolicited e-mails being received by Plaintiff from Defendant OPS's domain names included an unsubscribe link and an address and a phone number through which a recipient could unsubscribe from the database." (CP 36).

The trial court erred to the extent it concluded and based its judgment upon Defendant Daniel J. Martin's ("Martin") inclusion of an unsubscribe link, an address, and/or a phone number in the commercial electronic mail messages (referred to herein as "commercial emails" and, alternatively, as "spam emails") he sent to Benson caused such spam to be in compliance with RCW 19.190.

2. Finding of Fact No. 7 provides as follows: "Plaintiff made a conscious decision to not write to the address in the unsolicited e-mails or to call the phone number listed in such e-mails." (CP 36).

The trial court erred to the extent it based its judgment upon Benson's conscious decision not to write a letter or make a long-

distance phone call to OPS in order to unsubscribe from its spam list.

3. Finding of Fact No. 22 provides, in relevant part, as follows: “Breaking that down, this Court must first determine whether there was a commercial e-mail message that either, one, misrepresented the information identifying the point of origin or the transmission path of the commercial e-mail message, or, two, obscured the information identifying the point of origin or the transmission path of the commercial e-mail message.” (CP 41).

The trial court erred in omitting the word “any” from its description of RCW 19.190.020(1)(a).

4. Findings of Fact Nos. 25, 26, 27, and 30 provide, respectively, as follows: “The evidence presented at trial does not support a claim that Defendants misrepresented the information identifying the point of origin or the transmission path of the commercial e-mail messages. The unsolicited e-mails at issue came from swordfishmedia.com, swordfishmedia.biz, mydailyoffer.com, or topperz.net. Plaintiff Benson was able to readily identify these as domain names of Defendant OPS and that Defendant OPS was located in Grants Pass, Oregon. There was no

misrepresentation of the information identifying the point of origin or the transmission path of the unsolicited e-mails.” (CP 41-42).

“Similarly, the evidence presented at trial does not support a claim that Defendants obscured the information identifying the point of origin or the transmission path of the commercial e-mail messages. Plaintiff Benson argues that “obscure” should be defined as meaning to hinder. Again, that term “obscure” is not defined in the statute, and the Court will look to its ordinary meaning. Webster’s Third New International Dictionary, Unabridged, defines “obscure” as to conceal or hide.” (CP 42).

“The Court finds that the evidence presented at trial does not support a claim that the Defendants obscured, concealed, or hid the information identifying the point of origin or the transmission path of the commercial e-mail messages. As noted earlier, Plaintiff checked all the unsolicited e-mails he received and was able to identify the domain name registrant of all of those unsolicited commercial e-mails he received. Defendant OPS was the registrant of all those domain names, and Defendant OPS was identified as located in Grants Pass, Oregon. There was no obscuring of the information identifying the point of origin or the transmission path of the unsolicited e-mails.” (CP 42-43).

“Here the Court finds there was no misrepresentation or obscuring of the information identifying the commercial e-mails’ point of origin or transmission path.” (CP 44).

The trial court erroneously labeled these conclusions of law as findings of fact and the trial court also erred in concluding that Martin did not misrepresent or obscure any information in the 251 commercial emails in violation of RCW 19.190.020(1)(a).

5. Finding of Fact No. 28 provides as follows: “Plaintiff Benson cites to the Heckel case to support his position. This Court finds that the Heckel case is distinguishable on the facts. In Heckel, which can be found at 143 Wn.2d. 824, there was a claim against defendant Heckel arising from the fact that he sent out unsolicited commercial e-mail messages without providing a valid return e-mail address to which recipients could respond. However, in Heckel, none of the e-mail accounts that were used by the defendant could be readily identified as belonging to the defendant. Here, Plaintiff Benson was able to readily identify the e-mail accounts as belonging to OPS, which is located in Grants Pass, Oregon.” (CP 43).

The trial court erroneously labeled this conclusion of law as a finding of fact and the trial court also erred in interpreting the

import and scope of the holding in State v. Heckel, 143 Wn.2d 824, 24 P.3d 404 (2001).

6. Finding of Fact No. 29 provides as follows: "Plaintiff replied to the unsolicited e-mails he received and received a reply that the message he sent was not received. At best that is evidence of a faulty transmission path. The statute does not say that it is illegal to have a faulty transmission path. Rather, the statute states that you cannot misrepresent or obscure the information identifying the point of origin of the e-mail or misrepresent or obscure the information identifying the transmission path of the e-mail." (CP 43-44).

The trial court erroneously labeled this conclusion of law as a finding of fact and the trial court erred in interpreting the requirements of RCW 19.190.020(1)(a).

7. Finding of Fact No. 31 provides as follows: "An order of default was entered against Defendant OPS on September 2, 2005, but no default judgment has been entered against Defendant OPS. Based upon the findings set forth herein, the Court further finds the Plaintiff's claims against Defendant OPS should be dismissed." (CP 44).

The trial court erred in dismissing the claims against OPS.

8. Conclusions of Law Nos. 1 and 2 provide, respectively, as follows: “The unsolicited commercial e-mails sent to Plaintiff Benson by Defendant OPS did not violate Chapter 19.190 RCW. Therefore Plaintiff’s claims against all of the Defendants under Chapter 19.190 RCW should be dismissed with prejudice.” (CP 44).

“Plaintiff’s claims against the Defendants under Chapter 19.86 RCW are based on alleged violations of Chapter 19.190 RCW. Because the unsolicited commercial e-mails sent to Plaintiff by defendant OPS did not violate Chapter 19.190 RCW, Plaintiff’s claims against all of the Defendants under Chapter 19.86 RCW should be dismissed with prejudice.” (CP 44-45).

The trial court erred in concluding that Martin and OPS did not violate RCW 19.190 and RCW 19.86 and dismissing all of Benson’s claims with prejudice.

II. Issues Pertaining to Assignments of Error

1. Did the trial court misinterpret and misapply the provisions of RCW 19.190.020(1)(a) to the facts of this case such that this Court should hold Martin liable under the Act? (Assignments of error 3, 4, 5, 6, 7, 8). This issue is subject to de novo review because it involves conclusions of law that have been

erroneously labeled as findings of fact, the application of the law to the facts, and statutory interpretation. Keever & Assocs., Inc. v. Randall, 129 Wn. App. 733, 738, 119 P.3d 926 (2005); Guarino v. Interactive Objects, Inc., 122 Wn. App. 95, 108, 86 P.3d 1175 (2004); Colwell v. Etzell, 119 Wn. App. 432, 437, 81 P.3d 895 (2003); Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); Berger v. Sonneland, 144 Wn.2d 91, 104-05, 26 P.3d 257 (2001).

2. Based upon the facts of this case, if the Court determines Martin violated RCW 19.190.020(1)(a), then must the Court further determine that Martin has violated the CPA? (Assignment of error 8). This issue is subject to de novo review because it involves the application of the law to the facts and statutory interpretation. Guarino, 122 Wn. App. at 108; Colwell, 119 Wn. App. at 437; Sunnyside, 149 Wn.2d at 880; Berger, 144 Wn.2d at 104-05.

3. If a commercial electronic mail message violates RCW 19.190.020(1)(a), but includes an unsubscribe link, contact address, or contact phone number, does such email still violate the statute? (Assignments of error numbers 1 and 2). This issue is a

matter of statutory interpretation and is, thus, subject to de novo review. Berger, 144 Wn.2d at 104-05.

III. Statement of the Case

A. Procedural Background

This litigation began on March 8, 2004 when Benson served the corporate defendant, Oregon Processing Service, Inc. ("OPS"), with a Summons and Complaint. Mr. Benson alleged in his Complaint that OPS initiated the transmission of at least 177 commercial emails to him in violation of Washington's Commercial Electronic Mail Act (RCW 19.190) (the "Act"). (CP 2). Further, pursuant to RCW 19.190.030 and RCW 19.86, Benson alleged violations of the Washington Consumer Protection Act (the "CPA"). (CP 2-3). On June 22, 2004, Benson amended his Complaint and added Daniel J. Martin ("Martin") and his marital community as defendants, alleging that Mr. Martin violated the Act and the CPA. (CP 5-6). Martin and his marital community were served with the Amended Summons and First Amended Complaint on June 29, 2004. On the same date, the Amended Summons and First Amended Complaint were sent via U.S. mail to OPS's registered agent. Benson filed both the Complaint and the First Amended Complaint with the trial court on September 14, 2004. (CP 1, 4).

OPS did not appear with respect to, or defended against, the First Amended Complaint.

Counsel for Martin filed a Notice of Appearance with the trial court on September 20, 2004. (CP 8-9). Benson and Martin filed motions for summary judgment with the trial court and both motions were denied on August 12, 2005. (CP 14-18). An Order of Default was entered against OPS on September 2, 2005. (CP 18-19).

This matter was tried to the superior court without a jury on September 13, 2005 with witnesses Benson, Martin, and Bryan Wiznuk ("Wiznuk") testifying. (CP 25-26, 22). In addition to the testimony of Benson, Martin, and Wiznuk, the deposition transcript of Martin was offered into evidence and admitted. (CP 24, 26). Benson offered several exhibits into evidence at trial (which exhibits were admitted by stipulation). (CP 23-24, 26). These exhibits included commercial emails Benson received from OPS, Benson's replies to these commercial emails, and the error messages Benson received in response to his replies. (CP 23-24, 26).

Following the bench trial, the trial court ruled in favor of Martin and OPS on October 14, 2005 and the trial court entered its Findings of Fact and Conclusions of Law and its Judgment Dismissing Plaintiff's Claims on November 18, 2005. (CP 27, 33-

45, 30-32). Benson timely appealed the trial court's findings, conclusions, and judgment by filing a Notice of Appeal on December 15, 2005. (CP 28-29).

B. Factual Background

Benson owned the business Elite Cellular. (RP 26). Benson registered the domain name elitecellular.com to assist in the operation of his business. (RP 26). Benson first registered the domain name elitecellular.com in September 1997 and he was an Oregon resident at that time. (CP 34). The registration information on elitecellular.com was changed in August of 2000 when Benson became a Washington resident. (Id.).

Benson's Washington residency information has been available, upon request, from him since August 2000. (Id.). At trial, Benson testified that his Washington residency information for elitecellular.com could be obtained in several ways, including by conducting a "Whois" search via a website on the internet, by going to the elitecellular.com website, by contacting Elite Cellular directly, and/or by utilizing the Washington Association of Internet Service Providers' ("WAISP") website. (RP 28-29).¹ Benson owned and

¹ The WAISP website is an "on-line registry, where Washington residents who do not wish to receive spam can register their e-mail addresses, and thus where responsible e-commerce businesses can find lists of Washington e-mail

maintained the electronic mail addresses john@elitecellular.com and sales@elitecellular.com from September 1997 to the date of trial. (CP 35).

Between September 2003 and March 2004, Benson received 251 unsolicited commercial emails at john@elitecellular.com or at sales@elitecellular.com from swordfishmedia.com, swordfishmedia.biz, mydailyoffer.com, or topperz.net. (CP 35).² Copies of these 251 commercial emails were admitted at trial as Exhibits "B," "C," "F," and "I." (RP 32; Ex. "B"). Before receiving any of these 251 emails, Benson had registered his email addresses john@elitecellular.com and sales@elitecellular.com with the on-line registry co-sponsored by WAISP and the Washington Attorney General. (Id.).

Benson checked the domain name registrant on all the emails he received from swordfishmedia.com, swordfishmedia.biz, mydailyoffer.com, and topperz.net. (CP 35). Benson learned that these were the domain names of OPS. (CP 35-36). The

addresses." State v. Heckel, 122 Wn. App. 60, 65, 93 P.3d 189 (2004); see also CP 35, RP 30.

² The following are three examples of commercial email addresses used by OPS: yrgiha@swordfishmedia.biz; ijyewm@swordfishmedia.biz; rjvsru@swordfishmedia.com. (Ex. "B," pp. B1-B5).

registration information also indicated that OPS was located in Grants Pass, Oregon. (CP 36).

At least by December 6th, 2003, the unsolicited e-mails Benson was receiving from OPS included an unsubscribe link and an address and a phone number through which a recipient could unsubscribe from OPS's database. (Id.) If a recipient clicked the reply button in order to reply to a commercial email from OPS, the reply email would go back to the original server from where the commercial email came and then it would go into a "black hole." (Id.) Benson replied via email to the 251 commercial emails he received from OPS and asked to be removed from its spam list. (Id.) Benson received an email back to each of these reply messages stating that the message sent was not received. (CP 36; RP 37-38). Benson made a conscious decision to not write to the address in the unsolicited commercial emails or to call the phone number listed in such commercial emails. (Id.).

OPS was started in December 2002. (Id.) During OPS's existence, Martin was the sole shareholder, officer, and director of OPS. (CP 36-37). In addition, OPS was financed by Martin. (CP 37).

Martin has resided at 1011 South East Rogue Drive, Grants Pass, Oregon from approximately 1988 until the date of trial. (Id.). Martin has been in the business of internet marketing for approximately eight years. (Id.). Defendant Martin has worked for or with three internet marketing companies – CD Micro, OPS, and Smart-Buyz Incorporated. (Id.). Internet marketing companies attempt to generate leads through commercial email offers for such goods and services as mortgages, debt consolidation, dating offers, software, and toys. (Id.).

The eventual purpose for OPS was to use it as an internet marketing company. (Id.). It was Martin's idea to use OPS for this purpose. (Id.).

Charles Martin, Martin's son, and another individual named John Doshier worked for OPS as independent contractors on the basis of simple oral contracts. (Id.). Martin was the "marketing guy" for OPS. (Id.). In that regard, Martin obtained marketing offers for OPS from so-called marketing partners or affiliate networks. (Id.).

Martin made most of the decisions about what offers to run. (Id.). Martin would obtain the offers to run and then hand them over to Charles Martin and say something like "I think this will work, try this." (CP 37-38). OPS's marketing partners or affiliate network

companies would send emails to Martin's computer in his house or they would send such emails directly to Charles Martin containing the necessary offer information. (CP 38).

Charles Martin set the offers up; that is, he turned the offers into commercial emails that could be sent to OPS's email marketing lists. (Id.). Charles Martin also decided which e-mail marketing lists the commercial emails would be sent to and he would actually send out the commercial emails. (Id.). John Doshier was the "technician" for OPS in that he managed OPS's marketing lists and eight servers. (Id.).

During its existence, OPS's marketing partners or affiliate network companies assigned 300 or more offers to OPS. (Id.). OPS maintained, owned, and/or managed between 40 and 50 million email addresses to which it could send commercial emails. (Id.). Martin, through OPS, obtained these 40 to 50 million email addresses to send commercial e-mails to. (Id.). Further, during the fifteen months OPS operated, it sent out between 10 and 15 offers per week to the 40 to 50 million email addresses that existed on its lists. (Id.).

Martin did not consult with any attorney regarding the legality of OPS's business activities before January 2004. (Id.).

Charles Martin and John Doshier had limited relevant business experience before working for OPS as independent contractors. (CP 39). Charles Martin had no such business experience and he was 21 when he first started acting as an independent contractor for OPS. (Id.). John Doshier was the principal person affiliated with OPS who was in charge of making sure that OPS complied with the laws relevant to sending commercial emails. (Id.). Prior to working for OPS, John Doshier, who was 24 or 25 when he began working for OPS, worked for a software development company for approximately one year. (Id.). Since this company was an email software company, Martin figured John Doshier “ought to know, you know, what’s required.” (Id.).

Based upon this evidence, the trial court entered findings of fact and conclusions of law in favor of Martin and dismissed Benson’s claims.

IV. Argument

A. Standard of Review

This Court’s “review of a trial court’s findings of fact and conclusions of law is a two-step process.” Guarino, 122 Wn. App. at 108. First, this Court “must determine if the trial court’s findings of fact were supported by substantial evidence in the record.” Id.

Second, this Court “must then determine whether those findings of fact support the trial court’s conclusions of law.” Id. Conclusions of law, i.e. the application of the law to the facts, is reviewed de novo. Id.; Colwell, 119 Wn. App. at 437. Questions of law are also reviewed de novo. Sunnyside, 149 Wn.2d at 880. Finally, “[s]tatutory interpretation is a question of law which [is reviewed] de novo.” Berger, 144 Wn.2d at 104-05.

In addition, conclusions of law which are erroneously labeled as findings of fact are reviewed de novo. Keever, 129 Wn. App. at 738. A trial court’s determination which “concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact.” Inland Foundry Co., Inc. v. Dep’t of Labor and Indus., 106 Wn. App. 333, 340, 24 P.3d 424 (2001). If the trial court’s determination, however, “is made by a process of legal reasoning from facts in evidence, it is a conclusion of law.” Id.

B. The Trial Court Misinterpreted RCW 19.190.020(1)(a) as a Matter of Law.

1. The Plain Language of RCW 19.190.020(1)(a) Does Not Support the Trial Court’s Interpretation of RCW 19.190.020(1)(a).

The trial court concluded that Martin did not violate RCW 19.190.020(1)(a) based on its interpretation of the terms

“misrepresent” and “obscure” as these terms are used in the statute. (CP 41). The trial court’s analysis of RCW 19.190.020(1)(a) represents a narrow and inaccurate interpretation of this statute, which provides, in relevant part, as follows:

No person may initiate the transmission . . . or assist the transmission, of a commercial electronic mail message . . . to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident that: (a) . . . otherwise misrepresents or obscures **any** information in identifying the point of origin or the transmission path of a commercial electronic mail message

RCW 19.190.020(1)(a) (emphasis added).

Essentially, the trial court determined that because Benson was able to discover, through a so-called “Whois” search, that OPS was the registrant of the domain names contained in the spam emails he had received, the spam emails could not have been obscured or misrepresented. (CP 42-43). This interpretation of RCW 19.190.020(1)(a) is too narrow.

This interpretation of RCW 19.190.020 is analogous to an individual providing the wrong house number on the correct street on which he or she lives. Such an individual could not argue that he or she had not misrepresented or obscured his or her place of residence merely because he or she provided the correct street

when he or she had also provided the incorrect house number. However, this is essentially the holding of the trial court.

The term “internet domain name” is defined in RCW 19.190.010(10). However, neither “point of origin” nor “transmission path” are defined in RCW 19.190.010. Here, Benson utilized the internet domain name of the spam emails he had received to discover who had directed the spam emails to him. (CP 42; RP 34-35). However, RCW 19.190.020(1)(a) focuses on the point of origin and transmission path rather than the internet domain name. Essentially the trial court interpreted the terms “internet domain name,” “point of origin,” and “transmission path” as synonymous. This interpretation of RCW 19.190 in light of the Legislature’s use of three different terms is not appropriate. Had the Legislature intended to impose liability only on persons who misrepresented or obscured the internet domain name in spam emails, the Legislature would not have used the terms “point of origin” and “transmission path” in RCW 19.190.020(1)(a). “When the Legislature uses different words in the same statute it is presumed that a different meaning is intended.” Haley v. Highland, 142 Wn.2d 135, 147, 12 P.3d 119 (2000). Instead of using the term “internet domain name” in the second portion of RCW

19.190.020(1)(a), the Legislature elected to impose liability for 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 interpretation of RCW 19.190.020(1)(a) is too narrow to accomplish the intent of the Legislature, which is to impose liability on a broad range of behaviors that render the point of origin or the transmission path of spam emails useless.

“A court’s paramount duty in statutory interpretation is to give effect to the Legislature’s intent.” Sattler v. Northwest Tissue Center, 110 Wn. App. 689, 694, 42 P.3d 440 (2002). RCW 19.190.020(1)(a) imposes liability on any person who misrepresents or obscures the point of origin or the transmission path when sending spam email. RCW 19.190.020(1)(a) does not include an exception for those recipients of spam emails who are able, as Benson was here, to discover the identity of the person who initiated the spam emails to them through their own diligence. RCW 19.190.020(1)(a).

The implausibility of this interpretation of the statute is illustrated by any instance of spam email received from a more common internet domain name such as aol.com, earthlink.com, or

msn.com. In such instances, the recipients of the spam emails would not be able to identify the person who had initiated such emails to them by conducting a “Whois” search. Surely the Legislature’s intention was not to provide a remedy in one instance and not the other.

2. The Legislature’s Use of the Term “Any” Must be Interpreted as Imposing Liability on a Broad Class of Spam Email.

The plain language of RCW 19.190.020(1)(a) mandates that it be interpreted to cast a broad net of liability for spam emailers, including within its purview 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).

The broad meaning of the word “any” is illustrated in State v. Fjermestad, 114 Wn.2d 828, 791 P.2d 897 (1990). In Fjermestad the court interpreted the term, “any information” in the context of RCW 9.73, which prohibits the use of any information obtained from improperly intercepted or recorded private conversations. Fjermestad, 114 Wn.2d at 835. In Fjermestad, the Court held as follows:

Whenever we are faced with a question of statutory interpretation we look to the plain meaning of the words used in the statute. A nontechnical statutory

term may be given its dictionary meaning. Furthermore, statutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided. Thus, Webster's II New Riverside University Dictionary (1984) defines the word "any" as: "the whole amount of: ALL."

Id. (internal citations omitted). The Court in Fjermestad proceeded to interpret the statute at issue broadly based on the plain meaning of the language employed by the Legislature. As noted in Sattler, "A court's paramount duty in statutory interpretation is to give effect to the Legislature's intent." Sattler, 110 Wn. App. at 694.

The trial court's narrow interpretation of RCW 19.190.020(1)(a) significantly limits the actions prohibited by this statute despite the Legislature's use of broad and inclusive language. Under the trial court's interpretation, a spam marketer's mere inclusion of some accurate point of origin or transmission path information in the "from" spam email address would remove such spam email from the coverage of the Act. Here, Benson could not effectively reply to any of the 251 spam emails he received from OPS and Martin. (CP 36; RP 38). RCW 19.190.020(1)(a) provides that liability will attach when any information is misrepresented or obscured in the point of origin or transmission path of the spam email at issue. The fact that the 251 spam email addresses OPS

and Martin used to spam Benson were incapable of being replied to (i.e. they went into a “black hole”) means that some portion of the point of origin or transmission path information of the 251 spam emails was inaccurate, or, in other words, misrepresented or obscured.

The broad net cast by RCW 19.190.020(1)(a) is also supported by State v. Heckel, 122 Wn. App. 60, 93, P.3d 189 (2004) (review denied, 153 Wn.2d 1021, 108 P.3d 1229 (2005); cert. denied, 126 S. Ct. 387, 163 L. Ed.2d 172 (2005)) (referred to herein as Heckel II), which is one of the few reported cases decided under the Act. The defendant spam marketer in Heckel II engaged in the following activity in connection with his marketing:

To send his spam, Heckel used at least 12 different Internet addresses with the domain name ‘juno.com,’ which accounts were generally cancelled by Juno within two days of his bulk e-mail transmissions. When Juno would shut down one of Heckel’s accounts, Heckel would simply open a new one, and send out more batches of spam. Some recipients attempted to reply to Heckel’s spam and failed—in some cases because Juno had already terminated the account or accounts from which the spam had been sent.

Heckel II, 122 Wn. App. at 65. The Court held that “Heckel’s spam clearly fell within the hard core of the prohibitions contained in the Act: The spam was accompanied by misleading subject lines; was

transmitted along misleading paths, and 9 of the spam messages used the domain name of a third party who had not given permission to Heckel to use that inactive domain name.” Id. at 72.³

The broad language the Legislature employed in RCW 19.190.020(1)(a) (i.e. “any”) and the encompassing policy established in Heckel II compel the conclusion that the trial court in this matter has interpreted RCW 19.190.020(1)(a) too narrowly and this Court should reverse such interpretation and enforce the broad legislative policy underlying the Act.

3. **Broadly Construing RCW 19.190.020(1)(a) Would also Serve to Effectuate Another Policy Behind the Act to Prohibit the Cost-Shifting of Advertising.**

Another policy underlying the Act is aimed at prohibiting the shifting of the cost of advertising from spammers to the recipients of spam. State v. Heckel, 143 Wn.2d at 836 (referred to herein as Heckel I). In Heckel I, the Supreme Court of Washington explained the cost-shifting policy underlying the Act as follows:

Deceptive spam harms individual Internet users as well. When a spammer distorts the point of origin or transmission path of the message, e-mail recipients cannot promptly and effectively respond to the message (and thereby opt out of future mailings);

³ See State v. Heckel, 143 Wn.2d 824, 830, 24 P.3d 404 (2001) for another discussion of the facts in the Heckel cases regarding the practice of creating such “ephemeral” email accounts.

their efforts to respond take time, cause frustration, and compound the problems that ISPs face in delivering and storing the bulk messages. . . . This cost-shifting -- from deceptive spammers to businesses and e-mail users -- has been likened to sending junk mail with postage due or making telemarketing calls to someone's pay-per-minute cellular phone. In a case involving the analogous practice of junk faxing (sending unsolicited faxes that contain advertisements), the Ninth Circuit acknowledged 'the government's substantial interest in preventing the shifting of advertising costs to consumers.' We thus recognize the Act serves the 'legitimate local purpose' of banning the cost-shifting inherent in the sending of deceptive spam.

Id. at 835-836 (internal citations omitted).

Here, Benson testified that he estimated he spent at least 120 hours dealing with the spam admitted into evidence. (RP 36). The trial court appears to have placed significance in its findings and conclusions on Benson's decision not to pay postage and write a letter or make a long-distance telephone call to OPS and Martin in order to request to be removed from their spam email lists. (CP 36). This focus of the trial court is at odds with the policy underlying RCW 19.190 that spam marketers should not be permitted to shift their marketing costs to the recipients of their spam emails. Heckel I, 143 Wn.2d at 835-36. In addition, no language in the Act supports the interpretation that a spam emailer can escape liability under RCW 19.190.020 by providing a recipient

a **more costly** and **more time consuming** means of communicating his or her desire to cease receiving spam as the trial court seemed to hold in this case. (CP 36).

The decision of the trial court also contradicts the cost-shifting policy established in Heckel I in that Benson had already taken steps to avoid receiving spam before he started receiving spam emails from Martin and OPS. These steps included Benson's registration of his email addresses john@elitecellular and sale@elitecellular.com with the WAISP website. (CP 35).

The trial court's narrow interpretation of the Act guts RCW 19.190.020(1)(a) and allows spammers whose actions fall within the "core" of the statute to escape liability. The interpretation argued by Benson is in accord with the plain language of the Act and the policy of the Legislature: to prohibit senders of spam emails from shifting their marketing costs to their unwilling recipients.

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C. **Martin Violated RCW 19.190.020(1)(a) by Sending 251 Spam Emails to Benson.**

1. **OPS and Martin Initiated the Transmission of 251 Commercial Emails to Two Email Addresses Held by Benson, Who Is a Washington State Resident.**

The phrase “initiate the transmission” is partly defined in RCW 19.190.010(7). This statute provides, in relevant part, that the initiation of the transmission occurs with the original sender of an electronic mail message, not with an intervening interactive computer service. RCW 19.190.010(7). This phrase is further defined in RCW 19.190.010(1) as the formulating, composing, sending, originating, initiating, or transmitting of a commercial email. RCW 19.190.010(1). These words are not further defined in RCW 19.190, thus, their respective dictionary definitions are instructive and controlling.⁴ In that regard, The American Heritage Dictionary defines the words contained in RCW 19.190.010(1) as follows: 1) Formulate: to devise, invent; 2) Compose: to make or create by putting together parts or elements; 3) Send: to cause to be conveyed by an intermediary to a destination; 4) Originate: to bring into being; create; invent; 5) Initiate:

⁴ When words are not defined by a statute they are given their ordinary dictionary meaning. State v. Sullivan, 143 Wn.2d 162, 174, 19 P.3d 1012.

to begin or originate; 6) Transmit: to send from one person, thing, or place to another; convey.⁵

Here, OPS initiated the transmission of 251 commercial emails⁶ to two email addresses held by Benson (sales@elitecellular.com and john@elitecellular.com). These 251 commercial emails originated from the domain names “swordfishmedia.com,” “swordfishmedia.biz,” “mydailyoffer.com,” and “topofferz.net,” each of which was owned by OPS. (CP 35). Regardless of which of the three agents of OPS (Martin, Charles Martin, or John Doshier) actually pushed the button to send the 251 spam emails, such action of one or all of OPS’s agents makes it an initiator of the transmission of these commercial emails. This cannot be refuted.

Moreover, based upon Martin’s instrumental and active role in OPS, his actions also make him an initiator of the transmission of the 251 spam emails. Most importantly, Martin acquired the 40 to 50 millions email addresses to which OPS sent spam, which list

⁵ The American Heritage Dictionary (William Morris ed. Houghton Mifflin Co. 1981).

⁶ It is beyond question that each and every email Mr. Benson received from OPS and Martin constitute “commercial electronic mail messages” within the meaning of RCW 19.190.010(2). “Commercial electronic mail message” is defined as “an electronic mail message sent for the purpose of promoting . . . goods, or services for sale or lease.” RCW 19.190.010(2). Here, Martin has admitted that the eventual sole purpose for OPS was for sending commercial emails. (CP 37).

obviously included Bensons two email addresses. (CP 38). Further, Martin was the “marketing guy” for OPS, soliciting all the offers or campaigns that it ran, and he made most of the decisions about what offers or campaigns OPS would run. (CP 37-38). Without Martin playing these crucial roles in OPS, OPS would have no offers or campaigns to send and no email addresses to direct such offers or campaigns. Thus, both OPS and Martin initiated the 251 commercial emails to the two email addresses held by Mr. Benson.

2. **Martin Also Assisted OPS in Transmitting the 251 Commercial Emails to Benson’s Two Email Addresses.**

The phrase “assist the transmission” means the following:

[A]ctions taken by a person to provide substantial assistance or support which enables any person to formulate, compose, send, originate, initiate, or transmit a commercial electronic mail message . . . when the person providing the assistance knows or consciously avoids knowing that the initiator of the commercial electronic mail message . . . is engaged, or intends to engage, in any practice that violates the consumer protection act.

RCW 19.190.010(1).

Further, each of the 251 emails Benson received from OPS and Martin promoted either goods or services for sale.

First, Martin provided OPS with substantial assistance and support which enabled OPS to formulate, compose, send, originate, initiate, and transmit the 251 commercial emails at issue. Specifically, Martin provided the following instrumental assistance and support to OPS: 1) Martin acquired the 40 to 50 millions email addresses to which OPS sent spam; 2) Martin solicited all the offers or campaigns that OPS ran; 3) Martin financed OPS's operations; and 4) Mr. Martin provided his house to OPS to operate out of as its principal place of business for free. (CP 36-38, Ex. "K," p. 72). All of this substantial assistance and support enabled OPS to formulate, compose, send, originate, initiate, and transmit the 251 commercial emails to Benson.

Next, based upon the established facts in this case, the Court must conclude that when Martin provided the assistance detailed in the paragraph above he must have known or, at the very least, consciously avoided knowing that OPS was engaged in practices that violated the CPA. OPS's violations of RCW 19.190.020, which also constitutes a violation of the CPA pursuant to RCW 19.190.030, are detailed throughout this brief and, for the sake of brevity, will not be repeated here. Martin's actions which demonstrate he consciously avoided knowing that OPS was engaged in practices that violated the

CPA, however, will be detailed here. The following actions of Martin demonstrate such knowledge: 1) at the time Mr. 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 the campaigns or offers OPS would run and he would just hand them over to Charles, an in experienced and young alleged independent contractor, and instruct Charles that he thought "this will work, try this" (CP37-39); 4) Martin did not consult with any attorney regarding the legality of OPS's business activities before January 2004 (CP 38); 5) 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." (CP39). These facts demonstrate not only consciously avoiding knowing of OPS's violations of the CPA, but also reckless disregard as to whether OPS was operating within the law.

3. **Martin and OPS Knew or Had Reason to Know john@elitecellular.com and sales@elitecellular.com Were Electronic Email Addresses Held by Benson, a Washington State Resident.**

RCW 19.190.020(2) provides as follows:

For purposes of this section, a person knows that the intended recipient of a commercial electronic mail message is a Washington resident if that information is available, upon request, from the registrant of the internet domain name contained in the recipient's electronic mail address.

RCW 19.190.020(2). RCW 19.190.020(2) charges those persons who send commercial emails with the knowledge that an email address is held by a Washington resident if such residency information is available, upon request, from the registrant of the internet domain name contained in the recipient's email address.

In this case, Benson received the 251 commercial emails from OPS and Martin at his email addresses sales@elitecellular.com and john@elitecellular.com. (CP 3). Benson is the registrant of the domain name ("elitecellular.com.") contained in these email addresses. (CP 34). Further, Benson's Washington residency was available, upon request, from him. (Id.). Consequently, RCW 19.190.020(2) imputes to OPS and Martin the knowledge that they sent commercial emails to a resident of Washington.

In addition, this interpretation of RCW 19.190.020(2) was endorsed in Heckel II, where the court held, “actual knowledge is imputed—if residency information is available from the domain name registrant.” Heckel II, 122 Wn. App. at 67. Such is the case here. Furthermore, the court in Heckel II also held that the trial court could impute knowledge to spammers, like OPS and Martin, based on the statistical probability of an email ending up in Washington due to the sheer volume of commercial emails sent. In Heckel II, the defendant sent between 100,000 and 1,000,000 commercial emails per week. Heckel II, 122 Wn. App. at 69. Here, OPS and Martin sent out between 10 and 15 offers or campaigns to their list of between 40 and 50 million email addresses. (CP 38). On the low end, this means OPS and Martin sent out at least 400 million spam emails per week. The statistical probability of any of these commercial emails ending up in Washington is staggering. OPS’s and Martin’s knowledge of Benson’s Washington residency is imputed as a matter of law.

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4. **The 251 Commercial Emails Mr. Martin Transmitted and He Assisted OPS With Transmitting to Mr. Benson's Two Email Addresses Misrepresented and Obscured the Information Identifying Their Point of Origin and Transmission Path.**

The term “obscure” is not defined in RCW 19.190. Thus, it is appropriate to turn to its ordinary dictionary definition. Sullivan, 143 Wash.2d at 174. The American Heritage Dictionary defines “obscure” as follows: “to conceal from view; hide . . . [t]o obstruct; hinder.” The term “misrepresent” also is not defined in RCW 19.190. The dictionary definition of “misrepresent” is as follows: “To give an incorrect or misleading representation of.” (Id.).

Here, Benson attempted to reply to the 251 commercial emails he received from OPS and Martin. (CP 36). When Benson replied to the 251 spam emails, however, his replies were undeliverable to the commercial email addresses from which the spam came. (Id.). This is because, as Martin testified during his deposition, all reply emails to his and OPS’s spam emails went into a “**black hole**.” (Ex. “K,” p. 77; CP 36). This practice of Martin and OPS caused their commercial emails’ points of origin and transmission paths to be concealed and such misleading practice also hindered Benson from conveniently and expeditiously communicating to Martin and OPS that he wanted

to be removed from their spamming list. The “black hole” tactics Martin and OPS employed obscured and misrepresented the information identifying their spam emails’ point of origin and transmission path, in violation of RCW 19.190.020(1)(a).

D. Pursuant to RCW 19.190.030, a Violation of RCW 19.190.020 Constitutes a Violation of the CPA.

RCW 19.190.030 mirrors RCW 19.190.020 and provides that the conduct prohibited in RCW 19.190.020 also constitutes a CPA violation. Thus, each violation of RCW 19.190.020 by Martin and OPS also constitutes a violation of the CPA.

E. If a Spam Email Violates RCW 19.190.020(a)(1), But Such Email Contains an Unsubscribe Link, Contact Address, or Contact Phone Number, These Inclusions Do Not Pull the Email Outside the Parameters of the Statute.

The inclusion of an unsubscribe link, contact address, or contact phone number in a spam email that otherwise violates RCW 19.190.020(a)(1) is ineffective to make such an email compliant with this statute. No such defense is provided for in RCW 19.190.020(1)(a).

F. Benson Is Entitled to Attorneys Fees On Appeal

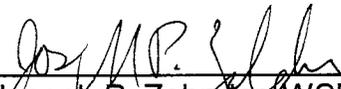
If the Court grants Benson the relief sought, Benson seeks attorneys fees pursuant to RCW 19.190.030, RCW 19.86, and RAP 18.1.

V. Conclusion

The conduct Martin and OPS engaged in falls within the core of the spam email activity RCW 19.190.020(1)(a) prohibits. The Court should interpret the Act to include the conduct complained of in this matter and hold Martin and OPS liable under the Act and the CPA. The Court should also reject the defense of including an unsubscribe link, contact address, or contact phone number in a spam email that otherwise violates RCW 19.190.020(1)(a). If the relief sought above is granted, then Benson requests the Court to grant him judgment in the amount of \$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, for costs and disbursements incurred, and reasonable attorney fees pursuant to RCW 19.190.030, RCW 19.86, and RAP 18.1.

Respectfully Submitted this 26th day of May 2006.

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COURT OF APPEALS
DIVISION II

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OF THE STATE OF WASHINGTON

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 as indicated below with counsel's approval, a copy of Appellant's Opening Brief on:

Michael W. Johns, Esq.
Davis Roberts & Johns
7525 Pioneer Way, Suite 202
Gig Harbor, WA 98335
(Counsel for Respondents)
Service via e-mail on 05/26/06
Service via U.S. Mail on 05/26/06

DATED this 26th day of May, 2006.

By: Anita K. Acosta
Anita K. Acosta

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