

Case No. 2006-CA-02148

THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Darin Brasel

v.

State of Mississippi

On Appeal from the Circuit Court of Lee County, Mississippi

BRIEF FOR APPELLANT

ORAL ARGUMENT IS REQUESTED

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CERTIFICATE OF INTERESTED PERSONS
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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 Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Darin Brasel, Appellant;
2. Jason L. Shelton, Attorney for Darin Brasel, Appellant;
3. Honorable Thomas J. Gardner, III, Lee County Circuit Court Judge;
4. The Hair Company, Defendant;
5. Roffler International, LLC, Defendant;
6. Dana G. Deaton, Attorney for The Hair Company;
7. Edwin H. Priest, Attorney for Roffler International, LLC.

Respectfully submitted, this the 7 of May, 2007.

BY: _____


JASON L. SHELTON
ATTORNEY FOR APPELLANT

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ISSUE PRESENTED

WHETHER THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI, ERRED WHEN IT RECONSIDERED ITS DENIAL OF THE HAIR COMPANY'S MOTION FOR SUMMARY JUDGMENT AND ROFFLER INTERNATIONAL, LLC'S JOINDER THEREIN, AND GRANTED ITS MOTION.

STATEMENT OF THE CASE

Appellant, Darin Brasel, had photographs taken of himself by Mike McBunch, the business owner and registered agent of The Hair Company. Without the consent of Mr. Brasel, The Hair Company transferred the photographs to Roffler International, LLC, to be displayed on the world wide web for commercial advantage. In turn, Roffler International, LLC, did without Mr. Brasel's consent display his photographs on its business website, www.rofflerhair.com, for commercial gain. These photographs were displayed on the world wide web for approximately six months without the Mr. Brasel's permission.

Mr. Brasel filed his Complaint against The Hair Company and Roffler International, LLC, on September 22, 2004 (R. 1), for appropriating his likeness for commercial advantage. The Hair Company claimed that pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure Mr. Brasel failed to state a claim upon which relief could be granted on September 30, 2004 (R. 4), and Roffler International, LLC, followed suit on October 25, 2004 (R. 7).

On May 2, 2005, The Hair Company filed a *Motion For Summary Judgment* claiming Mr. Brasel had failed to establish the essential elements of his claim (R. 10 & R. 36). Mr. Brasel responded on May 5, 2005, in his *Plaintiff's Response To The Hair Company's Motion For Summary Judgment*, and asserted the genuine issues of material fact that existed as to whether or not The Hair Company had Mr. Brasel's consent to use photographs of him for commercial advantage (R. 13).

On July 8, 2005, Judge Thomas Gardner, III, of the Circuit Court of Lee County,

denied The Hair Company and Roffler International, LLC's *Motion For Summary Judgment*, stating that there were genuine issues of material fact to be considered (R. 46). The Hair Company filed a *Motion to Reconsider* on this denial (R. 47), and on November 17, 2006, despite there being genuine issues as to material fact, Judge Gardner granted the motion to The Hair Company and joinder by Roffler International, LLC (R. 50). On December 19, 2006, Mr. Brasel, by and through counsel, filed his Notice of Appeal seeking review by this Honorable Court (R. 51).

SUMMARY OF THE ARGUMENT

Appellant, Mr. Brasel, appeals from the Order of the Circuit Court of Lee County, which granted The Hair Company and Roffler International, LLC's *Motion To Reconsider* on their *Motion For Summary Judgment*. Mr. Brasel argues that the Court committed reversible error, and that this should never have been granted, as there *were* genuine issues as to material fact to be considered, pursuant to Rule 56 of the Mississippi Rules of Civil Procedure. The Court originally denied these motions, citing that there were genuine issues as to material fact. Between July 8, 2005, and November 17, 2006, nothing changed in this matter. Therefore, the original Order denying Summary Judgment should have been upheld.

Due to this error of law, Appellant, Mr. Brasel, prays that this Honorable Court will vacate this Order granting Summary Judgment, and remand for new trial.

ARGUMENT AND AUTHORITY

WHETHER THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI, ERRED WHEN IT RECONSIDERED ITS DENIAL OF THE HAIR COMPANY'S MOTION FOR SUMMARY JUDGMENT AND ROFFLER INTERNATIONAL, LLC'S JOINDER THEREIN, AND GRANTED ITS MOTION.

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In ruling on a motion for summary judgment, the non-moving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor. *Hunt v. Cromartie*, 526 U.S. 1545 (1999). The burden of demonstrating that no genuine issue of fact exists is on the moving party; therefore, the non-movant is given the benefit of the doubt. *Williamson ex. rel Williamson v. Keith*, 786 So.2d 390, 393 (Miss. 2001).

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 (R. 13), therefore he should have been given the benefit of the doubt. Key to Mr. Brasel's Complaint was that he never gave his express or implied consent, thus the issue of material fact being The Hair Company and Roffler International, LLC, using Mr. Brasel's likeness for commercial purposes (R. 1). This was enough to deny the Defendants' *Motion For Summary Judgment*, and was made all the more clear in Mr. Brasel's deposition. (R. 58).

Rule 56(c) of the Mississippi Rules of Civil Procedure clearly states that summary judgment:

“shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” M.R.C.P. Rule 56(c).

The Circuit Court of Lee County recognized that pursuant to Rule 56 there was an issue as to material fact at stake here and denied summary judgment as a matter of law on July 8, 2005 (R. 46). This issue of material fact was in no way altered from this time until November 17, 2006, when the Court decided to reverse its original Order (R. 50).

If any triable issues of fact exist, the lower court’s decision to grant summary judgment will be reversed; otherwise the decision is affirmed. *Mercer v. Progressive Gulf Ins. Co.* 885 So.2d 61 (Miss. 2004). The triable issue of fact that exists in this case is whether Mr. Brasel’s image was appropriated for commercial gain without his express or implied consent. Thus, the Circuit Court’s order granting summary judgment should be reversed. The purpose of a summary judgment is not to resolve issues of fact but to determine whether issues of fact exist. *Dailey v. Methodist Medical Center*, 790 So.2d 903 (Miss. App. 2001). Again, the Circuit Court of Lee County acknowledged these issues of material fact.

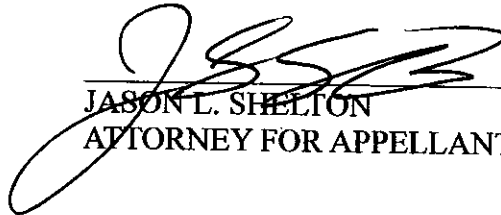
Furthermore, from a policy standpoint it is good policy that once a court has ruled that there are issues of material fact to be argued to stand by this order, especially when nothing new has been offered to contradict the facts at hand.

The Circuit Court of Lee County granted Summary Judgment when there were genuine issues of material fact at issue, which constituted reversible error. Appellant seeks relief from this Honorable Court, and respectfully requests that the Order granting Summary Judgment be vacated, and that this matter be remanded for a new trial.

CERTIFICATE OF COMPLIANCE

I, the undersigned counsel of record, do hereby certify that the foregoing instrument is in compliance with the Mississippi Rules of Appellate Procedure and has been compiled in a word processing program, using Microsoft Word 2003, double spaced using Time New Roman, 12pt. font.

So Certified, this the 7 day of May, 2007.



JASON L. SHELTON
ATTORNEY FOR APPELLANT