IN THE SUPREME COURT OF FLORIDA

CASE NO.: 71,071

LUMBERMENS MUTUAL CASUALTY COMPANY, :

Petitioner, :

vs. :

SUSAN AUGUST, :

Respondent. :

JURISDICTIONAL BRIEF OF PETITIONER

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INTRODUCTION

Throughout this brief, the Petitioner, LUMBEREMENS MUTUAL CASUALTY COMPANY, will be referred to "Lumbermens". The Respondent, SUSAN AUGUST, will be referred to "August".

SUMMARY OF ARGUMENT

The decision of the Fourth District Court of Appeal in this case expressly and directly conflicts with this Court's decision and mode of analysis as enunciated in Colhoun vs. Greyhound Lines, Inc., 265 So2d 18 (Fla. 1982). In Colhoun, supra, this court recognized cases when a Florida court will not apply the Florida statute of limitations but will "borrow" the statute of limitations of another jurisdiction pursuant to Section 95.10 Fla. Stat.

This Honorable court has stated that a court should apply a two pronged analysis in determining whether the "borrowing" statute applies. The first question is whether the cause of action arose somewhere other than Florida. The second question is whether that cause of action is barred in the jurisdiction where it arose. If both questions are answered affirmatively, it will mean plaintiff's cause of action may not be maintained in Florida. This court in Colhoun, supra, further provided that in order to determine where a cause of action arises when the action sounds in contract, the cause of action accrues at the place where the contract is completed.

This case, being a cause of action for uninsured motorist benefits, is a contract claim. The Fourth District Court of Appeal recognized the fact that the policy in question was issued in Massachusetts to Massachusetts resident, explicitly recognizing that the policy was received in Massachusetts. Thus, the court determined that Massachusetts was the place where the automobile liability policy of insurance was completed. Therefore, pursuant Colhoun, supra, Massachusetts is where the

cause of action for breach of the insurance contract arose or accrued. Further, the Fourth District Court of Appeal in this case explicitly recognized that this case would be barred if the cause of action arose in Massachusetts but not barred, if it arose in Florida. Thus, both prongs of the test as enunciated in Colhoun, supra, are answered in the affirmative. The "borrowing" statute should have been applied. The contract action being barred in Massachusetts, should also have been barred here.

The Fourth District Court of Appeal nevertheless decided that this breach of contract action arose in Florida, because Florida is where the accident occurred. Clearly, where the accident occurred is not determinative of where an action for breach of an insurance contract for uninsured motorist benefits accrues. This is totally contrary to this court's decision in Colhoun, supra, that a cause of action for breach of contract accrues where the last act to complete the contract is performed. Moreover, the Fourth District Court of Appeal neglected to apply this court's two pronged analysis in Colhoun, supra, thus leading to the erroneous result in this case.

In sum, the Fourth District Court of Appeal decided to apply the Florida statute limitation in direct contravention of this Court's mandate in Colhoun, supra, that if a cause of action arises somewhere other than Florida, (in the instant case Massachusetts) and if the cause of action is barred where it arose (the instant cause of action is barred in Massachusetts), then section 95.10 Fla. Stat. applies and therefore, the cause of action is also barred here.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing has been furnished by mail on this 9th day of September, 1987, to: Victor Tobin, Esquire, SIMONS, SIMONS, TOBIN & D'ESPIES, 1222 Southeast Third Avenue, Fort Lauderdale, Florida.

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By _____
Attorneys for Petitioner

STATEMENT OF FACTS

On February 17, 1979, August was involved in a motor vehicle accident in Florida with an uninsured motorist. Almost five years later to the day, on February 9, 1984, August brought an action in the State of Florida against Lumbermens for the purpose of obtaining uninsured motorist benefits. The action was based on an alleged breach of an automobile liability insurance contract entered into and completed by Ruth C. Quint in Massachusetts. The policy was issued by Lumbermens in Massachusetts.

Both Mrs. Quint, with whom August lived for nine years prior to December 27, 1984, and of course, August, were residents of Newton Center, Massachusetts. The Massachusetts contract of automobile liability insurance provided mandatory uninsured motorist coverage. In response to the complaint filed by August, Lumbermens filed a motion to dismiss based on the contention that the Massachusetts statute of limitation applies regarding the Massachusetts contract of automobile liability insurance. Thus, because August did not file her contract claim within Massachusetts' three-year limitations period, because the cause of action arose in Massachusetts as the contract of insurance was completed there, and due to the fact that the cause of action for breach of the insurance contract was barred there, so too it was barred in Florida. The trial court denied Lumbermens' Motions to Dismiss and two Motions for Summary Judgment filed by Lumbermens based on the above-mentioned contentions.

Lumbermens appealed the trial court's order granting August's Petition for Appointment of a Defense Arbitrator. The

Fourth District Court of Appeals affirmed the trial court's decision denying Lumbermens' Motion to Dismiss and granting August's Petition for Appointment of a Defense Arbitrator.

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEAL'S DECISION THAT THE FLORIDA STATUTE OF LIMITATIONS LAW IS APPLICABLE IN A CONTRACT ACTION FOR UNINSURED MOTORISTS BENEFITS BASED ON A MASSACHUSETTS' AUTOMOBILE LIABILITY CONTRACT ISSUED IN MASSACHUSETTS TO A MASSACHUSETTS' RESIDENT EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN COLHOUN V. GREYHOUND LINES, INC.

The decision of the Fourth District Court of Appeal in this case, Lumbermens Mutual Casualty Company v. August, 509 So.2d 352 (Fla. 4th DCA 1987), expressly and directly conflicts with this court's decision and mode of analysis as enunciated in Colhoun v. Greyhound Lines, Inc., 265 So2d 18 (Fla. 1972). Moreover, the Fourth District Court of Appeal failed to apply this court's analysis as outlined in Colhoun, thus leading to the erroneous result in this case.

In Colhoun, supra, this court was faced with the question of whether Florida law required a Florida court to apply a forum state's (Tennessee's) statute of limitations. In Colhoun, supra, the plaintiff, a Florida resident, was a bus passenger suing for personal injuries sustained in a bus accident that occurred in Tennessee. The bus ticket was purchased in Florida. The complaint contained counts of negligence, gross negligence and breach of contract warranty. Greyhound Lines denied the allegations except for the fact that the Plaintiff was riding the bus and moved for summary judgment based on the contention that the Tennessee one-year statute of limitations controlled, thus

barring the suit which was filed 20 months after the accident. The motion for summary judgment in favor of Greyhound Lines was granted and the Second District Court of Appeal affirmed.

This court stated that because Florida is the forum, either Section 95.11 Fla. Stat. or Section 95.10 Fla. Stat. controlled. This court recognized that there are times when a Florida court will not apply the Florida statute of limitations but will "borrow" the statute of limitations of another jurisdiction pursuant to Section 95.10 Fla. Stat. which now reads:

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

This court then stated the proper analysis a court should undergo in determining whether Section 95.10 Fla. Stat. applies:

> "...(1) whether the cause of action arose somewhere other than in Florida and, if so, (2) whether it is barred where it arose. An affirmative answer to both questions will mean the lower court properly concluded petitioner's cause of action to not be maintained in this state. Colhoun, supra, at 20.

. In Andrews v. Continental Insurance Company, 444 So2d 479 (Fla. 5th DCA 1984), the court held that a suit for uninsured motorist benefits is a contract claim. Further, the respondents agreed below that their cause of action is a contract action. With regard to step one in the analysis, in order to determine where a cause of action arises when the action sounds in contract, this court in Colhoun, supra, stated:

> "...where the last act necessary to complete the contract is performed that is the place of the contract; and the place where a contract is completed, there the cause of action accrues."

Citing Peters v. E.O. Painter Fertilizer Co., 73 Fla. 1001, 75 So 749 (Fla. 1917). Emphasis in the original.

In the instant case, the Fourth District Court of Appeal failed to apply this two pronged analysis as outlined by Calhoun, supra. If the court had properly applied the analysis, it would have came to the correct conclusion i.e. that August's contractual cause of action for uninsured motorist benefits arose in Massachusetts and being barred there, was barred here. This is so for two reasons. First, the Fourth District Court of Appeal recognized that both August and Mrs. Quint, who was the owner of the Massachusetts insurance policy in question, were Massachusetts residents and that:

> "prior to the accident, Quint had contracted for and received a standard Massachusetts automobile liability insurance policy from Lumbermens in Massachusetts."

August, supra, at 353. Emphasis added. Page 2, conformed copy.

Thus, the court determined that Massachusetts was the place where the automobile liability policy of insurance was completed. Therefore, Massachusetts is where the cause of action for breach of the insurance contract arose or accrued hence, step (1) in this court's analysis in Colhoun, supra, is answered in the affirmative, in the instant case i.e., that the cause of action arose outside of Florida.

The next question posed by this court in Colhoun is

> "...(2) whether it is barred where it arose." Colhoun, at 20.

This second question was also answered affirmatively by the Fourth District Court of Appeal wherein it stated

> "It is critical to note that the Massachusetts' statute of limitations is three years, although Florida's limitation is five years, thus, the case would be barred if the cause of action arose in Massachusetts, but not barred, if it arose in Florida."

August, supra, at 353. Emphasis added. Page 2, conformed copy.

Thus, the cause of action brought by August in this case meets both prongs of this court's test that is used to determine whether section 95.10 Fla. Stat., the "borrowing" statute applies. The Fourth District Court of Appeals nevertheless neglected to apply the borrowing statute in this case deciding the cause of action arose in Florida "...where the accident occurred." August, Id. at 353. Page 2, conformed copy. Clearly, where the accident occurred is not determinative of where a cause of action for breach of contract accrues. Please see Colhoun, supra, at 21.

In sum, the Fourth District Court of Appeal's decision that a cause of action for breach of contract arose in Florida, "...where the accident occurred..." is not determinative of this, an action for breach of insurance contract for uninsured motorists benefits. This is totally contrary to this court's decision in Colhoun, supra, that a cause of action for breach of contract accrues where the last act to complete the contract is performed.

Also, the District Court of Appeal's decision conflicts with that of this court in Colhoun, supra, by applying Florida's Statute of Limitations instead of Section 95.10 Fla. Stat., in spite of expressly finding that the contract was entered into and delivered in Massachusetts and the cause of action would be time barred in Massachusetts if brought there. This court has recently reaffirmed its two step analysis as enunciated in Colhoun, supra by stating:

> "... the statute bars actions brought in Florida which arise outside of the state of Florida and which are time barred in the jurisdiction in which the cause of

> action arose. In seeking to apply the statute to a given set of facts, it becomes necessary to determine where the cause of action arose. If the cause of action arose in another state and the action is time barred because of that state's limitations statute, the borrowing statute precludes the maintenance of the action in Florida."

Bates v. Cook, 12 FLW 396, 397 (Fla. July 16, 1987). Emphasis added.

Clearly, the Fourth District Court of Appeal's decision in this case, expressly and directly conflicts with this court's decision in Colhoun, supra. A cause of action in contract arises where the last act to complete the contract occurs; not where the accident occurs, as decided by the Fourth District Court in this case. Further, the Fourth District Court of Appeal decided to apply Florida Statute of Limitations in direct contravention of this court's mandate which states that if a cause of action arises somewhere other than Florida, and if it is barred where it arose (in this case Massachusetts) then Section 95.10 Fla. Stat. applies and therefore, the cause of action is barred here.

CONCLUSION

WHEREFORE, due the foregoing law and reasoning, the Petitioner, LUMBERMENS MUTUAL CASUALTY COMPANY, respectfully requests that this court invoke its discretionary jurisdiction pursuant to FLA. R. APP. P. 9.030 (A)(2)(A)(IV).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing has been furnished by mail on this 3rd day of September, 1987, to: Victor Tobin, Esquire, SIMONS, SIMONS, TOBIN & D'ESPIES, 1222 Southeast Third Avenue, Fort Lauderdale, Florida.

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