3-15-88

O/A 5-25-88

IN THE SUPREME COURT OF THE STATE OF FLORIDA
CASE NO.: 71,071

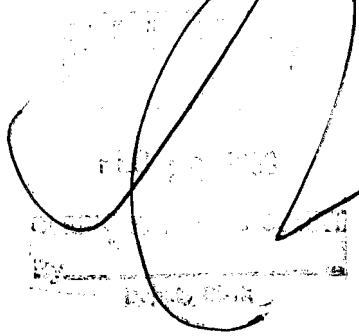
LUMBERMENS MUTUAL CASUALTY COMPANY,

Petitioner,

vs.

SUSAN AUGUST,

Respondent.
_____/



PETITIONER'S INITIAL BRIEF

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INTRODUCTION

Throughout this Brief, the Petitioner, LUMBERMENS MUTUAL CASUALTY COMPANY, will be referred to as "LUMBERMENS". Respondent, SUSAN AUGUST, will be referred to as "SUSAN AUGUST". References to the record will be preceded by the abbreviation "R". References to the appendix contained in the LUMBERMENS' Brief will be preceded by the abbreviation "App.".

STATEMENT OF THE CASE AND OF THE FACTS

On February 17, 1979, SUSAN AUGUST was involved in an automobile accident with an uninsured motorist while travelling in the State of Florida. Almost five years to the day later, on February 9, 1984, SUSAN AUGUST filed suit in the State of Florida, in Broward County Circuit Court seeking uninsured motorist benefits under an automobile liability insurance policy issued to Ruth C. Quint by LUMBERMENS. Until December 27, 1984, for a total of nine years, SUSAN AUGUST, granddaughter of Ruth C. Quint, resided in Mrs. Quint's household located in Newton Center, Massachusetts. Mrs. Quint negotiated for, and completed, the contract of automobile liability insurance with LUMBERMENS which was in force at the time of the accident in the State of Massachusetts. The subject automobile liability policy was a standard Massachusetts automobile policy issued by LUMBERMENS to Mrs. Quint in Massachusetts. SUSAN AUGUST's action was brought to appoint a defense arbitrator to determine SUSAN AUGUST's claim

for uninsured motorist benefits under the contract of automobile liability insurance with LUMBERMENS (R31-32).

LUMBERMENS moved to dismiss the above Complaint on the ground that Massachusetts law applied to bar the cause of action pursuant to the Massachusetts three year statute of limitations which governs both contract actions for personal injuries and tort actions (R37). This Motion to Dismiss was denied by the trial court (R38). Thereafter, LUMBERMENS answered the Complaint (R41).

On February 19, 1985, LUMBERMENS filed a Motion for Summary Judgment and supporting Memorandum of Law based essentially on the same grounds asserted in its Motion to Dismiss (R43-60). The trial court denied LUMBERMENS' Motion for Summary Judgment on May 6, 1985 (R80). LUMBERMENS filed a second Motion for Summary Judgment (R123-132), which was denied by the trial court (R135). On October 30, 1985 the trial court entered an order granting SUSAN AUGUST's petition for appointment of a defense arbitrator (R136).

LUMBERMENS filed a timely Notice of Appeal to the Fourth District Court of Appeal (App.1). The Fourth District Court of Appeal by opinion dated June 30, 1987 (App.2-5) affirmed the trial court's determination that Florida's five year limitations period governing contracts [Sec. 95.11(2)(b) Fla. Stat.] applied to this case rather than the applicable Massachusetts statute of limitations, Statute 260, Section 2A which provides that actions founded either on a contract to recover for personal injury or

tort are barred if not brought within three years. LUMBERMENS filed a timely notice to envoke this court's discretionary jurisdiction citing a conflict with this court's decision in Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972), (App.6). This Court then entered its order accepting jurisdiction and setting oral argument on January 28, 1988.

POINT ON APPEAL

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED BY DECIDING THAT THE INSTANT CAUSE OF ACTION FOR UNINSURED MOTORIST BENEFITS UNDER A CONTRACT OF INSURANCE AROSE IN FLORIDA AND NOT IN MASSACHUSETTS AND THEREBY ERRED BY APPLYING SECTION 95.11 FLA. STAT. RATHER THAN SECTION 95.10 FLA. STAT. WHICH DIRECTS THE COURTS OF THIS STATE TO BAR ANY CAUSE OF ACTION BROUGHT IN THIS STATE THAT IS BARRED IN THE STATE WHERE THE CAUSE OF ACTION AROSE.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal erred by deciding that the instant cause of action for uninsured motorist benefits does not arise in Massachusetts, thereby erroneously deciding that Section 95.11 Fla. Stat. should apply rather than 95.10 Fla. Stat., Florida's "Borrowing Statute". This is so because either under the law as it presently exists in Florida, or under a "significant contacts test"; the instant cause of action for benefits under a Massachusetts contract of insurance issued and delivered in Massachusetts to a Massachusetts resident which cover a risk principly covered in Massachusetts clearly arose in Massachusetts. Thus, it is equally clear that Section 95.10 Fla. Stat. and not Section 95.11 Fla. Stat. is applicable to this case. Pursuant to Section 95.10 Fla. Stat., because this action based on an insurance contract to recover for personal injuries is barred in Massachusetts if brought there, it is barred here.

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEAL ERRED BY DECIDING THAT THE INSTANT CAUSE OF ACTION FOR UNINSURED MOTORIST BENEFITS UNDER A CONTRACT OF INSURANCE AROSE IN FLORIDA AND NOT IN MASSACHUSETTS AND THEREBY ERRED BY APPLYING SECTION 95.11 FLA. STAT. RATHER THAN SECTION 95.10 FLA. STAT. WHICH DIRECTS THE COURTS OF THIS STATE TO BAR ANY CAUSE OF ACTION BROUGHT IN THIS STATE THAT IS BARRED IN THE STATE WHERE THE CAUSE OF ACTION AROSE.

The Fourth District Court of Appeal erred by deciding the trial court was correct in applying Section 95.11(2)(b), Florida's five year statute of limitations governing contract actions, rather than Massachusetts Statute 260, Section 2A which provides that actions, whether founded in tort or contract to recover for personal injury, must be brought within three years of its accrual. This is so because the Fourth District Court of Appeal did not employ this Court's analysis in Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972); and reaffirmed by this Court in Bates v. Cook, 509 So.2d 1112 (Fla. 1987). Failure to apply this Court's analysis led to the Fourth District Court's erroneous conclusion that Section 95.10 Fla. Stat. does not apply to the instant case and thus Florida's statute of limitations and not the Massachusetts statute of limitations applies.

It is the law of Florida that statutes of limitations are procedural in nature and therefore the limitation of action

statute of the forum is applicable where the cause of action may involve more than one state. Colhoun, supra, at 265 So.2d 20. Thus, there are possibly two applicable procedural/limitations provisions in the case sub judice: either Section 95.11 Fla. Stat. or Section 95.10 Fla. Stat. Colhoun, id at 20. The question in this case is whether Florida will apply its own statute of limitations or Section 95.10 Fla. Stat. which provides:

> Causes of Action Arising out of the State
> "When the cause of action arose in another state or territory of the United States, or in a foreign country, and its law forbid the maintenance of the action because of lapse of time, no action shall be maintained in this state."

Thus, the focus of inquiry is twofold. First, this Court must determine whether the cause of action arose outside the State of Florida. And second, if the answer to the first question is "yes", this Court must decide whether the cause of action is barred where it arose. In this case, if the cause of action is barred in Massachusetts where the instant cause of action arose, it is barred here. Section 95.10 Fla. Stat.

With regard to answering the first question, i.e., whether the instant cause of action arose outside the State of Florida, Florida courts presently answer this question by applying the law of the forum state. Colhoun, supra, at 20; Meehan v. Celotex Corporation, 466 So.2d 1100, 1101 (Fla. 3rd DCA 1985). A determination of whether a cause of action is founded upon either contract or tort is relevant in determining which choice of law

principles are applicable in this state. This is because the Restatement (Second) Conflict of Laws significant relationships factors governing tort actions would apply in determining where a cause of action in tort arises for the purpose of determining whether Section 95.10 Fla. Stat. applies. Bates v. Cook, supra. And, the law of the place where the contract is made or completed is the controlling factor a court employs to decide a choice of law issue in an action based on a contract for the purpose of determining whether the above cited "Borrowing Statute" applies. Colhoun, supra, at 21.

Florida courts recognize that a cause of action seeking uninsured motorist benefits under a contract of automobile liability insurance is an action founded on contract rather than tort. Burnett v. Firemens Fund Insurance Company, 408 So.2d 838 (Fla. 2nd DCA 1982) rev. den. 419 So.2d 1197 (Fla. 1982). Thus, the rule enunciated in Colhoun, supra, that the place of making the contract is controlling in deciding where a cause of action based on a contract arises in order to determine whether the "Borrowing Statute" applies is applicable to this case. Please see also Amica Mutual Insurance Company v. Gifford, 434 So.2d 1015 (Fla. 5th DCA 1983). This is because SUSAN AUGUST is seeking to recover uninsured motorist benefits for personal injury under a contract of automobile liability insurance. Therefore, the choice of law rule which determines where a contract claim arises for purpose of determining whether to apply

the "Borrowing Statute" is the place where the contract is made. Colhoun, supra.

However, LUMBERMENS recognizes this Court is currently deciding whether to continue to apply the rule of lex loci contractus with respect to deciding choice of law questions regarding the substantive law governing parties rights and obligations under a contract. Brooks v. Sturiano, 497 So.2d 976 (Fla. 4th DCA 1986). LUMBERMENS also recognizes that this Court may decide to apply the Restatement (Second) of Conflict of Laws factors governing contracts and specifically, insurance contracts, in order to determine where an action founded on a contract arises for the purpose of determining whether Florida's "Borrowing Statute" should apply to a given case. Additionally, LUMBERMENS also recognizes that since this case deals solely with a procedural question, Colhoun, supra, and is still the law governing the issue sub judice, it is not necessary to the resolution of the issue before this Court to adopt any other rule than the one enunciated in Colhoun, supra. Askew v. Sonson, 409 So.2d 7 (Fla. 1981). This is true especially in light of the fact that the issue of whether the courts of this state should continue to adhere to Colhoun, supra, was not before the District Court. Thus, the first part of the Brief below will apply the choice of law rule as it presently exists in Florida in order to determine where the instant cause of action arose in this case. However, if this Court chooses to abrogate the rule enunciated in Colhoun, supra, in the second part of the Brief below, LUMBERMENS

will apply the Second Restatement of Conflict factors and will demonstrate that the result is the same. That is, that the instant cause of action for uninsured motorist benefits arose in Massachusetts and, being barred there, is barred here.

As stated above, Florida applies the rule of lex loci contractus or the place where the contract is made in determining where a cause of action for contract arises and in deciding whether the "Borrowing Statute" applies to a given case. Colhoun, supra. Hence, "... the place where the contract is completed, there the cause of action accrues". Colhoun, supra, at 21. Citations omitted.

In the case sub judice, both SUSAN AUGUST and Ruth C. Quint, the owner of the LUMBERMENS' policy, resided in Massachusetts both at the time of contracting for the automobile liability policy and at the time of the accident. The policy of insurance was a Massachusetts automobile liability policy issued in Massachusetts to Ruth C. Quint in Massachusetts. Ruth C. Quint purchased the policy through an insurance agent located in Massachusetts. Thus, the instant contract of insurance was completed in Massachusetts with the purchase and delivery of the Massachusetts automobile liability policy to the Massachusetts resident. See Gifford, supra, at 1017. Quite simply, Florida had no connection to the contract of automobile liability insurance. Massachusetts is the place where the instant action on the insurance contract arises for the purpose of determining whether Section 95.10 Fla. Stat. applies. Therefore, the first

question posed by this Court in Colhoun, supra, and Bates, supra, is answered in the affirmative.

Having determined that the instant cause of action arose outside of Florida, Section 95.10 Fla. Stat., the "Borrowing Statute", applies. Colhoun, supra, at 20; Bates v. Cook, supra, at 1113. The next question then is whether the cause of action is barred in Massachusetts. If so, SUSAN AUGUST's cause of action is barred here. Colhoun, supra, at 20; Section 95.10 Fla. Stat. Massachusetts' statute 260, Section 2A "Limitations of Action" provides:

> "Three years; actions of tort, contract to recover for personal injuries and replevin
> Except as otherwise provided, actions of tort, actions of contract to recover from personal injury,... shall be commenced only within three years next after the cause of action accrues."

Thus, it is clear that this action, regardless of whether it is founded on contract or tort, should have been brought in Massachusetts within three years of the date of the accident which was February 17, 1979. Since the accident would have been barred in Massachusetts if brought on February 9, 1984, the answer to the second question in the analysis enunciated by Colhoun, supra and Bates, supra, is in the affirmative. That is, the action is barred in Massachusetts. Therefore, it is barred in Florida. Section 95.10 Fla. Stat.

As stated above, this result obtains regardless of whether this Court adheres to the time honored lex loci contractus choice of law rule with respect to determining the applicability of the

"Borrowing Statute"; or whether this Court chooses to adopt the Restatement of Conflict of Laws (Second) choice of law principles governing contracts in general and insurance contracts in particular. Section 193 of the Restatement (Second) Conflict of Laws provides:

> "Contracts of Fire, Surety or Casualty Insurance
>
> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principle location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in Section 6 to the transaction and the parties, in which event the local law of the state will be applied".

Comment (b) to the above quoted section states that the "insured risk" as used in Section 193 has as its principle location "... the state where it (the risk) will be during at least a major portion of the insurance period". (Parenthetical added.) The comment goes on to state: "...in the case of an automobile liability policy, the parties will usually know beforehand where the automobile will be garaged at least during most of the period in question." And, with regard to how much weight the location of the insured risk is given, the comment states: "the location of the insured risk will be given greater weight than any other single contact in determining the state of the applicable law provided that the risk can be located, at least principly, in a single state."

In this case, Ruth C. Quint, the owner of the policy, was a resident of the State of Massachusetts as was the granddaughter, SUSAN AUGUST. The principle location of the risk was clearly located in Massachusetts, not Florida. Thus, pursuant to this Court's analysis in Bates, supra, and Colhoun, supra, the answer to the first question, whether the cause of action arose in Massachusetts, would be answered affirmatively if this Court chooses to apply the Restatement (Second) of Conflict of Laws Section 193 which is applicable to insurance contracts. Since the cause of action arose in Massachusetts and is barred there, it would be barred here. Therefore, this action should be barred here whether this Court adopts the Restatement criteria or adheres to the lex loci contractus rule in determining were the instant cause of action arose in order to determine whether to apply Florida's "Borrowing Statute".

Moreover, the same result would be obtained if this Court applies the factors listed in the Restatement (Second) of Conflict of Laws as Section 188(2), which governs contracts generally and provides:

> "In the absence of an effective choice of law by the parties (see Section 187), the contacts to be taken into account in applying the principles of Section 6 to determine the law applicable to an issue include:
> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicile, residence,

> nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue."

Application of the above factors to the instant case reveal: (a) that the place of contracting was the State of Massachusetts; (b) that the place of negotiation was the State of Massachusetts; (c) that the place of performance was to be either in North Quincy, Massachusetts, where demand for benefits was made upon LUMBERMENS, or in Newton, Massachusetts, where the owner of the policy or the agent was located and where payment was expected (R34); (d) that the location of the subject matter (the risk assumed by LUMBERMENS) was principally located in Massachusetts where the owner of the policy garaged and registered her vehicle; (e) that the domicile and residence of Ruth C. Quint and SUSAN AUGUST was in Newton, Massachusetts and LUMBERMENS was doing business in Massachusetts.

From the above analysis, it can be readily seen that if this Court deems the Restatement (Second) of Conflict of Laws governing contracts controlling in order to determine where a cause of action arises for the purpose of deciding whether Florida's "Borrowing Statute" applies, the first question of the analysis enunciated in Colhoun, supra, and Bates, supra, is answered in the affirmative. In other words, even applying the Restatement principles, it is clear that the cause of action in this case arose outside of Florida, in Massachusetts. Since this

cause of action is barred in Massachusetts if brought there, it is barred here.

As demonstrated above, the Fourth District Court of Appeal's decision in this case that: "...in the instant case the cause of action arose in Florida, where the accident occurred, and Florida's five year statute of limitations applies." (App.4) - is not correct. Pursuant to this Court's analysis in Colhoun, supra, or even under the Restatement (Second) of Conflict of Laws, a cause of action based on a contract is not determined by "...where the accident occurred...". Under either the law as it currently exists or if this Court deems the Restatement to be applicable, this cause of action for uninsured motorist benefits arose in Massachusetts. Thus, Section 95.10 Fla. Stat. directs this Court to apply the statute of limitations extant in Massachusetts. Because this cause of action would be barred there if it had been brought in Massachusetts, it is barred here.

CONCLUSION

Pursuant to the foregoing law and reasoning, the Petitioner, LUMBERMENS MUTUAL CASUALTY COMPANY, respectfully requests that this Court reverse the decision of the Fourth District Court of Appeal in this case and direct the trial court to enter an order granting LUMBERMENS MUTUAL CASUALTY COMPANY final summary judgment as the Massachusetts' statute of limitations applies to bar SUSAN AUGUST's cause of action in the instant case.

CERFIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing has been furnished by mail the 19th of February, 1988 to: Victor Tobin, Esquire, J. JAY SIMONS, P.A., 1222 S.E. Third Avenue, Fort Lauderdale, Florida 33316 and Evelyn Merchant, Esquire, One Biscayne Tower, Two South Biscayne Blvd., Suite 3410, Miami, Florida 33131.

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