# IN THE COURT OF APPEALS
# OF THE
# STATE OF MISSISSIPPI
## NO. 1998-CA-01717-COA

**CHRIS BROWN** **APPELLANT**

**v.**

**HENRY BOND** **APPELLEE**

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| DATE OF TRIAL COURT JUDGMENT: | 10/26/1998 |
| TRIAL JUDGE: | HON. JERRY O. TERRY SR. |
| COURT FROM WHICH APPEALED: | STONE COUNTY CIRCUIT COURT |
| ATTORNEYS FOR APPELLANT: | KELLY MICHAEL RAYBURN |
| | KATHLEEN L. SMILEY |
| ATTORNEY FOR APPELLEE: | KIM T. CHAZE |
| NATURE OF THE CASE: | CIVIL - PERSONAL INJURY |
| TRIAL COURT DISPOSITION: | DEFAULT JUDGMENT |
| DISPOSITION: | REMANDED FOR 30 DAYS- 05/02/2000 |
| MOTION FOR REHEARING FILED: | |
| CERTIORARI FILED: | |
| MANDATE ISSUED: | |

EN BANC

SOUTHWICK, P.J., FOR THE COURT:

¶1. A default judgment was entered in favor of Henry Bond. On appeal the defendant Chris Brown argues that he was not properly served. We disagree with the trial judge that there were two alternative means by which service could have been accomplished in this case, though we agree with the applicability of one of them. The trial judge's findings were ambiguous as to whether he found the deputy sheriff credible when he testified that he completed the applicable service. We seek a clarification from the trial court on this point. We reverse and remand for that limited purpose.

## FACTS

¶2. Bond filed a complaint against Brown for personal injuries resulting from an alleged assault and battery. Bond claimed that Brown had struck him in his left cheek with a glass bottle causing physical injury, lost wages, and pain and suffering. The means of service is disputed and will be discussed below. Brown did not file an answer. After Bond's motion pointing out the failure, the clerk made an entry of default. M.R.C.P. 55.

¶3. Bond's motion sought a hearing after the clerk's entry of default so that a default judgment might be entered. He gave Brown notice of the hearing. Brown appeared without an attorney and attempted to

demonstrate good cause for not responding to the complaint. The main issue of dispute was whether Brown had received proper service of the summons and complaint. The court judge found that Brown had been served and refused to set aside the entry of default. After an evidentiary hearing, he awarded $12,500 in damages for the tortuous conduct.

## DISCUSSION

### *Service of process*

¶4. The only issue that we address concerns whether the circuit court ever acquired jurisdiction. The return of service indicated that the summons and complaint were served personally upon Brown. How in fact they were served elicited three explanations.

¶5. In the first version, deputy sheriff Lester Blackmore testified that he knew Brown and personally served him with a copy of the summons and complaint. Blackmore completed the return of service form. He testified that had he not personally served Brown he would not have completed the return in that fashion. The record contains a copy of the summons which discloses the proper address, the deputy's signature, and that it was personally served on Brown on May 9, 1998.

¶6. To the contrary, Brown testified that he was not personally served. He stated that on May 9, 1998 he did not live at the address noted on the summons but instead lived across the street.

¶7. The final explanation came from Glenda Brown. She stated that she was Brown's cousin, "but I raised him as a mother." She disputed Brown's statement that he lived across the street and testified that they both were residing at the address printed on the summons. However, Chris Brown was not at the house at the time the summons and complaint were delivered. Moreover, it was deputy sheriff Donnie Johnston and not deputy sheriff Blackmore who came to the house. Johnston gave the summons to her, not to the defendant Chris Brown. At the time of delivery she was preparing for a move to another house and laid the summons and complaint on a box. She did not know what had happened to them later, but she knew that she had not given them to Brown.

¶8. What the trial judge considered to be the relevant legal principle is revealed by the exchange between the judge and the plaintiff Bond's attorney at the conclusion of the testimony:

> MR. CHAZE: Pursuant to Rule 4, I believe either way he's been served if he served a person that's a full-time resident of the same household, is my understanding of Rule 4. But frankly I would stand behind the deputy of Stone County. He testified under oath that he served the gentleman.
>
> But from either perspective, with respect to Rule 4, I believe it specifically says that if you serve somebody that's a resident of the household that's also good service of process.
>
> THE COURT: I believe you're correct, that when the service is had upon an adult resident of the household in the absence of the named defendant it's still good service of process. The fact that service was left somewhere else or lost or what have you, that's not the plaintiff's fault.
>
> MR. CHAZE: I would also add, Your Honor, I must say there's no sense in making anecdotal observations, but it would be unusual for such an important paper to have been served on a woman who's acting as Mr. Brown's mother and surmise from that or deduce from that she never gave it to

him.

But once again, I stand behind the Stone County Sheriff's department and its integrity. That's my primary contention here. But even taking the perspective of Mr. Brown, he's still been served. And it simply comports with Rule 4 and 2 as opposed to simply one.

THE COURT: Okay.

It is evident, then, that the judge considered leaving the summons with the defendant's adult relative to be sufficient regardless of whether Brown himself was served.

¶9. In order to determine whether that is correct, we quote the procedural rule. The means to serve an individual is the following:

> (A) by delivering a copy of the summons and of the complaint to him personally or to an agent authorized by appointment or by law to receive service of process; or (B) if service under subparagraph (1)(A) of this subdivision cannot be made with reasonable diligence by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service, and by thereafter mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing.

M.R.C.P. 4 (d)(1).

¶10. Therefore, if service is not made personally upon the defendant or an agent specifically authorized for service of process, it can be left with a member of the defendant's family over the age of 16, a description that applies to Glenda Brown. However, if service is made upon a relative, then the summons and complaint must also be mailed to the defendant at the same address. The supreme court has found that mailed notice is a prerequisite to the completion of this form of service. *Williams v. Kilgore*, 618 So. 2d 51, 56 (Miss. 1992).

¶11. In the present case, there was unequivocal testimony from deputy sheriff Blackmore that he knew the defendant Brown and gave him a copy of the summons and complaint. Both Chris Brown and Glenda Brown denied this. The trial judge stated that regardless of whether Glenda Brown or deputy Blackmore's version was accepted, the service was valid. Thus he never reached the question of whether he believed the Browns or the deputy sheriff.

¶12. The credibility of witnesses is a matter left to the discretion of the trial court. We have no means to determine which explanation the trial judge accepted since he did not believe that it mattered legally. We may uphold the lower court on a different legal basis than the one on which he relied, or as here, uphold him on one of the two bases. *Patel v. Telerent Leasing Corp*., 574 So.2d 3, 6 (Miss. 1990). In order to expedite the resolution of this case, either to approve what was done or to determine that there was no jurisdiction, we seek the assistance of the trial court. We are authorized to return a case to a trial court for findings of fact that we find necessary for disposition. M.R.A.P. 14(b). We exercise that discretion here.

¶13. The trial judge shall have thirty days to make this necessary finding of fact. Does he find that the summons and complaint were served on Chris Bond by the deputy sheriff, or does he find that these papers

were left with an adult relative, namely, Glenda Brown? When the circuit judge has those findings returned to us, they should also been sent to the attorneys for the parties. Each party will have 15 days from the date that these findings are entered to submit for our consideration a supplemental brief of no more than ten pages if either party believes that to be useful.

¶14. **THE JUDGMENT OF THE CIRCUIT COURT OF STONE COUNTY IS REMANDED FOR THIRTY DAYS FOR FINDINGS OF FACT CONSISTENT WITH THIS OPINION. THE ATTORNEYS SHALL HAVE FIFTEEN DAYS FROM THE DATE OF THE ENTRY OF THOSE FINDINGS OF FACT TO RESPOND.**

**McMILLIN, C.J., LEE, MOORE, PAYNE, AND THOMAS, JJ., CONCUR.**

**KING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY BRIDGES AND IRVING, JJ.**

KING, P.J., DISSENTING:

¶15. I respectfully dissent from the majority opinion.

¶16. Chris Brown has appealed the entry of a default judgment, arguing that he was not properly served.

¶17. The majority opinion indicates that the trial judge found that service was proper under either of two methods. Presumably, the methods are direct personal service, pursuant to 4(d)(1)(A) and service upon a third party, pursuant to 4(d)(1)(B) M.R.C.P. The record does not support this statement being attributed to the trial judge. However, the record does reflect that this representation was made to the trial judge by Mr. Chaze the attorney for the Appellee, Bond.[(1)]

¶18. Having misstated the remarks of the trial judge, the majority proceeds to disagree with those remarks stating that only one method of service would be applicable under these facts. That method, as inferred by the majority, is personal service pursuant to Rule 4(d)(1)(A) M.R.C.P. To establish service pursuant to Rule 4(d)(1)(A), the majority remands this matter to the trial judge to make a finding". . . as to whether he found the deputy sheriff credible when he testified that he completed the applicable service." That applicable service being that he personally served Chris Bond.

¶19. The majority apparently desires that the trial judge utter those magic words, "I find the testimony of the deputy sheriff to be credible." Having gotten the trial judge to utter these magic words, the majority will then arrive at its predetermined destination of affirming this judgment.

¶20. We do not require that our trial judges fill the record with magic words, such as "I find", *Dorman v. Dorman* 737 So. 2d 426, 431( ¶11) (Miss. App. 1999) . We do however, require that our trial judges use sufficient words to convey to this Court the basis for their actions. In my opinion, the trial judge met that requirement.

¶21. There is only one statement in the record, made by the trial judge, which provides a basis for his ruling. That statement is this, "I believe you're correct, that when the service is had upon an adult resident of the household in the absence of the named defendant it's still good service of process. The fact that service was left somewhere else or lost or what have you, that's not the plaintiff's fault."[(2)]

¶22. Where the trial judge has made a finding, whether explicit or implicit, the function of this Court is to review the record to determine whether that finding is supported by substantial evidence. *Cotton v. McConnell*, 435 So. 2d 683, 685 (Miss. 1983). Where the record contains substantial evidence to support that finding, our only recourse is to affirm. *Culbreath v. Johnson*, 427 So. 2d 705, 708 (Miss. 1983). Where the record does not contain substantial evidence to support that finding, our only recourse is to reverse. *Tinnin v. First National Bank of Mississippi*, 570 So. 2d 1193, 1194 (Miss. 1990).

¶23. In the present case, the trial judge implicitly found service of process pursuant to rule 4(d)(1)(B) M.R.C.P. The record contains testimony that process was left with an eligible third party, However, 4(d)(1)(B)[(3)] also requires a mailing to the Defendant. The record clearly reflects that the required mailing was not done. Accordingly, there was not substantial evidence to support the finding of the trial judge, and we are compelled to reverse. *Id*. at 1194.

¶24. The majority implicitly acknowledges the trial court's finding of service under 4(d)(1)(B) by its decision to reverse this matter. Unless there is a finding of 4(d)(1)(B) service, there exists nothing for the majority to reverse.

¶25. Where supported by substantial evidence we are bound by the trial court's finding of facts. *Simmons v. Cleveland*, 749 So. 2d 192, 195 (¶ 9) (Miss. App. 1999) (quoting *Richardson v. Riley*, 355 So. 2d 667, 668 (Miss. 1978)). Because the trial judge found 4(d)(1)(B) service, he of necessity found a failure of 4(d)(1)(A) service. There is then nothing to remand for further determination.

¶26. In seeking to reach its predetermined destination of affirming this judgment, the majority states, "We may uphold the lower court on a different legal basis than the one on which he relied, or as here uphold him on one of the two bases." While this is correct as a general statement of law, it is absolutely incorrect when applied to the facts of this case.

¶27. The facts required for proper service pursuant to Rule 4(d)(1)(A) M.R.C.P. are totally inconsistent with the facts required for proper service under Rule 4(d)(1)(B) M.R.C.P. Because they are mutually exclusive, a finding of one must of necessity exclude the other.

¶28. Because the trial judge found 4(d)(1)(B) service, he of necessity found a failure of 4(d)(1)(A) service.

¶29. I would reverse and render.

**BRIDGES AND IRVING, JJ., JOIN THIS OPINION.**

1. Mr. Chaze:" Pursuant to Rule 4, I believe either way he's been served if he served a person that's a full-time resident of the same household, is my understanding of rule 4. But frankly I would stand behind the deputy of Stone County. He testified under oath that he served the gentleman.

But from either perspective, with respect to Rule 4, I believe it specifically says that if you serve somebody that's a resident of the household that's also good service of process."

2. To indicate that this remark is not taken out of context, I have included the other portions of that conversation:

Mr. Chaze:" Pursuant to Rule 4, I believe either way he's been served if he served a person that's a

full-time resident of the same household, is my understanding of rule 4. But frankly I would stand behind the deputy of Stone County. He testified under oath that he served the gentleman.

But from either perspective, with respect to rule 4, I believe it specifically says that if you serve somebody that's a resident of the household that's also good service of process.

The Court: I believe you're correct, that when the service is had upon an adult resident of the household in the absence of the named defendant it's still good service of process. The fact that service was left somewhere else or lost or what have you, that's not the plaintiff's fault.

Mr. Chaze: I would also add, Your Honor, I must say there's no sense in making

anecdotal observations, but it would be unusual for such an important paper to have been served on a woman who's acting as Mr. Brown's mother and surmise from that to deduce from that that she never gave it to him.

But once again, I stand behind the Stone County Sheriff's department and its integrity. that's my primary contention here. But even taking the perspective of Mr. Brown, he's still been served. And it simply comports with Rule 4 and 2 as opposed to simply one

The Court: Okay."

3. Rule 4(d)(1)(B) reads: Summons and complaints: Persons to be served. The summons and complaint shall be served together. Service by sheriff or process server shall be made as follows:

(1) Upon an individual other than an unmarried infant or a mentally incompetent person,

(A) by delivering a copy of the summons and of the complaint to him personally or to an agent authorized by appointment or by law to receive service of process; or (B) if service under subparagraph (1)(A) of this subdivision cannot be made with reasonable diligence, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service, and by thereafter mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing.