

**IN THE COURT OF APPEALS 12/29/95**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-01011 COA**

**JOHNNIE MAE BRANCH**

**APPELLANT**

**v.**

**STAR GROCERY; PETE PATTERSON, INDIVIDUALLY AND AS OWNER OF STAR GROCERY; RAY BLANKS AND A.D. RAMSEY, INDIVIDUALLY AND AS MANAGERS OF STAR GROCERY**

**APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. GRAVES, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

CHOKWE LUMUMBA

ATTORNEY FOR APPELLEES:

WES W. PETERS

NATURE OF THE CASE: CIVIL: PLAINTIFF FRAUDULENTLY SOLD PORK INSTEAD OF  
GROUND BEEF AT A GROCERY STORE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT FOR THE DEFENDANTS

BEFORE THOMAS, P.J., COLEMAN, AND PAYNE, JJ.

THOMAS, P.J., FOR THE COURT:

Johnnie Mae Branch filed a complaint in the Circuit Court of Hinds County and alleged that she made three separate purchases of ground beef from Star Grocery in March and April of 1992 and after eating the ground beef, she contracted headaches. Branch alleged that the defendants mixed pork with the ground beef which raised her blood pressure and caused the headaches. The trial court granted a summary judgment motion filed by the defendants. Feeling aggrieved, Branch appeals to this Court and asserts the following assignment of error:

I. WHETHER OR NOT THE LOWER COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WHEN A GENUINE ISSUE OF A MATERIAL FACT EXISTED IN THIS CASE?

We find that the trial court was correct and therefore affirm.

## **FACTS**

Branch filed a complaint against the defendants for selling her ground beef in March and April of 1992 which caused her to become sick and that by mixing pork and/or spoiled meat with the ground beef, the defendants committed fraud and bad faith, breached an express or implied contract, breached implied warranties, and violated state laws and health codes. Branch has high blood pressure and was on a strict diet and was instructed by her doctor not to eat pork.

In her complaint, Branch alleged she purchased and consumed ground beef from Star Grocery in March and April of 1992 which contained pork and caused her to become sick. Branch also alleged she saw an employee put pork fat in the ground beef and that another employee told her that the store's policy was to mix pork fat in the ground beef that was sold to customers. However, in her sworn deposition, Branch stated that she did *not* see anyone put pork in the ground beef and had *not* eaten the meat she purchased from Star Grocery in March and April of 1992. Branch did explain that she had eaten ground beef she purchased from Star Grocery prior to March and April of 1992.

Branch's medical records revealed that she never went to a doctor complaining of headaches during the time in question. Branch did continue regular blood pressure checks with her doctor which demonstrated that her blood pressure was in a better condition during the time period when she allegedly contracted headaches from eating the meat.

On August 30, 1993, the defendants filed a summary judgment motion based upon affidavits from Daniel W. Jones, medical doctor, and Stephanie McDearman, a registered dietician. Both Jones and McDearman stated that there is no difference between pork or pork fat and beef or beef fat as it concerns high blood pressure patients and therefore Branch could demonstrate no injury. The summary judgment hearing was scheduled for 8:00 a.m. on September 21, 1993 and Branch's counsel, Chokwe Lumumba, failed to show. As a result, the trial court granted summary judgment

for the defendants.

Subsequently, Lumumba filed a motion for reconsideration and the trial court granted the motion and voided its original summary judgment order. In October 1993, Branch filed the affidavit of her treating physician, Dr. Malcolm Taylor. Taylor stated he had advised Branch not to eat pork because it could "aggravate" her high blood pressure condition.

On December 3, 1993, Taylor's deposition was conducted. Taylor stated he agreed with and deferred to the defendant's experts who stated there was no difference between pork, pork fat, beef, and beef fat as it relates to high blood pressure patients. On December 20, 1993, Branch's sworn deposition was also conducted wherein she admitted that she *never ate* the meat she purchased in March and April of 1992 but that she had in fact consumed meat she purchased from Star Grocery prior to March and April of 1992. As a result of this admission by Branch, her counsel moved to amend the complaint to include meat Branch purchased and consumed prior to March and April of 1992. The trial court denied this attempt to amend the original complaint.

On February 9, 1994, the defendants renewed their motion for summary judgment for several reasons: (1) Taylor, Branch's own physician, agreed with the defendant's experts (Jones and McDearman) who stated there was no difference between pork, pork fat, beef, and beef fat and he admitted that a dietician such as Stephanie McDearman would be the proper expert in this area, as such, Taylor's deposition does not create a genuine material issue of fact; (2) Branch alleged she was injured from consuming meat purchased in March and April 1992 but never complained to any doctor, including her own doctor, about her consumption of this meat; (3) Jones stated that Branch's blood pressure was in a better condition at the time she allegedly consumed this meat; and finally, (4) Branch admitted in her sworn deposition that she *never ate the meat she purchased in March and April of 1992* which were the dates on which she based her complaint.

In response, Branch admitted that her complaint does allege that she was sick due to meat she purchased and consumed in March and April of 1992, but the complaint also alleges that the defendants committed fraud by selling her ground beef mixed with pork, acted in bad faith, breached an express or implied contract, breached implied warranties, and violated state laws and health codes, all of which Branch alleged creates a material genuine issue of fact. Branch also rebutted with the affidavit of Dr. Bernard Matthews, a chiropractor who specializes in nutritional therapy, who stated Branch suffered from an allergic reaction to pork which adversely affected her hypertension and caused other physical problems.

On April 26, 1994, the trial court granted summary judgment on the basis that Branch never produced a medical doctor who opined "any causal connection between the consumption of pork and the aggravation or exacerbation of a condition of high blood pressure." Moreover, the trial court mentioned that Branch offered Matthews' affidavit but did not specifically state whether it simply disbelieved Matthews' affidavit or whether it held that he was unqualified to render an opinion concerning allergic reactions to pork. In addition, the trial court held that Branch could not recover punitive damages absent some physical injury. The trial court did not address Branch's fraud, breach of contract, breach of implied warranties, and violation of state laws and health code claims.

Subsequently, Branch appealed to this Court.

## I. WHETHER OR NOT THE LOWER COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WHEN A GENUINE ISSUE OF A MATERIAL FACT EXISTED IN THIS CASE?

Branch argues that Dr. Bernard Matthews, a chiropractor who specializes in nutritional therapy, stated in an affidavit that Branch suffered from an allergic reaction to pork which adversely affected her hypertension and caused other physical problems. Branch contends that Matthews' affidavit creates a genuine material issue of fact which should have precluded summary judgment. Branch also contends that mixing pork with ground beef violated express warranties, implied warranties of merchantability, was an act of bad faith and was fraudulent.

The Mississippi Supreme Court explained our standard of review in determining whether a trial court properly granted summary judgment in *Palmer v. Anderson Infirmary Benevolent Ass'n* which provides a:

[D]e novo review, [and] this Court looks to see if the moving party has demonstrated that no genuine issue of fact exists. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993). 'A motion for summary judgment should be overruled unless the trial court finds, beyond a reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim.' *Id.* at 599 (citing *McFadden v. State*, 580 So. 2d 1210 (Miss. 1991)). "The lower court is prohibited from trying the issue; it may only determine whether there are issues to be tried." *Id.* (citing *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 362 (Miss. 1983)).

*Palmer v. Anderson Infirmary Benevolent Ass'n*, No. 91-CA-00654-SCT, slip op. at 6 (Miss. 1995).

The evidence must be viewed in a light most favorable to the party against whom the motion has been made. If the court finds that the moving party is entitled to judgment as a matter of law, summary judgment should be entered in his favor. Otherwise, the court should deny summary judgment. *Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.*, 594 So. 2d 1170, 1172 (Miss. 1983).

A simple denial by the non-movant does not create a material issue of fact. *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 362 (Miss. 1983). "Only sworn denials providing a credible basis therefor in evidentiary fact will suffice." *Id.* The non-movant "is required to bring forward significant probative evidence demonstrating the existence of the triable issue of fact." *Id.*

The trial court appeared to hold that Branch failed to rebut the testimony of the defendant's experts, Dr. Daniel W. Jones, M.D., and Stephanie McDearman, a registered dietitian. Both stated that Branch's blood pressure would not be affected any differently if she ate pork instead of beef. In her rebuttal to this evidence, Branch offered the testimony of Dr. Matthews, a chiropractor who specializes in nutritional therapy, who stated that Branch was allergic to pork.

Here, an objective analysis of the facts demonstrate that Branch has failed to demonstrate any genuine material issue of fact. Branch did *not* eat the meat she purchased in March and April of 1992

from Star Grocery. Obviously, she could not have been sick from meat she did not eat. For this reason, we need not address whether Matthews' affidavit raised a genuine material issue of fact because she did not eat the meat she claimed caused her to be sick. Concerning Branch's fraud and bad faith claims and breach of an express or implied contract, breach of implied warranties, and violation of state laws and health codes, there is no evidence in the record demonstrating whether the meat purchased in March and April is in fact pork instead of ground beef. As a result, these claims fail as a matter of law because there is no evidence demonstrating that the meat was pork. In addition, as the trial court denied Branch's request to amend her complaint to include purchases of meat prior to March and April of 1992, there is no claim that can survive the summary judgment motion and the trial court must be affirmed.

Although the trial court may have traveled the wrong route, this Court employs the same rule as the Mississippi Supreme Court which has stated numerous times that it will affirm a trial court which has traveled the wrong route but reached the right result. *Valley Forge Ins. v. Strickland*, 620 So. 2d 535 (Miss. 1993) (citing *Monroe County Bd. of Educ. v. Rye*, 521 So. 2d 900 (Miss. 1988)); *Love v. Barnett*, 611 So. 2d 205 (Miss. 1992) (quoting *Tedford v. Dempsey*, 437 So. 2d 410 (Miss. 1983) (where chancellor reaches correct result in accordance with the law and the facts, the Mississippi Supreme Court will affirm the result even if "a wrong reason be assigned"); *Rawls v. Parker*, 602 So. 2d 1164 (Miss. 1992) ("that the chancellor traveled the wrong route does not require reversal so long as he reached the proper result") (citing *Patel v. Telerent Leasing Corp.*, 574 So. 2d 3 (Miss. 1990)).

**THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS AFFIRMED.  
COSTS ARE TAXED TO THE APPELLANT.**

**FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE,  
AND SOUTHWICK, JJ., CONCUR.**