

**IN THE SUPREME COURT OF MISSISSIPPI**  
**No. 2007-IA-01586**

WILLIAM O'BRIEN JENKINS, a/k/a  
BUDDY JENKINS,

APPELLANT

Versus

MARGARET B. OSWALD, a/k/a  
ELAINE OSWALD,

APPELLEE

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On Petition for Interlocutory Appeal from the Chancery Court of Madison County, Mississippi  
Petition Granted By Supreme Court By Order Of October 3, 2007

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**APPELLANT'S REPLY BRIEF**

JAMES W. CRAIG (MSB [REDACTED])  
PHELPS DUNBAR, LLP  
111 E. Capitol Street, Suite 600  
Jackson, MS 39201

DALE DANKS, JR.  
DANKS, MILLER, HAMER & CORY  
213 S. Lamar Street  
Jackson, MS 39215

COUNSEL FOR APPELLANT

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**STATEMENT REGARDING ORAL ARGUMENT**

This Court's precedent requiring dismissal of cases when service of process has not been effected within the 120 days required by Rule 4(h) is clear. Appellant is of the opinion that there is no reason for this Court to hear oral argument, and requests the Court to vacate the Chancellor's order and render judgment of dismissal for Appellant on the briefs submitted to the Court.

## LAW AND ARGUMENT

Appellee Oswald makes no effort whatsoever to distinguish the cases of *Powe v. Byrd*, 892 So. 2d 223 (Miss. 2004) and *Mitchell v. Brown*, 835 So. 2d 110 (Miss.Ct.App. 2003). In *Powe*, a plaintiff who successfully served a defendant **three days** after the 120 day deadline could not show good cause for the delay, the Supreme Court held that the case should be dismissed. *Powe v. Byrd*, 892 So. 2d 223 (Miss. 2004). Similarly, where process was served thirteen days after the Rule 4(h) deadline, dismissal of the complaint was affirmed by the Court of Appeals. *Mitchell v. Brown*, 835 So. 2d 110 (Miss.Ct.App. 2003).

Ms. Oswald claims that Mr. Jenkins “evaded” process. Appellee’s Brief at 8. But the Chancellor made no such finding of fact. The Chancellor did conclude that Ms. Oswald was “diligent,” but this conclusion does not comport with this Court’s precedent.

In this regard, Ms. Oswald points out that the standard of review for this Court is abuse of discretion. Appellant Jenkins agrees. But deference is not absolute. Thus, where a circuit court had found good cause for untimely service by virtue of a mere two attempts to serve process in a two year period, the Supreme Court reversed. *Bacou-Dalloz Safety, Inc.*, 938 So. 2d at 823, ¶¶14-15. The Court held that the two attempts showed “a lack of good cause far beyond excusable neglect.” *Id.* at ¶14. Accordingly, the Supreme Court reversed the trial court’s

denial of Bacou-Dalloz' motion to dismiss and rendered a judgment of dismissal without prejudice. *Id.* at ¶15

As argued in Jenkins' opening brief, plaintiff must show "some level of detail" to constitute a demonstration of good cause for failure to timely serve the defendant. *Kingston v. Splash Pools of Mississippi, Inc.*, 956 So. 2d 1962, 1065 at ¶11 (Miss.Ct.App. 2007).

Ms. Oswald attempts to distinguish *Kingston*, because she did testify in the Chancery Court. But the Court of Appeals' opinion in *Kingston* specified the types of facts that a plaintiff must adduce:

While Kingston or his attorney may have had personal knowledge of the server's attempts, the record is void of any detail to support such an assertion [of diligence]. For instance, **no dates, times, or locations were given to prove that any efforts had been made to serve process on the defendants within the 120-day time period.** Likewise, **no affidavit from the process server exists to demonstrate if any attempts were made**, and the record is void of any returns of the summons originally issued. The only indication in this record which would support a finding that Kingston may have attempted to serve process during that time period was a statement that 'some attempts' were made. No further details were given.

*Id.*, 956 So. 2d at 1064-65, ¶10 (emphasis added).

Ms. Oswald did not supply these details in her testimony. Rather, while she testified that she hired a process server in Florida to serve the alias summons issued in August 2002, she could not recall the name of the process server or

whether she had actually paid for the services. T 27. She produced no invoice or other documentation showing any efforts made by any Florida process server. No return of service was filed showing that Jenkins was “not found,” and no motion to extend the time period to effect service was filed.

Moreover, Jenkins testified that he was in residence at the Florida address given to Oswald by the USPS. Thus, process by certified mail under Rule 4(c)(5) would have been effective on Jenkins in the summer of 2002. In *Rains v. Gardner*, 792 So. 2d 1192, 1198 (Miss. 1999), the Supreme Court found dispositive the fact that the plaintiff had the knowledge and the means to serve process by mail, but did not do so. *Rains*, 731 So. 2d at 1198, ¶20. As the *Rains* Court held, a diligent plaintiff who has the defendant’s out-of-state address, but who has not availed herself of the certified mail option cannot be found diligent. Nor can such a plaintiff establish good cause for failing to timely serve the defendant.<sup>1</sup>

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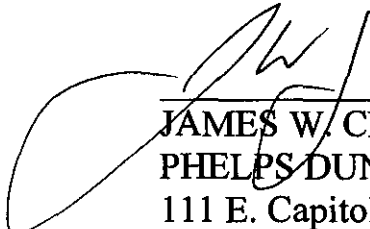
<sup>1</sup> Ms. Jenkins cited *Rains* on the issue of standard of review, but did not discuss, much less distinguish, the case’s holding about the use of process by mail.

## CONCLUSION

Ms. Oswald only secured the issuance of two alias summons over the more than four years period after filing her Complaint. She made no attempt to serve Mr. Jenkins by certified mail, despite having his correct Florida address. She provided no testimony about what her process server did, or tried to do to serve Mr. Jenkins with process from 2002 until 2007.

Thus the Chancellor erred as a matter of law, and abused the Court's discretion, by finding that plaintiff had established "good cause" for the seriously delinquent service of process on the defendant in this case. This Court should vacate the Chancery Court's denial of Jenkins' motion to dismiss and render judgment of dismissal without prejudice.

Respectfully submitted,



JAMES W. CRAIG (MSB [REDACTED])  
PHELPS DUNBAR, LLP  
111 E. Capitol Street, Suite 600  
Jackson, MS 39201  
Tel: 601-360-9711  
Fax: 601-360-9777  
E-mail: james.craig@phelps.com

DALE DANKS, JR.  
DANKS, MILLER, HAMER & CORY  
213 S. Lamar Street  
Jackson, MS 39215

COUNSEL FOR APPELLANT



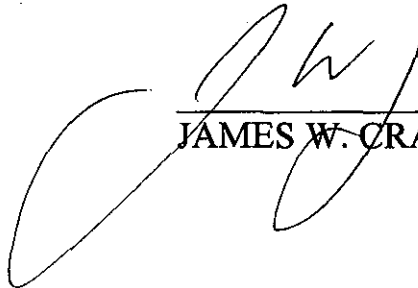
## **CERTIFICATE OF SERVICE**

I, James W. Craig, hereby certify that I have this day caused to be served,  
via United States Mail, postage prepaid, a true and correct copy of the above and  
foregoing Brief of Appellant to the following persons:

The Hon. Cynthia L. Brewer  
Chancery Judge of Madison County  
Post Office Box 404  
Canton, MS 39046

Vann F. Leonard, Esq.  
P.O. Box 16026  
Jackson, MS 39236

THIS the 26th day of June, 2008.



JAMES W. CRAIG