

Eva BROOKS v. TOWN & COUNTRY MUTUAL
INSURANCE COMPANY

87-176

741 S.W.2d 264

Supreme Court of Arkansas
Opinion delivered December 21, 1987

1. PLEADING — AFFIRMATIVE DEFENSES MUST BE EXPRESSLY PLED. — Rule 8(c), Arkansas Rules of Civil Procedure, requires that affirmative defenses shall be expressly pled in response to a complaint.
2. PLEADING — AMENDMENT MAY BE NECESSARY TO CAUSE PLEADINGS TO CONFORM TO THE EVIDENCE. — Rule 15(b), Arkansas Rules of Civil Procedure, also provides that such amendment of the pleadings as may be necessary to cause them to conform to the evidence, and to raise these issues, may be made upon motion of any party at any time.
3. PLEADING — NO MOTION TO CONFORM — NO IMPLIED ACQUIESCENCE IN ADMISSION OF EVIDENCE — JUDGMENT CANNOT REST ON UNPLED AFFIRMATIVE DEFENSE. — Where the record reflects neither a motion to conform nor any basis for a determination that the evidence itself was impliedly acquiesced in, the judgment cannot rest upon an unpled affirmative defense.
4. INSURANCE — MATERIAL MISREPRESENTATION — BURDEN OF PROOF. — The insurance company had the burden of showing that had it known of the earlier loss of its insured, the circumstances were such that it would not have issued the present coverage.

Appeal from Prairie Circuit Court, Southern District; *Cecil A. Tedder*, Judge; reversed and remanded.

Randall L. Gammill, and *Wright, Lindsey & Jennings*, for appellant.

Randall Templeton, for appellee.

STEELE HAYS, Justice. Eva Brooks (appellant) insured her home in De Valls Bluff for \$25,000 with Town & Country Mutual Insurance Company (appellee) against loss by fire. In May 1985 the dwelling was totally destroyed by fire. Town & Country denied the claim and Mrs. Brooks filed suit. Town & Country

pled affirmatively that the fire was intentionally set and that the dwelling had remained unoccupied for more than sixty days without the written permission of Town & Country which terminated coverage under the policy.

The parties waived a jury and the issues were tried to the court, which found the proof insufficient to support either of the defenses pled by Town & Country. However, the court found a material misrepresentation of fact in that Mrs. Brooks had experienced an earlier fire which she failed to disclose when applying for coverage with Town & Country. On that basis judgment was entered for Town & Country.

Mrs. Brooks has appealed upon three points of error: 1) The court erred in finding for Town & Country on the basis of an affirmative defense that was not pled; 2) the court erred in not requiring proof that any misrepresentation of fact was intentional in order to defeat the claim; and 3) the court erred in finding a material misrepresentation of fact in the absence of any proof as to materiality.¹

Affirmative Defense Issue

We agree that Town & Country neither pled material misrepresentation of fact nor introduced evidence to sustain a finding of material misrepresentation and, accordingly, we reverse and remand for a new trial on all issues.

[1] Rule 8(c), Arkansas Rules of Civil Procedure, requires that affirmative defenses shall be expressly pled in response to a complaint. That material misrepresentation is an affirmative defense is not subject to doubt. *American Family Life Assurance Company v. Reeves*, 248 Ark. 1303, 455 S.W.2d 932 (1970); *Continental Casualty Company v. Campbell*, 242 Ark. 654, 414 S.W.2d 872 (1967); 44 Am. Jur. 2d, *Insurance*, § 1918. Town and

¹ Town & Country cross-appealed from the court's denial of its arson and nonoccupancy defenses. It was not necessary to cross-appeal from the denial of these defenses. A cross-appeal is required only when the appellee seeks affirmative relief that he failed to obtain in the trial court, not when he won the case below and merely asks that the judgment be affirmed. *Moose v. Gregory*, 267 Ark. 86, 590 S.W.2d 669 (1979).

Reversed and remanded.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, concurring in part and dissenting in part. I agree with the majority opinion that the trial court improperly considered the appellee's affirmative defense of material representation. However, I would reach a different result because I find that the appellee's failure to amend its pleadings prior to entry of the judgment bars consideration of any affirmative defense which appellee has not pled.

The appellee pled two affirmative defenses which the trial court, sitting as a jury, found unsupported by the evidence. So far as I am concerned, these factual findings were settled as well as those matters which were required to be pled. Both the law of the case and res judicata appear to me to bar a retrial of these matters of fact. Therefore, I would reverse and remand with directions to enter a judgment for the appellant in the amount of the policy limits, interest, costs, and attorney's fees.
