IN THE SUPREME COURT OF FLORIDA

CASE: 71,071

LUMBERMENS MUTUAL CASUALTY COMPANY,

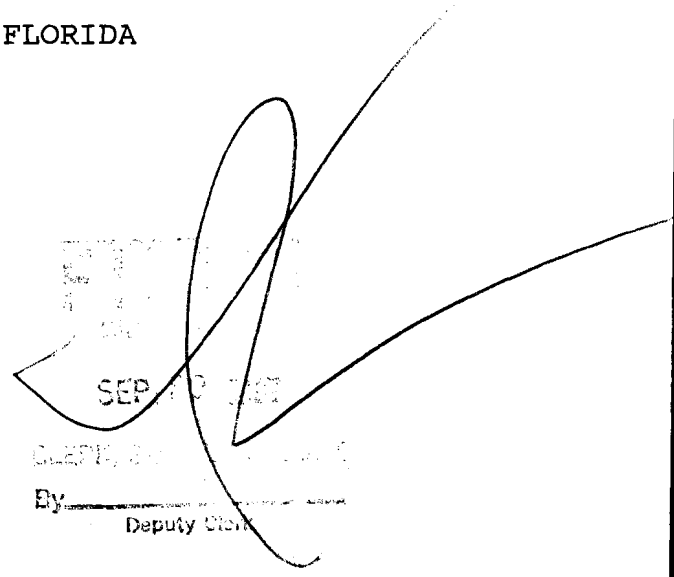
Petitioner,

v.

SUSAN AUGUST,

Respondent.

_____/



REPLY BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

INTRODUCTION

Throughout this Reply Brief, the Petitioner, Lumbermens Mutual Casualty Company, will be referred to as Petitioner or Lumbermens", and the Respondent, Susan August, will be referred to as Respondent, or "Susan August".

FACTS

Respondent accepts Petitioner's Statement of the Facts with one exception. The action below was a Petition for Appointment of a Defense Arbitrator rather than an action for a Breach of Contract (Petitioner's Brief Page 1 Paragraph 1).

ARGUMENT

Lumbermen's argument reduced to its simples form is that this court's holding in Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972), should apply to the facts of this case and thus, Florida, the forum court, must borrow the Massachusetts Statute of Limitations which would time bar Susan August's claim under the uninsured motorist provision of her insurance policy. The following argument will establish that the decision of the Fourth District Court of Appeal in Lumbermen's Mutual Casualty Company v. August, 509 So.2d 352 (Fla. 4 DCA 1987), was correct, and therefore it does not conflict with this court's decision in Colhoun.

The Respondent agress with the Petitioner's analysis of the two-prong test Colhoun adopted in determining when Section 95.11, Florida Statutes, "the borrowing statute", is triggered for a breach of contract action for personal injuries against a common carrier. However, Petitioner's attempt to apply Colhoun's two-prong test to the facts of this case fails. The critical error in Petitioner's application of the two-prong test is found in its application of the first prong. Specifically, the determination of: "1) whether the cause of action arose somewhere other than in Florida."

Colhoun involved a breach of contract claim for personal injuries between a common carrier and one of its passengers. The distinction between Colhoun and the case subjudice is that in Colhoun, the plaintiff was claiming Greyhound's own wrongdoing

was the direct cause of the plaintiff's personal injuries. Here, Susan August is suing pursuant to the uninsured motorist provision of her insurance policy with Lumbermen's. She is not claiming that any action by Lumbermen's directly caused her personal injuries. The distinction is critical.

As noted above, Colhoun deals with a true Breach of Contract Action, i.e., that the defendant's breach of contract caused the plaintiff's harm. Therefore, traditional notions of the contract law apply to the determination of where the cause of action arose. Whereas a claim for uninsured motorist coverage under an insurance policy is a cross-breed between a breach of contract action and a tort action. Uninsured motorist coverage gives the insured the same cause of action against the insurer that he has against the uninsured third party tortfeasor for damages for bodily injury. Dewberry v. Auto-Owners Insurance Company v. Parker, 365 So.2d 1077 (Fla. 1978).

It cannot be disputed that Florida's statute of limitations would apply to any action filed by Susan August against the uninsured third party tortfeasor. Similarly, Susan August's claim under the uninsured motorist provision of her insurance policy for the claim she would have had against the uninsured third party tortfeasor is governed by Florida's Statute of Limitations.

In its opinion below, the Fourth District Court of Appeal correctly relied on this court's opinion in State Farm Mutual Automobile Insurance Co. v. Kilbreath, 419 So.2d 632 (Fla. 1982), for the proposition that in an uninsured claim, a cause of action

accrues, and the statute of limitations begins to run, on the date of the accident.... They went on to say, Florida law does not distinguish between when a cause of action accrues and when a cause of action arises. Meehan v. Celotex Corp., 466 So.2d 1100 (Fla. 3 DCA 1985). August id at 353 Page 2, conformed copy. Thus, Colhoun does not control in this claim for uninsured motorist benefits for an automobile accident that occurred in Florida, and the Borrowing Statute does not come into play. Accordingly, the Fourth District Court of Appeal correctly applied Florida's Statute of Limitations to Susan August's uninsured motorist claim against Lumbermens.

CONCLUSION

The foregoing argument and law establishes that the Fourth District Court of Appeal correctly decided the underlying action. Accordingly, Respondent respondent respectfully submits there is no basis for this court to invoke its discretionary jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(A)(2)(A)(iv).

RESPONDENT'S REQUEST FOR ATTORNEYS' FEES

Respondent respectfully requests attorneys' fees for this Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been hand-delivered to Wesley L. Catri, Esq., Pyszka, Kessler, Massey, Weldon, Catri, Holton and Douberley, P.A., Attorneys for Petitioner, 100 Blackstone Building, 707 Southeast Third Avenue, Fort Lauderdale, Florida, 33316, on this 28th day of September, 1987.

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