IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-02148

DARIN BRASEL,
APPELLANT

V.

THE HAIR COMPANY and
ROFFLER INTERNATIONAL, LLC,
APPELLEES

Appellee Brief / Hair Co.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court and/or the judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

Interested Persons	**Connection or Interest**
Darin Brasel	Plaintiff/Appellant
Jason L. Shelton Ned "Tres" McDonald, III Brandon Leslie	Attorneys for Plaintiff/Appellant
The Hair Company	Defendant/Appellee
Mike McBunch	Owner of The Hair Company
Dana G. Deaton Chris H. Deaton	Attorneys for Defendant/ Appellee The Hair Company
Roffler International, LLC	Defendant/Appellee

Edwin H. Priest	Attorney for Defendant/Appellee Roffler International, LLC
Honorable Thomas J. Gardner, III	Circuit Court Judge

DANA G. DEATON
Counsel of Record for Defendant
Appellee/The Hair Company

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STATEMENT OF ISSUES

This appeal from the Order Granting Motion to Reconsider entered by the Circuit Court of Lee County, Mississippi on November 20, 2006 (Record [hereinafter "R."]., p. 260; Record Excerpts [hereinafter "R.E."], 2), presents the following issue for appeal:

Did the trial court err in granting The Hair Company's Motion to Reconsider and The Hair Company's Motion for Summary Judgment where Plaintiff Darin Brasel failed to establish essential elements of his claim for appropriation of identity for unpermitted use and, in fact, testified, under oath, (1) that he allowed The Hair Company to take the pictures; (2) that he placed no restrictions or limitations on The Hair Company's use of the pictures; and (3) that he has no proof that The Hair Company received compensation or business or commercial advantage for the pictures?

STATEMENT OF THE CASE

(1) Nature of case, course of proceedings, and disposition below:

On September 23, 2004, Plaintiff Darin Brasel [hereinafter "Brasel"] sued The Hair Company and Roffler International, LLC [hereinafter "Roffler"] for appropriation of his identity for an unpermitted use. R., pp. 3-5.

On September 30, 2004, The Hair Company, by and through its then attorney, Edwin H. Priest, answered Brasel's lawsuit, denying its substantive allegations and raising a number of affirmative defenses. R., pp. 6-8.

Subsequently, on or about October 29, 2005, Roffler, by and through attorney Edwin H. Priest, answered Brasel's lawsuit, denying its substantive allegations and raising a number of affirmative defenses. R., pp. 9-11.

On November 1, 2004, The Hair Company moved the Court for an order allowing the withdrawal of attorney Edwin H. Priest and the substitution of attorneys from the firm of Deaton & Deaton, P.A. as its attorneys of record. R., pp. 12-13.

On November 8, 2004, The Hair Company served its Motion for Leave to Assert a Counter-claim. R., pp. 14-15. Specifically, it sought the trial court's permission to grant it leave to assert a counter-claim against Mr. Brasel for the approximate $1300.00 Mr. Brasel owed it for services it had rendered Mr. Brasel. R., pp. 14-15.

The trial court granted The Hair Company's Motion for Leave and signed its Order Granting Leave to Assert Counter-Claim on November 10, 2004. R., pp., 26-17. It granted The Hair Company's Motion to Substitute Counsel and signed its Order Substituting Counsel on November 19, 2004. R., p. 26.

Pursuant to the Court's Order Granting Leave to Assert Counter-Claim, The Hair Company asserted its Counter-claim against Brasel on November 19, 2004. R., pp. 18-20. Brasel answered the Counter-claim several days later. R., pp. 23-25.

Discovery ensued.

Ultimately, on May 2, 2005, The Hair Company moved the Court for summary judgment. R., pp. 37-187. Brasel opposed the motion (R., pp. 188-210); The Hair Company filed a reply brief (R., pp. 211-215), and the trial court initially denied The Hair Company summary judgment. (R., p. 218).

On October 31, 2006, The Hair Company served its Motion to Reconsider. R., pp. 257-259. In its Motion, The Hair Company demonstrated to the trial court both that Brasel had failed to meet the essential elements of proof and that Brasel had, in fact, admitted himself out of court. R., pp. 257-259.

On November 7, 2006, Roffler joined in The Hair Company's Motion to Reconsider. R., pp. 259-A and 259-B.

Ultimately, on November 17, 2006, the Circuit Court Judge signed an order granting The Hair Company's Motion to Reconsider and The Hair Company's Motion for Summary Judgment. R., p. 260. In his order, the Circuit Court Judge duly noted his careful consideration of The Hair Company's motion and Roffler's joinder and opined that there are no genuine issues of material fact and that The Hair Company and Roffler are entitled to judgment as a matter of law. R., p. 260.

This appeal followed. R., pp. 261-262.

(2) Statement of Facts.

One evening, Mike McBunch, owner of The Hair Company, cut Brasel's hair just as he had done a number of times over a ten to twelve year period. R., p. 48, lines 13-23. Pleased with his work, McBunch asked to photograph Brasel. R., p. 47, lines 8-24; p. 115, lines 7-8. Brasel willingly consented, and McBunch took three photographs of Brasel in the foyer of The Hair Company. R., pp. 50, lines 6-9; p. 115, lines 5-18; see also R., pp. 152-154. Significantly and by his own sworn admission, Brasel placed no limitation or restriction on McBunch with regard to use of the photographs. R., pp. 50, lines 10-14; p. 115, lines 9-18.

At some point, Roffler asked McBunch to submit photos of his work for use on its website. R., pp. 165-66 at response to interrogatory no. 9. McBunch submitted pictures of Brasel in response to Roffler's request, and Roffler posted the pictures on its website. R., pp. 165-66 at response to interrogatory nos. 9 and 10. However, The Hair Company neither received compensation nor business as a result of Roffler's posting. R., p. 53, lines 1-7; p. 77, lines, 4-20; p. 109, lines 9-25; p. 139, lines 7-14

During a subsequent hair cut, McBunch mentioned that Roffler had posted Brasel's pictures. R., p. 54, lines 6-12 and p. 142, lines 10-17. Brasel would have never known the pictures had been posted if McBunch hadn't mentioned that fact to him during the subsequent hair cut. R., p. 54, lines 6-12 and p. 142, lines 10-17. Noone ever told Brasel that he or she had seen his pictures on Roffler's website. R., p. 114, lines 12-15; p. 144, lines 14-21, Noone, other than the persons that Brasel approached and discussed the matter with, was even aware that Brasel's pictures had been on Roffler's website. R., p. 141, lines 20-25.

Importantly and, again, by his own admission, Brasel was not subjected to personal humiliation by others because of the pictures. R., p. 114, line 16 - p. 115, line 1. Brasel's social life has not been adversely affected by the pictures. R., p. 141, lines 16-19. His ability to go out in public or to be in relationships has not been affected by the pictures. R., p. 143, lines 5-8 and p. 144, lines 1-4. Nor has his income or ability to work been adversely affected by the pictures. R., p. 138, lines 12-22. Significantly, Brasel's only stated criticism with the pictures, after Roffler posted them, was that, in his opinion, the pictures were "unflattering" because they were not taken by a professional photographer and because the lighting was poor. R., p. 56, lines 9-17; p. 118, line 24 - p. 119, line 11.

Significantly, Brasel admitted, under oath and upon deposition, that the pictures Roffler posted accurately depicted the way he looked at the time in question. R., 56, lines 3-5; p. 57, lines 4-11; and p. 118, lines 9-12. By his own admission, Brasel was satisfied with the hair cut he received - - the hair cut that was depicted in the pictures. R., p. 56, lines 6-7 and p. 116, lines 8-11.

Ultimately, on or about September 23, 2004, Brasel sued The Hair Company and Roffler for invasion of privacy. R., pp. 3-5. Specifically, he claimed they invaded his privacy by

appropriating his likeness for commercial advantage. R., pp. 3-5. He claimed that, because the pictures Roffler posted were not made by a professional photographer, he suffered anxiety and mental distress. R., pp. 3-5.

After deposing Brasel, The Hair Company moved for summary judgment. R., pp. 37-187. Brasel opposed The Hair Company's Motion (R., pp. 188-210), and the trial court initially denied The Hair Company's motion (R., p. 218). However, upon reconsideration, the trial court entered its order granting The Hair Company's Motion to Reconsider and the Hair Company's Motion for Summary Judgment. R., p. 260. In its order, the trial court specifically found that there are no genuine issues of material fact and that The Hair Company is entitled to summary judgment. R., p. 260. This appeal followed. R., pp. 261-262.

SUMMARY OF THE ARGUMENT.

In order to prevail on his claim against The Hair Company for appropriation of identity for unpermitted use, Plaintiff Darin Brasel was required to come forward with proof that The Hair Company (1) appropriated his name or likeness; (2) without consent; (3) for unpermitted use. Plaxico v. Michael, 735 So. 2d 1036,1039 (Miss. 1999); Harbin v. Jennings, 734 So. 2d 269, 272 (Miss. 1999); Candebat v. Flanagan, 487 So. 2d 207, 209 (Miss. 1986). Brasel, however, failed to come forward with proof in support of any of these elements much less all three elements. Moreover and importantly, Brasel himself defeated his claim by testifying under oath and upon deposition (1) that he allowed The Hair Company to take the pictures subject of his lawsuit (R., 50, lines 6-9; p. 115, lines 5-18); (2) that he placed no restrictions or limitations on The Hair Company's use of the pictures (R., p. 50, lines 10-14; p. 115, lines 9-18); and (3) that he has no proof that The Hair Company received compensation or business or commercial

advantage for the pictures (p. 53, lines 1-7; p. 77, lines 4-20; p. 109, lines 9-20; p. 139, lines 7-14).

ARGUMENT

I. Standards of Review.

The Mississippi Supreme Court employs a *de novo* standard of review of a trial court's grant (or denial) of summary judgment. Gregory ex rel. Gregory v. Central Sec. Life Ins. Co., 953 So. 2d 233, 238, ¶ 19 (Miss. 2007). Applying this standard, it examines all evidentiary matters before it, including admissions in pleadings, answers to interrogatories, affidavits, and depositions, in a light most favorable to the party against whom the motion for summary judgment was made. Gregory ex rel. Gregory, 953 So. 2d 233, 238, ¶ 19 (citing Hurdle v. Holloway, 848 So. 2d 183, 185 (Miss. 2003)). If, in this view, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law, then this court affirms the trial court's grant of summary judgment. Gregory ex rel. Gregory, 953 So. 2d at 238, ¶ 19.

Importantly, this court ensures that the party which opposed summary judgment did not merely rest upon allegations or denials in his pleadings but, rather, set forth specific facts showing there to be genuine issues for trial. Mullen v. American Honda Finance Corp., 952 So. 2d 309, 312, ¶ 7 (Miss. App. 2007). It affirms the trial court's grant of summary judgment if the non-movant failed to make a showing sufficient to establish an element essential to that party's case and on which that party would have born the burden of proof at trial. Mullen, 952 So. 2d 309, 312, ¶ 7 (citing Galloway v. Travelers Ins. Co., 515 So. 2d 678, 683 (Miss. 1987)).

II. The Trial Court's Grant of Summary Judgment Was Proper and Should be Affirmed.

Even a cursory review of the record in this case demonstrates that the trial court's grant of summary judgment was proper and should be affirmed.

Under Mississippi law, the tort "invasion of privacy" is comprised of four separate sub-torts: (1) intentional intrusion upon the solitude or seclusion of another; (2) appropriation of another's identity for unpermitted use; (3) public disclosure of private facts; and (4) holding another to the public eye in a false light. Plaxico, 735 So. 2d 1036, 1039. Brasel sued The Hair Company for the invasion of privacy sub-tort of appropriation of another's identity for an unpermitted used. In order to prevail on this invasion of privacy sub-tort, Brasel would have born the burden of proving the following elements at trial: that The Hair Company (1) appropriated his name or likeness; (2) without consent; (3) for unpermitted use. Plaxico v. Michael, 735 So. 2d 1036, 1039 (Miss. 1999); Harbin v. Jennings, 734 So. 2d 269, 272 (Miss. 1999); Candebat v. Flanagan, 487 So. 2d 207, 209 (Miss. 1986). However, Brasel not only failed to make a showing sufficient to establish these elements essential to his case, he, in fact, admitted away his case.

More specifically, Brasel testified under oath that he permitted McBunch to take his picture:

> Q. Now when Mr. McBunch took your photograph, actually took the photographs, did he do that with your permission?
>
> A. Yes.

R., p. 50, lines 6-9. Thus, because Brasel consented to the photographs, he cannot establish that The Hair Company appropriated his likeness "without consent."

Similarly, Brasel testified that he placed no restrictions or limitations on The Hair Company's use of the pictures of him:

> Q. Did you place any restrictions on the photographs at that time?
>
> A. He didn't ask for any.

Q. Did you give any?

A. No.

. . .

Q. Okay. Did you in any way tell him [McBunch] "There's limitations on what you can do with my likeness if you take my picture."?

A. He didn't ask.

Q. Did you tell?

A. No.

R., p. 50, lines 10-14 and p. 115, lines 13-18. Thus, because Brasel placed neither restriction nor limitation on The Hair Company's use of his photographs, he cannot establish that The Hair Company appropriated his likeness for "unpermitted use."

Finally and importantly, Brasel alleged in his complaint that The Hair Company took pictures of him for commercial advantage. R., pp. 3-5. Yet, Brasel conceded under oath that he cannot establish that claim. He testified under oath that he has no proof that The Hair Company made money or gained business or commercial advantage through Roffler's publication of pictures of him on its website:

Q. Do you have any facts to show that The Hair Company received any business as a result of placing these photographs?

A. No facts in writing.

Q. Do you have facts of any other type?

A. No, sir.

. . .

Q. Do you know if he's ever gotten any money from the haircut?

A. I have no written proof.

Q. Do you have any kind of proof?

A. None other than what he told me on that date.

Q. And what he told you was that he hadn't gotten any money from the haircut, right?

A. The day I confronted him, the day he mentioned it, he said if they purchased the haircut that we would get money for it.

Q. Okay. Do you know if Roffler ever purchased the haircut?

A. It was on their [sic] website.

Q. Do you know if Roffler purchased the haircut?

A. No.

. . .

Q. So it's your testimony you believe he may have lied, but you have no factual basis to support that belief, do you?

A. That's correct.

. . .

Q. Now I know I've already asked you this, but I wanted to make sure that I'm certain since this is one time I get to depose you. You're not aware of any commercial gain whatsoever that either Roffler or Mr. McBunch or The Hair Company derived as a result of placing your likeness on rofflerhair.com, are you?

A. No.

R., p. 53, lines 2-7; p. 77, lines 4-20; p. 109, lines 22-25; p. 139, lines 7-14.

Interestingly, Brasel put forth only two arguments in his appellate brief. Both lack merit. The first was that:

> Mr. Brasel clearly set out in his *Plaintiff's Response To The Hair Company's Motion For Summary Judgment* issues of material fact to be disputed, therefore he

> should have been given the benefit of the doubt.[1] Key to Mr. Brasel's Complaint was that he never gave his express or implied consent,[2] thus the issue of material fact being The Hair Company and Roffler International, LLC, using Mr. Brasel's likeness for commercial purposes. This was enough to deny the Defendant's *Motion for Summary Judgment*, and was made all the more clear in Mr. Brasel's deposition. (Deposition p. 12, line 10).[3]

See Brasel's appellate brief at p. 5. Brasel's first argument clearly fails. He claims that he opposed summary judgment by arguing that he never gave his express or implied consent. See Brasel's appellate brief at p. 5. Yet, the deposition site he provided in no way states or even

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1

The Court should note that Brasel made no effort in his appellate brief to specify what "issues of material fact to be disputed" were "clearly set out" in his response in opposition to summary judgment. See Brasel's appellate brief at p. 5. Rather, he only stated in his appellate brief that "[k]ey to Mr. Brasel's Complaint was that he never gave his express or implied consent." See Brasel's appellate brief at p. 5. Astonishingly, Brasel made said statement to this Court despite his sworn deposition testimony that McBunch took his photographs with his permission. See R., p. 50, lines 6-9.

2

See footnote 1.

3

In his appellate brief, Brasel supported his contention that Brasel never consented to the photographs by referencing Line 10 from page 12 of his deposition. Line 10 from page 12 of Brasel's deposition reads "took pictures for personal reasons as is a designer." See R., p. 51, line 10. That clearly does not support Brasel's argument that he never gave express or implied consent to be photographed. The whole question and answer from which line 10 of p. 12 of Brasel's deposition came reads:

> Q. Okay. What are the facts you have to support your contention that the photographs were given to Roffler for commercial advantage?
>
> A. That was never discussed. I thought he took pictures for personal reasons as is a designer I take pictures of my work from time to time, and that was the extent of what I was under the impression of.

R., p. 51, lines 6-13. Likewise, the whole question and answer do not support Brasel's argument on appeal that he never gave express or implied consent to be photographed. Frankly, there simply is no line from any page in Brasel's deposition to support Brasel's argument on appeal. Rather, Brasel's deposition clearly indicates, at page 11, lines 6-9 (R., p. 50, lines 6-9), that Brasel in fact gave McBunch permission to take his photographs. See R., p. 50, lines 6-9.

suggests that he had not given his consent. See R., p. 51, line 10. Moreover and importantly, Brasel's deposition testimony clearly and explicitly states "yes," McBunch took his photographs with his permission. See R., p. 50, lines 6-9.

Brasel's only other argument on appeal also fails. It was that:

> Furthermore, from a policy standpoint it is good policy that once a court has ruled that there are issues of material fact to be argued to stand by this order, especially when nothing new has been offered to contradict the facts at hand.

See Brasel's appellate brief at p. 6. Interestingly, Brasel provided no authority in support of his second "good policy" argument. Indeed, there is no such authority. It simply is not good policy for a court to stand by a ruling it believes to be erroneous. Rather, good policy is for the trial court to correct its error and avoid or circumvent costly and needless litigation.

In this case, it is clear that summary judgment was appropriate and should have been granted from the outset. Brasel himself admitted himself right out of court. Significantly, The Hair Company did not rely on its own testimony, allegations or denials in moving for summary judgment. Rather, it only put forth Brasel's own sworn testimony which, in and of itself, defeated Brasel's claim. The trial court recognized this upon careful reconsideration and ultimately and correctly granted The Hair Company summary judgment. R., p. 260.

CONCLUSION.

The trial court's grant of The Hair Company's Motion to Reconsider and Motion for Summary Judgment was correct and proper. Plaintiff Darin Brasel admitted his own case away during his deposition. Specifically, he admitted both that he had given McBunch permission to photograph him and that he placed neither restriction nor limitation on McBunch's or The Hair Company's use of the pictures that McBunch took of him. R., p. 50, lines 6-14; p. 115, lines 5-18. Moreover, he testified that he simply has no proof that The Hair Company received either

compensation or business as a result of Roffler's posting of the pictures of Brasel. R., p. 53, lines 1-7; p. 77, lines 4-20; p. 109, lines 9-25; and p. 139, lines 7-14. In light of Brasel's sworn deposition testimony, Brasel would have been unable to establish the elements essential to his case and on which he would have born the burden of proof at trial (that is, that The Hair Company appropriated his likeness without consent and for unpermitted use). Thus, the trial court correctly and properly granted The Hair Company summary judgment. To have denied The Hair Company summary judgment in light of Brasel's own sworn testimony would have resulted in a needless and costly trial for the litigants and would have placed an unnecessary burden on an already over-crowded trial docket.

For these reasons, The Hair Company respectfully submits that the trial court's grant of summary judgment was correct, proper and should be affirmed. The Hair Company respectfully requests this Honorable Court to affirm the trial court and to tax all costs of this appeal to the Plaintiff/Appellant, Darin Brasel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that the undersigned attorney for Deaton & Deaton, P.A. has this date delivered true and correct copies of the above and foregoing Brief of Appellant to counsel of record and to the trial court judge by placing true and correct copies thereof in the United States Mail, postage prepaid, addressed as follows:

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THIS, the 31st day of May, 2007.

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