

2003

Jesse Riddle v. Celebrity Cruises and John Does 1 -10 : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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PRIORITY NO.: 15

APPELLANTS' REPLY BRIEF

Attorneys for Plaintiff-Appellant Jesse Riddle

FILED
UTAH APPELLATE COURTS
JUL 19 2024

IN THE UTAH COURT OF APPEALS

JESSE RIDDLE,

vs.

Defendants/Appellees.

PRIORITY NO.: 15

APPELLANTS' REPLY BRIEF

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APPELLANT’S BRIEF

Appellant, Jesse Riddle submits this reply brief in the appeal before this Court.

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

The Plaintiff-Appellant:

Jesse Riddle,

The Defendant-Appellee:

Celebrity Cruises, and John Does one through ten whose true names are unknown (“Celebrity Cruises”).

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ARGUMENT

1. Pop-up Advertisements Fit Within the Definition of the Act and Should Be Included Therein.

The statute underlying this action was, at the time this suit was originally filed, a new and unexamined statute. The statute was an attempt by the state legislature to relieve Utahns from the burdens caused by unsolicited commercial emails. Although Appellants recognize the statute has been repealed in response to the passing of a new federal statute dealing with this pernicious problem at a Federal level, the Utah statute had not been repealed at the time the Appellant was SPAMMED, nor had it been repealed at the time he filed his original complaint, nor had it been repealed on the date he gave notice of his intent to appeal the district court's decision. This action was and is an attempt by a Utah citizen to enforce rights that had been statutorily provided him at the time he filed his action. It was important to him then and remains important to him now.

Appellee insinuates several times in its brief that because the statute has since been repealed that there ought not be time or effort wasted on a proper determination of Appellant's claim. That however is improper. The rights Appellant had at the time he received the email are the same rights that should be considered at this point. SPAM remains such a problem that Federal legislation has now been adopted to try and deal with this scourge. Further, the decision of this case is important for the Appellant. Any suggestions to the contrary are without merit and an attempt to distract the Court.

Furthermore, in an apparent attempt to vilify the Plaintiff and his attorneys, they include as a footnote the untrue assertion that Plaintiff's counsel has filed more than 1200 similar cases. This number has been loosely thrown around by Appellee's counsel throughout this litigation. It seems difficult to reconcile the assertion on the one hand that this is just one simple meaningless case and on the other that there are some "1200" cases in the wings. In reality there other cases that have been filed, although the number nowhere approaches that suggested by Appellees in this case. In turn, each of those cases will be affected by the decision of the Court in this case. Therefore this case does not decide a moot point as suggested by Appellants.

Pop-up advertisements, like the message in this suit, are of the type of "email" covered by the statute. The definition section in Utah's Anti Spam statute provides that pop-up advertisements are indeed covered by the Act and their inclusion in the statute was contemplated by the legislature.

Utah Code §13-36-102(3), defines email as "... an electronic message, file, data, or other information that is transmitted: (a) between two or more computers, computer networks, or electronic terminals; or (b) within a computer network." Just as Appellee agrees, this is a very broad definition. A broad definition that seems obvious it was intended to cover all unsolicited electronic messages, in whatever electronic form they are sent. As pointed out by Appellee, the legislature knows how to be specific and to narrow the scope of any statute. They apparently have done so with the recently enacted Spyware Control

Act, Utah Code Ann. §§ 13-36-40, *et seq.* It seems more obvious that the legislature intentionally left the Utah Unsolicited Commercial Email Act, Utah Code Ann. §§ 13-36-101, *et seq.* broad so as to cover the types of electronic messages sent in this case as well.

Appellees argue that pop ups and pop unders are not sent through email service providers, but rather through internet service providers. That argument is made without any citation to any fact established in the record. That is an unknown and, for the purposes of this matter, unverifiable allegation. That was one of the very purposes for the Appellant's prior motion for 56(f) relief. Plaintiff is not a computer or internet specialist, neither are his counsel. For that matter, Defendant is apparently a cruise line and there have been no supporting facts produced that either it or its counsel has expertise in the area. That simply has not been produced, but the information is necessary for the Court to make a proper decision.

Appellee also argues that the weight of the legislative history falls in their favor. Appellee bases that argument upon the use of the term SPAM in the legislative debates before the House and the Senate. Appellee, however can cite to nowhere in the legislative record where SPAM is defined by the legislature. Citations to comments made by Senator Arent such as "[t]his bill concerns unsolicited commercial email, also known as SPAM" and that the intended purpose was to place "some reasonable limitations on SPAMers" and to provide a remedy for consumers, email service providers and businesses that bear the cost of receiving SPAM," do not define or even quantify the term. A pop up or pop under fits

under those statements as any other type of SPAM. Appellee apparently acknowledges that fact because instead of providing the Utah legislature's definition, it turns to case law and a web-based dictionary to support their argument. There is no question that pop ups and pop unders create cost for their recipients. Maybe even as much or more costs than an actual email. An email could potentially be ignored, but the recipient of a pop up or pop under must deal with it in some way before he or she can do anything else with their computer. In some ways the intrusion is worse with a pop up or pop under than an email. In all probability most internet users have either experienced first hand or heard of those infamous pornographic pop ups that pop up in a string or succession that cannot be closed fast enough and eventually require a whole system to be shut down before eliminating them from view. This is the protection the Utah legislature was seeking for Utah's citizens. It certainly is not an overly broad definition to include pop ups and pop unders within the meaning of an electronic communication.

Appellee also cites to certain legislative record occurring after the statute had been passed, supposedly clarifying the meaning of the statute. That record should not even be considered. It relates to an amendment to the actual statute, an amendment that was not passed, but that might have eliminated this question altogether. That amendment reflects new and different opinions and efforts by Utah legislatures, not those opinions, efforts, or testimony relied upon for the statute that was actually passed. Although those statements appear to say what Appellees want them to say, they come in a time when they can not be

taken to limit or refine the meaning previously given, especially when they were made in relation to an amendment to the statute, that was not passed. They should not be considered.

Appellee further argues that to adopt pop ups and pop unders within the meaning of the statute, would result in an absurd outcome. This suggestion is made because “pop-up” advertisements do not contain a subject line. Therefore, the argument goes, “how could the spammer comply with the Act that requires ‘ADV:’ to be included in the subject line, when a pop-up advertisement currently has no subject line?” This argument is flawed in at least two aspects. First, a spammer can add a subject line to any pop-up, just as they add text and other sophisticated graphics within the message. To comply, the spammer simply needs to add a subject line. It is disingenuous to choose the format of the pop-up, which format violates Utah law, and then argue that the pop-up is not covered because the format does not have a subject line.

Second, the defendants fail to understand the intent of the statute. There is no prohibition in sending pop-up’s that do not contain a subject line. Appellees can send pop-up advertising to their clients as often as they like, even ad’s that do not have the statutory requirements, because their client has a “relationship” with them. Spammers who send pop-up’s, if they chose not to include a subject line or to comply with other strictures of the act, are free to send pop-up’s to those with whom they have existing or preexisting relationships. If they chose to send it to any others, they must comply with the Act.

2. Appellant’s Motion for Discovery under Rule 56(f) Should Have Been Granted.

Rule 56(f) of the Utah Rules of Civil Procedure provides:

“Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”

The Utah Supreme Court has held on “numerous occasions that rule 56(f) motions opposing a summary judgment motion on the ground that discovery has not been completed should be granted liberally unless they are deemed dilatory or lacking in merit.” *Salt Lake County v. Western Dairymen Coop*, 48 P.3d 910 (Utah 2002) (citing *Price Dev. Co. v. Orem City*, 995 P.2d 1237 (Utah 2000); *Crossland Sav. v. Hatch*, 877 P.2d 1241 (Utah 1994); and *Cox v. Winters*, 678 P.2d 311 (Utah 1984)).

In this case, there were no interrogatories, no requests for admission, no requests for production, no depositions. There was simply no time to do them before Appellee filed it's motion to dismiss. As such, there cannot be any finding that Appellant's motion was dilatory. Nor could their motion be seen to be lacking in merit. Not a single person involved in the original litigation could be classified as an internet expert, except for the self-serving assertion of Defendant's affidavit supplying witness. There could be no way to dispute any of the facts, neither general about the process, Internet, or pop ups; nor the specific facts pertaining to the actual events. Not without discovery. Discovery would have allowed the parties to determine several material facts, including a determination of the method of sending pop-ups from one computer to another. This was set forth in Plaintiff's

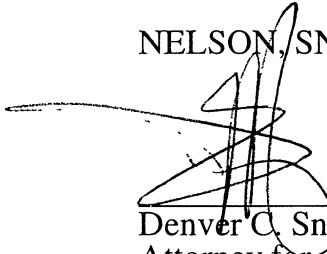
rule 56(f) motion and memorandum. The lower court had enough basis to grant the continuance requested. It was error to deny it.

CONCLUSION

Pursuant to the foregoing arguments and law, Appellant respectfully requests this Court reverse the lower court's ruling that Pop-up advertisements are not governed under the Utah Unsolicited Commercial and Sexually Explicit Email Act, and further remand this matter back to the lower court to allow for appropriate discovery to occur.

DATED this 19 day of July, 2004.

NELSON, SNUFFER, DAHLE & POULSEN



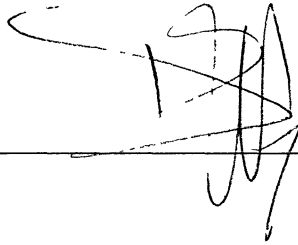
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CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing
APPELLANTS' REPLY BRIEF, via first class mail, postage prepaid, on the following:

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on this 11 day of July, 2004.


A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, is written over a solid horizontal line.

ADDENDUM

There are no exhibits attached as Addenda to this Reply Brief.