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COURT OF APPEALS

No. 34195-6-II

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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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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.  
MARTIN and DIANE M. MARTIN,  
Respondents.

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**BRIEF OF RESPONDENTS MARTIN**

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**ORIGINAL**

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**A. INTRODUCTION**

The Appellant, E. John Benson ("Benson"), originally commenced this case by filing a complaint against Respondent Oregon Processing Service, Inc. ("OPS"). Benson claimed that OPS had violated the provisions of Chapter 19.190 RCW in sending commercial e-mails to him. Benson later amended his complaint to add the Respondents Daniel J. Martin and Diane M. Martin ("Martin"). Benson alleged in his amended complaint that Martin had assisted OPS with the transmission of the e-mails at issue.

OPS did not file an answer to the complaint and Benson obtained an order of default against OPS. OPS is not represented in this appeal. Martin will thus be the only Respondent filing a Response Brief.

**B. COUNTERSTATEMENT OF FACTS**

Mr. Martin incorporated OPS in 2002 and was the sole shareholder of OPS. (CP 36-37). Mr. Martin formed the corporation in conjunction with his son, Chuck Martin. Mr. Martin provided the financial resources, while Chuck and Chuck's friend, John Doshier, had technical knowledge

necessary to operate the business. (RP 57-58). Mr. Martin's role in the company was to find offers and then provide them to Mr. Doshier, who in turn set up the e-mail offers, tested them and ensured that all of the click-through and unsubscribe links worked properly, and then sent out the messages. (RP 58-59).

Beginning in late 2003 through early 2004, OPS sent e-mail solicitations to Benson. By December 2003, if not earlier, each e-mail included the OPS domain name, the OPS address, the OPS telephone number and an "unsubscribe" button that worked properly. (CP 36, RP 59-60, 79). Rather than use the unsubscribe button, mail a letter to OPS, or call OPS to ask that e-mails no longer be sent to him, Benson proceeded to reply more than 250 times. (CP 36). With each e-mail that he sent, he received a message that the e-mail was not received. (CP 36).

At trial, Benson acknowledged that he had made a deliberate decision not to contact OPS by using either the mailing address or the phone number provided on each e-mail. (CP 36, RP 42-43). Nor did Benson click on the unsubscribe button provided on each e-mail. (RP 41).

Instead, Benson claimed he had spent approximately 120 hours in "dealing with" the e-mails, primarily by replying to each e-mail and then documenting that each reply was returned to him with a message that it was not received. (RP 36).

**C. ARGUMENT**

After considering all of the evidence introduced at trial, the Trial Court found that neither OPS or Martin had misrepresented or obscured any information regarding either the point of origin or the transmission path of the e-mails OPS sent to Benson. (CP 41-44). Therefore, the Trial Court dismissed Benson's claims without entering further conclusions of law regarding Martin's affirmative defense of failure to mitigate damages. (CP 44-45). Nor did the Trial Court enter any findings or conclusions that Martin had individually either initiated the transmission of any of the e-mails or had assisted in the transmission while knowing a violation of Chapter 19.190 RCW would occur.

The evidence introduced at trial overwhelmingly supports the Trial Court's findings of fact and conclusions of law that no information was either misrepresented or

obscured. The evidence and the findings of fact the Trial Court did make further conclusively establish that, even if a violation had occurred, Benson's claims would have been barred as a result of his failure to mitigate his damages. Finally, the evidence clearly establishes that Martin did not initiate any of the e-mail messages and, even if he had assisted in the transmission of any of the messages, he clearly never knew, nor avoided knowing, that any violation of Chapter 19.190 RCW would take place.

1. OPS Did Not Violate Chapter 19.190 RCW.

There is no law prohibiting private parties from sending commercial e-mail messages to other parties, even if such commercial e-mail messages are numerous or are sent in bulk. Instead, RCW 19.190.020 provides that it is only illegal to initiate commercial e-mail messages that misrepresent or obscure the point of origin or transmission path of the e-mail. Essentially, the law provides that an e-mail recipient must have the opportunity to identify the sender and request that the e-mails be stopped.

As the Trial Court noted in her findings and conclusions, the evidence at trial did not support Benson's

claims that OPS misrepresented any information identifying the point of origin or the transmission of the e-mail messages. The messages properly indicated that they came from domain names owned by OPS, which Benson himself was readily able to identify. The messages had OPS's address and telephone number, both of which specified the location and contact information of the sender. (CP 41-42).

As the Trial Court also noted in her findings and conclusions, the evidence at trial did not support Benson's claims that OPS obscured the point of origin or transmission path. Because Chapter 19.190 RCW does not define the term "obscure", the Trial Court properly looked to the ordinary meaning of the word as defined by Webster's Dictionary, which defines "obscure" as "to conceal or hide". (CP 42). The Trial Court properly found that there was no evidence that OPS obscured, concealed or hid any information identifying the point of origin or the transmission path of the e-mail messages. (CP 42-43).

Benson failed to provide any evidence that OPS misrepresented or obscured anything. Instead, Benson based his claim solely on the fact that he was not able to

“reply” to the e-mails, completely ignoring the “unsubscribe” function, ignoring the address and ignoring the telephone number on the e-mails.

On direct examination, Benson opined that there were two possible reasons why his replies to OPS’s e-mails were not successful. The first was that the address that was in the ‘from’ line of the original message from OPS was incorrectly typed. (RP 38). Benson offered no additional evidence to support his speculation that any of the addresses had in fact been incorrectly typed.

The second reason advanced by Benson was that OPS’s server “was not set up to receive messages back.” (RP 38). Additional evidence at trial established that Benson’s “replies” were received by OPS’s server, but from there went to a “black hole”. (CP 36). It is thus apparent that the second reason advanced by Benson, that OPS was not set up to receive a “reply” message, was the reason why his replies were unsuccessful. Far from establishing Benson’s cause of action, however, this evidence confirms the Trial Court’s findings that no violation of Chapter 19.190 RCW occurred.

Though Benson clearly continues to believe otherwise, there is no requirement that a sender or an e-mail must be “set up” to receive messages back in reply. Chapter 19.190 RCW, the sole basis for Benson’s causes of action against the Respondents, certainly imposes no such requirement. Nor does Chapter 19.190 RCW impose any requirement that a sender of commercial e-mail provide a mechanism for the recipients of its messages to respond or unsubscribe, even though OPS did provide the “unsubscribe” function. Chapter 19.190 RCW simply prohibits senders of commercial e-mails from misrepresenting or obscuring where the messages come from. There would thus be no basis for imposing liability against OPS under Chapter 19.190 RCW simply because Benson’s “replies”, though received by OPS’s server, went to a “black hole” and were not reviewed by anyone at OPS.

Moreover, Benson always knew who was sending the messages and where they were coming from because the e-mails included OPS’s name, domain name, physical address and telephone number. What is especially ironic is that OPS provided an “unsubscribe” button that, after 250 attempts to

“reply”, Benson still had failed to use, even once. Had Benson used that button, he could have unsubscribed from OPS’s mailing list free of charge. (RP 79).

2. Benson’s Claims Must Be Dismissed Because He Wholly And Deliberately Failed To Mitigate His Damages.

Benson could have stopped OPS from sending to him any further e-mails if he had either followed the instructions and used the “unsubscribe” button, written a letter to OPS or called OPS. Benson deliberately chose not to take any of these steps.

“The rule as stated in C. McCormick, Damages § 33, at 128 (1935) is that where one person has committed a tort, breach of contract, or other legal wrong against another, **it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided...**With respect to the interpretation of RCW 19.86, the legislature has declared that it was intended to complement the federal law on the same subject and that the courts should be guided by interpretations of federal courts in construing comparable statutes. RCW 19.86.920...In accordance with the directive contained in RCW 19.86.920, we conclude that the doctrine of avoidable consequences applies in damage actions authorized by RCW 19.86.”

*Young v. Whidbey Island Bd. of Realtors*, 96 Wn.2d 729, 732-733, 638 P.2d 1235 (1982) (emphasis added).

In the present case, most, if not all of the commercial e-mails received by Benson contained a highlighted link stating "Click Here to Stop Receiving E-Mails". Many of the e-mails also contained the following statement:

You can also unsubscribe from our database by sending a letter through direct mail and/or by phone. Please be sure to let us know what your e-mail address is or it will be impossible for us to remove you from our database.

Address – 560 A NE "F" St #438  
Grants Pass, OR 97526  
Phone # -- 1-201-581-0342

(Ex. C and F).

Though Benson testified that he sent a number of reply e-mails that were returned to him as undeliverable, he made a conscious decision not to write to the address or call the phone number provided in the e-mails. (CP 36) Nor did he ever clicked on to the unsubscribe link. (RP 41, 79). Benson thus wholly failed to mitigate any damages that he might have incurred as a result of OPS's alleged violations of Chapter 19.190 RCW.

Benson testified at trial that he did not believe he should have to pay \$0.37 to mail a letter, or the similarly nominal cost of a long distance phone call, to be removed

from OPS's mailing list. (RP 43). He apparently believes that Chapter 19.190 RCW provides a mechanism for him to be removed from e-mailer's mailing lists, though nothing in the statute so provides. However, even if Chapter 19.190 RCW did so provide, he was provided with several opportunities to do so. Moreover, even if OPS had violated the statute, which it did not, it would not relieve Benson of the absolute duty all plaintiffs have to "use such means as are reasonable under the circumstances to avoid or minimize the damages" he might suffer as a result of a violation of the statute.

Washington law prohibits a plaintiff from recovering for any item of damage which could have been avoided by reasonable efforts at mitigation. Benson intentionally chose not to take steps to mitigate his damages, affirmatively deciding he would not spend \$0.37 to send a letter, pay the similarly nominal amount associated with a long distance call, or even simply hit for free the unsubscribe button provided in the e-mails themselves. Benson is therefore as a matter of law not entitled to recover damages for any of the

e-mails he received, regardless of whether or not OPS violated Chapter 19.190 RCW in sending the e-mails to him.

3. Martin Did Not Initiate Any E-Mail Messages to Benson.

Benson asserted in his amended complaint that Martin assisted OPS in the transmission of e-mail messages. However, at trial and now on appeal, Benson argues that Martin himself initiated the e-mail messages in question. To support this absurd claim, Benson misstates the clear definition of “initiate the transmission” found in Chapter 19.190 RCW.

RCW 19.190.010(4) specifically provides that to “initiate the transmission” refers to the action by the original sender of an electronic mail message.” Benson, however, asserts in his brief that “this phrase is further defined in RCW 19.190.010(1) as the formulating, composing, sending, originating, initiating or transmitting of a commercial email.” (Appellant Brief at page 26.) This is simply inaccurate.

RCW 19.190.010(1) defines the phrase “assist the transmission” and in no way “further defines” the wholly separate phrase “initiate the transmission”. Indeed, the act

of initiating a transmission is but one of a number of actions that can constitute the much more expansive definition of "assisting the transmission".

Other actions, wholly different from initiating a transmission, such as formulating, composing, sending and originating, can constitute assistance under 19.190.010(1). Thus composing can constitute assisting, just as initiating can constitute assisting. However, composing cannot constitute initiating, any more than initiating can constitute composing, simply by virtue of both being acts that can be deemed to constitute "assisting". Composing remains wholly separate from the act of initiating, just as initiating is wholly separate from the act of composing.

The flaw in Benson's logic can best be illustrated by example. CR 3 provides that commencement of a civil action can be by service of the summons and complaint or, alternatively, by filing the complaint. Service and filing are two separate acts, either of which can constitute commencement of the action. Yet service is not filing and filing is not service simply because each act in isolation is deemed to constitute commencement of an action. The

definition of what constitutes service is not found under CR 3 at all, but under CR 4. No portion of CR 3 defines service, nor is it meant to do so.

Similarly, initiating a transmission under RCW 19.190.010(1) is one method of assisting in a transmission. But RCW 19.190(1) does not purport to, nor does it in any way, define what constitutes “initiating a transmission”, any more than it defines what constitutes “composing” or “formulating”. Those terms are defined elsewhere.

While Benson is correct that Chapter 19.190 RCW does not include definitions for the terms “formulating” or “composing”, he is absolutely incorrect in asserting that the term “initiate the transmission” is not defined by the statute. As noted above, RCW 19.190.010(4) specifically defines what it means to “initiate the transmission”. No portion of that definition includes formulating, composing, or originating a message.

“In construing a statute, this Court's primary objective is to ascertain and give effect to the intent of the Legislature. *Cherry v. Municipality of Metro. Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991). If a statute is unambiguous this

Court is required to apply the statute as written and 'assume that the legislature mean[t] exactly what it says.' *In re Custody of Smith*, 137 Wn.2d 1, 9, 969 P.2d 21 (1998) (quoting *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995))." *State v. Radan*, 143 Wn.2d 323, 329-330, 21 P.3d 255 (2001).

"If the language of a statute is clear on its face, courts must give effect to its plain meaning and should assume the Legislature means exactly what it says. *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). If a statute is unambiguous, its meaning must be derived from the wording of the statute itself. *Rettkowski v. Department of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996); *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 329, 815 P.2d 781 (1991). A statute that is clear on its face is not subject to judicial interpretation. *State v. Mollich*, 132 Wn.2d 80, 87, 936 P.2d 408 (1997)." *State v. Chapman* 140 Wn.2d at 451. (emphasis added).

Chapter 19.190.010 clearly provides that the phrase "initiate a transmission" refers to the action of the original sender. There is no evidence whatsoever that Martin

himself sent any of the subject e-mails to Benson. Indeed, the undisputed evidence at trial was that Martin did not have the technical knowledge necessary to create and send commercial e-mail messages. (RP 57-58, 64, 78).

Because “initiate the transmission” is specifically defined to refer to the act of the sender of the e-mails, and because Martin was not the sender of any of the subject e-mails, Martin cannot be found to have initiated any transmission of e-mail under Chapter 19.190 RCW.

4. This Court Cannot Direct Entry Of Judgment Against Martin For “Assisting The Transmission” of E-Mail Messages In The Absence of Any Findings Of Fact Entered By The Trial Court Establishing Martin’s Liability.

In order for Benson to have prevailed on any claim against Martin for assisting in the transmission of e-mails under RCW 19.190.030(2), Benson first had to establish that OPS had violated subsection (1) of the statute. As noted above, the Trial Court found that OPS had not violated the statute. As a result, the Trial Court dismissed Benson’s claims.

The Trial Court did not make any finding of fact that Martin had assisted OPS in the transmission of any e-mail

message to Benson. Nor did the Trial Court make any finding that Martin knew or consciously avoided knowing that OPS intended to engage in any practice that violates the Washington Consumer Protection Act.

To the contrary, the findings of fact that the Trial Court did make establish that the e-mails sent by OPS properly identified OPS as the sender and included not only an unsubscribe link, but also the physical address and phone number of OPS. In view of that detailed information being provided in the e-mails at Martin's direction (RP 59), the only conclusion a trier of fact could make is that Martin had absolutely no reason to suspect, let alone know, that anyone at OPS would obscure or misrepresent either the point of origin or the transmission path of any e-mail, because doing so would serve no purpose.

Yet Benson now asks this Court to not only reverse the Trial Court's decision that OPS did not violate RCW 19.190.030, but to also affirmatively enter judgment against Martin in the absence of any of the findings of fact referenced above. Washington law does not allow an

appellate court to determine issues of fact and this Court should decline to do so.

Even if this Court was to determine that the record did not reflect substantial evidence to support the Trial Court's determination that OPS did not violate RCW 19.190.030, and this Court were to further determine that Benson's claims are not defeated by virtue of his total and deliberate failure to mitigate his damages, this Court would have to remand this case back to the Trial Court for entry of findings of fact regarding Martin's actions. *See Kerns v. Pickett*, 47 Wn.2d 184, 194-195, 287 P.2d 88 (1955). Those findings of fact would have to establish that Martin either knew or consciously avoided knowing that OPS would send e-mails to Benson obscuring the point of origin or transmission path of the e-mails before any judgment could be entered against Martin. This Court cannot simply direct that judgment be entered against Martin as Benson asks.

#### **CONCLUSION**

The evidence introduced at trial overwhelmingly supports the Trial Court's findings of fact and conclusions of law that OPS did not either misrepresent or obscure any

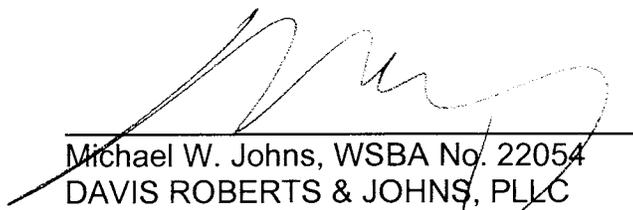
information regarding the point of origin or the transmission path of any of the e-mails it sent to Benson. The evidence and the findings of fact the Trial Court did make further conclusively establish that, even if OPS had misrepresented any of this information, Benson's claims would have been barred as a result of his failure to mitigate his damages.

Finally, the evidence clearly establishes that Martin did not initiate any of the e-mail messages and, even if he had assisted in the transmission of any of the messages, he clearly never knew, nor avoided knowing, that any violation of Chapter 19.190 RCW would take place.

This Court should therefore affirm the decision of the Trial Court.

Dated: July 24<sup>th</sup>, 2006.

Respectfully submitted,



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FILED  
COURT OF APPEALS

US DISTRICT COURT  
NO. 34195-6-II

BY: *CMM*

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E. JOHN BENSON, d/b/a ELITE  
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NO. 34195-6-II

DECLARATION OF  
SERVICE

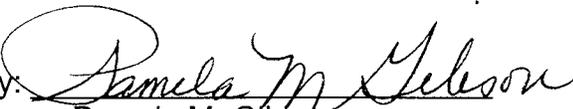
The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served as indicated  
below with counsel's approval, a copy of the Respondents Martins'

Brief and Declaration of Service:

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DATED this 24th day of July, 2006.

By:   
Pamela M. Gibson