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

CHRIS BROWN **APPELLANT**

v.

HENRY BOND **APPELLEE**

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 IN FAVOR OF APPELLEE
DISPOSITION:	AFFIRMED - 10/03/2000
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/24/2000

OPINION AFTER REMAND

EN BANC

SOUTHWICK, P.J., FOR THE COURT:

¶1. The plaintiff sought damages for personal injuries allegedly caused by the defendant. The circuit court found that the defendant had properly been served but had failed to answer. A default judgment was therefore entered. We find no error and affirm.

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 him physical injury, lost wages, and pain and suffering. The means of service was disputed. Deputy Sheriff Lester Blackmore testified that he personally served Brown. Brown and the cousin with whom he lived, Glenda Brown, denied such service. The cousin testified that she accepted the summons and misplaced it without giving it to Brown.

¶3. Brown did not file an answer. Bond made a motion for an entry of default, and the clerk complied. M.R.C.P. 55. Bond's motion also sought a hearing so that a default judgment might be entered. Brown was given notice of the hearing by mail. Brown appeared without an attorney and attempted to demonstrate

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

¶4. Brown then hired an attorney and appealed. On May 2, 2000, we remanded the case so that the trial court could make clear findings of fact on the means by which service was effected. After the remand, the trial court found that the defendant Brown had been personally given the summons and complaint by the deputy sheriff.

DISCUSSION

I. Service of Process

¶5. The first issue raised by Brown on appeal to this Court is that service of process was improper and, thus, jurisdiction was not established. Three different versions appear in the testimony.

¶6. 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.

¶7. Another version is from the defendant. He 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.

¶8. 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.

¶9. The relevant procedural rule for serving 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 sixteen, 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). No such mailed notice ever occurred.

¶11. What the trial judge considered the relevant legal principles at the original hearing and before our remand is revealed by the exchange between the judge and the plaintiff Bond's attorney:

> 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.

¶12. It is evident that the judge considered leaving the summons with the defendant's adult relative to be sufficient regardless of whether Brown himself was served. Never does the court indicate, though, what he found factually to have occurred. The first of the two just-quoted statements by the judge is just legal analysis. That last statement, the word "okay," is not a fact-finding either. Since the court held as a matter of law that proper service had occurred, the most that can be said about what the court revealed on the record is that he believed one means of effective service was by leaving the documents with another adult in the same household. The dissent interprets what we have called merely the trial judge's legal analysis, instead to be an implied finding of fact regarding the method by which service was effected. With respect, we believe the statement is equally supportive of the implication that the court found it did not matter who was telling the truth between the deputy sheriff and Glenda Brown, since either version in his view would sustain personal jurisdiction.

¶13. We therefore remanded to the trial court so that he could reveal not just what he found to be the legal principles, but what he found to be the factual reality of service. The court made a fact-finding that he accepted as truthful the deputy sheriff's testimony that he knew the defendant and had given him a copy of the summons and complaint.

¶14. The trial judge had the opportunity to observe the demeanor of the parties at the hearing and reached his decision from that perspective. We affirm his finding that jurisdiction existed.

¶15. We note briefly that the remand to the trial court for supplemental findings is expressly permitted by court rule. M.R.A.P. 14(b). Moreover, even though the trial judge initially ruled on the basis of an understanding of alternative procedures with which we have disagreed, we may uphold the lower court on a different legal basis than the one on which he relied. *Patel v. Telerent Leasing Corp*., 574 So.2d 3, 6 (Miss. 1990). Here, we actually are affirming because one of the two initial bases was a proper one, and the trial judge has made findings sufficient to support it.

II. Abuse of discretion for entering default judgment

¶16. Brown next argues that the trial court abused its discretion in entering its judgment of default, given that Brown appeared for the hearing. However, the default judgment procedural rule expressly recognizes that judgment may be entered even when the defendant attends the hearing. M.R.C.P. 55(b). If the defendant has appeared in the action though not timely filed an answer, resulting in the entry of default by the court clerk, the defendant must be given at least three days notice of the hearing that will consider the application for entering a default judgment. *Id.* No argument is raised here that there was improper notice.

¶17. "The mere appearance by a defending party will not keep him from being in default for failure to plead or otherwise defend, but if he appears and indicates a desire to contest the action, the court can exercise its discretion and refuse to enter a default." M.R.C.P. 55 cmt. Thus we look at what Brown argued at the hearing, i.e., how did he indicate a desire to contest the action? Brown principally discussed why he did not answer. He contended that his default was unintentional, that he did not receive service of process, and that he did not know about the complaint against him. As already reviewed, the trial court found credible Deputy Blackmore's testimony that he personally served Brown with process and the testimony of Brown and Glenda Brown not to be believable. Brown's focus on a good faith reason for not having answered was properly found to be inadequate.

¶18. The court may choose to set aside an entry of default by the clerk "for good cause shown." M.R.C.P. 55(c). We find no abuse of discretion in the trial judge proceeding to entering judgment, as no good cause appears for giving relief from the entry of default.

¶19. **THE JUDGMENT OF THE CIRCUIT COURT OF STONE COUNTY IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

McMILLIN, C.J., BRIDGES, LEE, MOORE, AND THOMAS, JJ., CONCUR.

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

MYERS, J., NOT PARTICIPATING.

KING, P.J., DISSENTING:

¶20. I dissent from the majority opinion.

¶21. On May 2, 2000, this Court reversed and remanded this action for the limited purpose of having the

trial judge make specific findings "as to whether he found the deputy sheriff credible when he testified that he completed the applicable service." Given the record upon appeal, I believed this Court's actions were in error, and therefore dissented.

¶22. The trial court on May 15, 2000, entered an order consistent with this Court's directive. The majority having gotten that order, now affirms the trial court. It is my belief that this Court's process was in error on May 2, 2000, and that those same errors are perpetuated in the majority opinion on remand. Accordingly, I dissent.

¶23. Because the majority opinion perpetuates the same error, I adopt and replicate herein my dissent of May 2, 2000 in this case. On May 2, 2000, I said: I respectfully dissent from the majority opinion.

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

¶25. 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)]

¶26. 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 M.R.C.P Rule 4(d)(1)(A). 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.

¶27. 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.

¶28. 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. Ct. 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.

¶29. 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)]

¶30. 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).

¶31. In the present case, the trial judge implicitly found service of process pursuant to M.R.C.P Rule 4(d)(1)(B). 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. *Tinnin v. First National Bank of Mississippi*, 570 So. 2d 1193, 1194 (Miss. 1990).

¶32. 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.

¶33. 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. Ct. 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.

¶34. 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.

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

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

¶37. I would reverse and render.

IRVING AND PAYNE, 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.