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.

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PETITIONER'S REPLY 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 "AUGUST". References to the record will be preceded by the symbol "R".

SUMMARY OF ARGUMENT

AUGUST is incorrect in her assertion that State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So.2d 632, 633 (Fla. 1982) and Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972), can only be read so as not to conflict if this Court holds that by implication, this Court has carved out an exception to the application of the lex loci contractus doctrine. Kilbreath decided "when" a cause of action for uninsured motorists benefits accrues under Florida law. Colhoun decided "where" a cause of action in contract arises for the purpose of determining whether to apply Florida's "Borrowing Statute" in a given case. Because these cases address separate issues, there is no indication that an exception has been carved out nor needs to be carved out.

AUGUST is incorrect in her assertion that if Kilbreath is followed, the claim for uninsured motorists benefits arose in Florida, where the accident occurred. Kilbreath has little, if any, applicability to the question before this Court which is to determine where a cause of action arises for uninsured motorists benefits under a contract of automobile liability insurance, for the purpose of determining whether to apply Florida's "Borrowing Statute". This is because Kilbreath does not address the question of where a cause of action arises for Borrowing Statute purposes.

Although there is little substantive difference between

the words "accrue" and "arise," there is a substantial difference if the word "when" or the word "where" precedes accrue/arise. When a cause of action accrues/arises focuses on the question of the time at which a right of action begins and where a cause of action accrues/arises focuses on to the place or location given rise to the cause of action. Thus, AUGUST should not be permitted to blur the important distinction between "when" and "where" a cause of action of accrues or arises because these are clearly separate concepts and relate to clearly separate questions for limitations purposes.

This Court has not receded from the lex loci contractus doctrine as asserted by AUGUST in her Brief but has reaffirmed the lex loci contractus doctrine in Sturiano v. Brooks, 13 F.L.W. 224 (Fla. March 24, 1988). Moreover, because this Court has recognized that limitation periods and borrowing statutes are substantive in nature, so too should the substantive rule of lex loci contractus be used in order to determine whether to apply Florida's "Borrowing Statute" as in other issues of substantive automobile liability insurance choice of law questions.

LUMBERMENS did not err by directing this Court to apply Section 188 whose statement (Second) Conflict of Laws and Section 193 with statement (Second) conflict of laws. This is because this Court decided that Section 188 was applicable but nevertheless rejected the significant relationship tests found in Section 188 in Sturiano v Brooks. Additionally, Section 188

lists factors that are correlative with Section 6 of the Restatement (Second) Conflicts of Laws which is commonly referred to as the "significant relationships test". Specifically, Section 193 of the Restatement (Second) Conflict of Laws lists the paramount factors to be taken into account regarding insurance contracts. Thus, if this Court rejects the application of the lex loci contractus doctrine to determine whether Florida's "Borrowing Statute" is applicable in insurance contract cases, either one or both of these sections of the Restatement applies in this case.

The instant cause of action for uninsured motorists benefits arose in Massachusetts either under the lex loci contractus doctrine or the significant relationships test. Because the cause of action is barred in Massachusetts where it arose, it is barred here. Section 95.10 Fla. Stat.

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.

LUMBERMENS agrees with AUGUST'S statement in her brief that a cause of action accrues for the purpose of determining when the statute of limitations begins to run on the date of the accident with the uninsured motorist in actions on a contract for uninsured motorists benefits. State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So.2d 632, 633 (Fla. 1982). However, LUMBERMENS disagrees with AUGUST'S assertion that Kilbreath, supra, and Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972), can only be read so as not to conflict if this Court decides that by implication, this Court has carved out an exception to the application of the lex loci contractus doctrine.

This is because Kilbreath, supra, and Colhoun, supra, addressed two separate issues. Kilbreath decided when a cause of action for uninsured motorists benefits accrues under Florida law. Id. at 633. Colhoun decided inter alia, how to determine whether Section 95.10 Fla. Stat. applies in a given case and reiterated how to determine where a cause of action in contract

arises for the purpose of determining whether Section 95.10 Fla. Stat. is applicable in such a case. Since these cases clearly address separate issues, there is simply no indication that an exception has been carved out nor a need to carve out such an exception as AUGUST contends.

Moreover, this Court has recently reaffirmed the applicability of the doctrine of lex loci contractus in determining conflict of law questions involving automobile insurance policies. Sturiano v. Brooks, 13 F.L.W. 224 (Fla. March 24, 1988). Thus, it is clear that the lex loci contractus doctrine, at least with respect to its applicability to automobile insurance policies, is still viable when deciding conflicts of law questions. Therefore, the analysis set forth in Colhoun, supra, with respect to determining where a cause of action in contract arises for the purpose of determining whether Florida's "Borrowing Statute" applies to a given case is still viable.

LUMBERMENS also disagrees with AUGUST'S reading of Kilbreath, supra, at page 5 of her Brief where she states that if Kilbreath is followed the claim for uninsured motorist benefits arose in Florida, where the accident occurred. However, Kilbreath determined when a cause of action for uninsured motorists benefits accrues for the purpose of determining when the limitations period begins to run in such cases. Kilbreath did not address the issue of how to determine where a cause of

action for uninsured motorist benefits under a contract of automobile liability insurance arises for the purpose of determining whether to apply Florida's "Borrowing Statute," which is the issue in this case. Thus, Kilbreath, has little, if any, applicability to the issue presently before this Court.

LUMBERMENS also agrees that there is little substantive difference between the words "accrue" and "arise" for limitations purposes. Meehan v. Celotex Corporation, 466 So.2d 1100 (Fla. 3rd DCA 1985). However, there is a significant difference in the words that precede the words "accrue" and "arise". If the word "where" precedes "accrue" or "arise", it is the place or location of the cause of action that is the focus of the Court's inquiry as in this case. If the word "when" precedes the words "accrue" or "arise", the focus is on the time the right of action begins, which is not directly at issue in this case. Therefore, AUGUST should not be permitted to blur the important distinction between "when" and "where" a cause of action accrues or arises because they address clearly separate concepts.

In order to determine where a cause of action accrues/arises for the purpose of determining whether to apply Florida's "Borrowing Statute" in contract actions, a court must decide where the contract was completed. Colhoun, supra at 21. In this case, it is the State of Massachusetts where the automobile liability insurance contract was completed. Therefore, the instant cause of action arose in Massachusetts.

Section 95.10 Fla. Stat. states that the cause of action is barred in Florida if it is barred in Massachusetts. Since the cause of action is barred in Massachusetts pursuant to Massachusetts Statute 260, Section 2A, AUGUST'S cause of action is barred here.

In the second portion of AUGUST'S Brief, it is asserted that State Farm Mutual Automobile Insurance Company v. Olsen, 406 So.2d 1109 (Fla. 1981) and Bates v. Cook, 509 So.2d 1112 (Fla. 1987) evince an intent by this Court to recede from Colhoun, supra. LUMBERMENS disagrees with this contention. This Court has departed from the lex loci delicti rule in determining the choice of law questions regarding statutes of limitations and other substantive choice of law questions in tort actions. Bishop v Florida Specialty Paint Company, 389 So.2d 999 (Fla. 1980); Bates v Cook, supra. However, this Court has also upheld the applicability of the lex loci contractus the rule found in Colhoun regarding choice of law questions with respect to automobile liability insurance policies. Sturiano v. Brooks, supra. In Sturiano, supra, this Court applied the doctrine to determine that New York law applied to determine the insurer's obligation under an automobile liability policy. This Court rejected the Restatement (Second) of Conflict of Law Section 188 (1971) and the "significant relationships test." Thus, this Court has not receded from the Colhoun, supra, opinion but has reaffirmed the application of the lex loci

contractus doctrine's applicability to causes of action brought on contracts of automobile liability insurance. Clearly, Colhoun has not been receded from with respect to the choice of law questions and the doctrine contained therein has been reaffirmed.

AUGUST next contends that logic does not support treating a contract action different from tort when determining where a cause of action arises for the purpose of applying Florida's "Borrowing Statute". However, with regard to an action in contract, the parties enter into the agreement feeling that the law of the jurisdiction in which it is entered is controlling. Sturiano, supra at 226. In an action sounding in tort, there are no foreseen statutes or rules to which the parties, at least impicitly, recognize would control the cause of action. Sturiano Id. Thus, there are reasons that an insurance contract action should be treated differently than an action sounding in tort.

It is logical that this Court would apply the lex loci contractus doctrine to determine where a cause of action arises for the purpose of determining whether Florida's "Borrowing Statute" applies in an action on an automobile liability insurance contract as in this case. This is because this Court in Bates v. Cook, supra, has at least implicitly recognized the proposition that limitation periods and "Borrowing Statutes" are substantive in nature. Thus, as this Court decided in Bates, supra, that the significant relationships test will apply in order to determine where a cause of action arises for the purpose

of applying Florida's "Borrowing Statute" as in other issues of conflicts or tort law; so too should the lex loci contractus doctrine be used to determine where a cause of action arises in order to apply Florida's "Borrowing Statute" as in other issues of substantive automobile liability insurance law Sturiano, supra.

AUGUST cites several cases in her Brief which she asserts stands for the proposition that most courts apply the significant relationships test when determining conflicts of law questions in actions on insurance policies. However, these cases do not address whether the claims before them sound in contract. It is respectfully submitted that these courts did not properly determine whether the claims before them were in contract or tort in their analysis. Therefore, these courts never directly addressed the issue of whether the doctrine of lex loci contractus, which applies to automobile liability insurance contracts, applied to the cases then before them.

The courts that have determined that an action for insurance benefits sounds in contract has applied the lex loci contractus doctrine in determining choice of law questions relative to insurance contracts. Sturiano v. Brooks, supra; Sheehan v. Lumbermens Mutual Casualty Company, 504 So.2d 776 (Fla. 4th DCA 1987); Brooks v. Sturiano, 497 So.2d 976 (Fla. 4th DCA 1986); New Jersey Manufacturers Insurance Company v. Robertazzi, 473 So.2d 235 (Fla. 4th DCA 1985). Thus, when the

requisite initial determination is made by courts confronted with conflicts of law questions relating to contracts of insurance, the lex loci contractus doctrine has been applied.

AUGUST primarily relies upon State Farm Mutual Insurance Company v. Olsen, 406 So.2d 1109 (Fla. 1981) for the proposition that this Court has applied the "significant relationships" test in order to resolve conflicts of law questions regarding insurance contracts. The question to which this Court answered "yes" as posed by the 5th District Court of Appeals was as follows:

> "In a personal injury suite filed in Florida for a tort alleged to have occurred outside of Florida, can the contributory negligence defense by recovery?" Id. at 1110.

Thus, this Court answered the question regarding tort law choice of law principles and not contract choice of law principles. Therefore, Olsen, supra, does not support AUGUST'S contention.

Andrews v. Continental Insurance Company, 444 So.2d 479 (Fla. 5th DCA 1984) is also relied upon by AUGUST who contends that the 5th District Court of Appeals applied Maine law in that case because Maine had the most significant relationship to the occurrence. Respondent's Initial Brief at 9. However, the 5th District stated:

> "Whether we apply the lex loci contractus rule or the restatement's significant relationship test to contract disputes, we must apply the law of Maine." Id. at 42

Thus, it cannot be said that the court's decision in Andrews, supra, was determined by the court's utilization of the significant relationships test.

In the last section of Respondent's Brief, AUGUST asserts that the conclusion is "inevitable" that the significant relationships test must be utilized in order to determine where the instant cause of action arose for purpose of applying Florida's "Borrowing Statute". However, the conclusion that seems most likely to be arrived at in light of this Court's holding of Sturiano v. Brooks, supra, is that this Court intends to adhere to the lex loci contractus doctrine governing choice of law questions in insurance contract cases and insurance contract Limitations questions.

AUGUST further asserts that LUMBERMENS erred by directing this Court to apply Section 188 Restatement (Second) Conflict of Laws and Section 193 Restatement (Second) Conflict of Laws contending that Section 142 (1986) of the Restatement (Second) Conflict of Laws is the applicable section which was adopted in Bates, supra. Within the context in which Section 142 is cited in Bates, supra, Section 142 is cited to support the passage in the opinion which refuses to make the procedural/substantive distinction regarding statutes of limitation. Therefore, this Court did not adopt Section 142 as contended by AUGUST.

Given this Court's decision in Sturiano, supra, which rejected the application of the significant relationship test to

actions based upon automobile liability insurance contracts, LUMBERMENS will briefly address the contention that Sections 188 and 193 of the Restatement (Second) of conflicts of law do not apply to this case. In Sturiano v. Brooks, supra, this Court by implication stated that the "significant relationships" test with respect to insurance contracts could be found in Section 188. Sturiano v Brooks, supra, at 226. Further, Section 188 provides the contacts that are to be applied in contract cases which are correlative of the general principles outlined in Section 6 of the Restatement of Conflicts of Laws which is commonly referred to as the "significant relationships test". Clearly, if this Court rejects the application of the lex loci contractus doctrine, Section 188 is applicable to the case at bar. Section 193 Restatement (Second) Conflict of Laws also provides the significant relationship factors correlative of Section 6 and indicates that the paramount factor is the location of the insured risk. Thus, the Section 188 and 193 of the Restatement of Conflict of Laws is applicable to the case at bar if the Court so decides to abandon the lex loci contractus rule.

Lastly, AUGUST argues that Florida has the most significant relationship to this case because the accident occurred here and Florida has an interest in protecting its uninsured motorists drivers from foreign subrogation actions. LUMBERMENS submits that where the cause of action occurs is not

determinitive of which state law applies regarding tort actions _Bishop v Florida Specialty Paint Company_, supra, and where an accident occurs is not determinitive of when answering the question of which state's law applies in automobile insurance cases. Further, allowing an action to be brought in Florida in spite of the fact that both parties to the action are Massachusetts residents litigating a Massachusetts contract of automobile liability insurance, which litigation is barred if brought in Massachusetts, can hardly be said to be protecting the Florida uninsured motorist if the Massachusetts insurance carrier is found liable in Florida on the contract of insurance and thereafter pursues its subrogation rights against the Florida driver. To allow this action is clearly contrary to the purpose of Section 95.10 Fla. Stat. which is:

> ". . . to give no greater life in the foreign jurisdiction than it would have in the state whose substantive law is to be applied . . ." _Meehan v. Celotex Corporation_, supra, at 1102 and period one.

In summation, the 4th District Court of Appeal erred in refusing to apply Section 95.10 Fla. Stat. in this case. This is because that this Court erred in finding that the instant cause of action, which was based on a Massachusetts contract of automobile liability insurance which was completed between a Massachusetts insured and insurer arose in Florida. This decision is based on the erroneous reasoning that a cause of action in contract accrues for the purpose of applying the borrowing statute where the accident occurred. Clearly, the

action in contract for uninsured motorist benefits arose in Massachusetts either under the lex loci contractus doctrine or under the significant relationships test. Because the cause of action is barred in Massachusetts, it is barred here. Section 95.10 Fla. Stat.

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.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing has been furnished by mail the 29th of April, 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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