

O/A 5-25-88 4-8

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

LUMBERMENS MUTUAL CASUALTY
COMPANY,

Petitioner,

vs.

SUSAN AUGUST,

Respondent.

MAR 25 1988
CLERK OF THE COURT
By Deputy Clerk

RESPONDENT'S REPLY BRIEF

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INTRODUCTION

Throughout this Brief, the Petitioner, LUMBERMENS MUTUAL CASUALTY COMPANY, will be referred to as "PETITIONER" or "LUMBERMENS", and Respondent, SUSAN AUGUST, will be referred to as "RESPONDENT", or "SUSAN AUGUST".

FACTS

RESPONDENT accepts PETITIONERS statement of the facts.

ISSUE

I. WHETHER THE FOURTH DISTRICT COURT OF APPEALS CORRECTLY DECIDED THAT THE INSTANT CLAIM FOR UNINSURED MOTORIST BENEFITS UNDER A MASSACHUSETTS CONTRACT OF INSURANCE FOR INJURIES SUSTAINED IN AN ACCIDENT WHICH OCCURRED IN FLORIDA, AROSE IN FLORIDA, AND THEREFORE, SECTION 95.10 FLA. STAT., WAS NOT APPLICABLE AND FLORIDA'S STATUTE OF LIMITATIONS CONTROLS.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeals correctly determined the instant cause of action arose in Florida. Thus, Florida's "Borrowing Statute" is inapplicable. The Fourth District Court of Appeal's decision is correct because this Court has departed from the use of lex loci contractus in determining where contract causes of actions arise, at least with respect to actions for uninsured motorist benefits under contracts for automobile insurance. We reach this conclusion under either one of two theories.

First, this Court holds that a cause of action for uninsured motorist benefits accrues on the date of the automobile accident. Accordingly, there the cause of action arises. Since the cause of action arises in Florida on the date of the accident in question, Florida's "Borrowing Statute" is not triggered and thus Florida statute of limitations controls.

Second, this Court has recently stated that just as in other issues of substantive law, the significant relationship test should be used to decide conflict of law questions concerning the statute of limitations. Further, this Court has applied the significant relationship test to resolve substantive questions of law in actions for uninsured motorist benefits under a contract for automobile insurance. It follows then that we must apply the significant relationship test to determine the conflict of laws question of the applicable statute of limitations in this case.

Applying the significant relationship test set out in Section 142 of the Restatement (Second) of Conflict of Laws to the facts of this case, it is clear that Florida has the most significant relationship to this cause of action. Specifically, the accident occurred in Florida and Florida has a paramount interest in protecting the rights of its citizens who are subject to subrogation. Accordingly, based on the facts of this case, the "Borrowing Statute" is not triggered and Florida's five year statute of limitations controls.

ARGUMENT

I. THE FOURTH DISTRICT COURT OF APPEALS CORRECTLY DECIDED THAT THE INSTANT CLAIM FOR UNINSURED MOTORIST BENEFITS UNDER A MASSACHUSETTS CONTRACT OF INSURANCE FOR INJURIES SUSTAINED IN AN ACCIDENT WHICH OCCURRED IN FLORIDA, AROSE IN FLORIDA, AND THEREFORE, SECTION 95.10 FLA. STAT., WAS NOT APPLICABLE AND FLORIDA'S STATUTE OF LIMITATIONS CONTROLS

PETITIONER correctly claims that Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972), stands for the proposition that where a contract is made, there a cause of action for breach of contract accrues. However, with respect to the facts of this case, the result reached by the Fourth District Court of Appeals is correct under the present status of the law on claims for uninsured motorist benefits under contracts for automobile insurance.

The following argument will show that this Courts rulings in State Farm Mutual Automobile Insurance Company v. Olsen, 409 So.2d, 1109 (Fla. 1981), State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So.2d 632 (Fla. 1982), and Bates v. Cook, Inc., 509 So.2d 1112 (Fla. 1987), establish that this Court has effectively retreated from Colhoun's strict mechanical construction of where a cause of action in contract arises, at least as to actions for uninsured motorist benefits under a contract for automobile insurance. Alternatively, if this Court does not believe it has receded from Colhoun with respect to uninsured motorist claims, RESPONDENT respectfully submits this Court should now recede from Colhoun's use of lex loci contractus in determining where a cause of action for uninsured motorist benefits under a contract for automobile insurance arises.

I. THE CAUSE OF ACTION ACCRUED AND THUS AROSE IN FLORIDA.

As the Fourth District Court of Appeals stated, for an uninsured motorist claim, a cause of action accrues, and the statute of limitations begins to run, from the date of the accident, rather than on the date of compliance with the conditions precedent contained in the insuring agreement. State Farm Mutual Automobile Insurance Company v. Kilbreath, 419 So.2d 632 (Fla. 1982). Significantly, Florida law does not distinguish between the term "arise" and "arose" with the terms "accrue" and "accrued". Meehan v. Celotex Corp., 466 So.2d 1100 (Fla. 3rd DCA 1985). Clearly, if Kilbreath and Colhoun are read so as not to conflict, we must conclude that this Court has carved out an

exception to the strict use of lex loci contractus in determining when a cause of action in contract arises and has determined to the treat actions for uninsured motorist benefits under contracts for automobile insurance separately from traditional breach of contracts such as in Colhoun. Following Kilbreath, the instant claim for uninsured motorist benefits arose in Florida where the accident occurred. Since Florida's "Borrowing Statute" only applies if the cause of action arises in another state, Florida's five year statute of limitations controls this action.

II. FLORIDA HAS THE MOST SIGNIFICANT
RELATIONSHIP TO THIS OCCURRENCE.

Alternatively, Respondent submits that this Court's holdings in State Farm Mutual Automobile Insurance Company v. Olsen, 409 So.2d 1109 (Fla. 1981) and Bates v. Cook, 509 So.2d 1112 (Fla. 1987) demonstrate an intent by this Court to depart from Colhoun, supra.

In Bates, the United States Court of Appeals certified the following question to this Court:

For the purpose of applying Florida's limitation of actions "Borrowing Statute", a Fla.Stat. Ann., Section 95.10 (West, 1982), is the determination whether a cause of action for theft or trade secrets has arisen in a state other than Florida to be made solely with reference to the state in which the "last act necessary to establish liability" occurred, Colhoun v. Greyhound Lines, Inc., 265 So.2d 18,21 (Fla. 1972), or with reference to "significant relationships" that the respective states have to the cause of action. Bishop v. Florida Specialty Paint Co., 389 So.2d 999, 1000-01, (Fla. 1980)? Cf. Pledger v. Burnup and Sims, Inc., 432 So.2d 1323, (Fla. App. 4th Dist., 1983), review denied, 446 So.2d 99 (Fla. 1984); Meehan v. Celotex Corp., 466 So.2d 1100 (Fla. App. 3rd Dist., 1985); Steiner v.

Mount Vernon Fire Ins. Co., 470 So.2d 3; (Fla. App. 2nd Dist. 1985) (per curiam).

Answering the certified question, this Court stated:

We are now convinced that just as in the case of other issues of substantive law, the significant relationships test should be used to decide conflicts of law questions concerning the statute of limitations.

Id. at 1113.

Admittedly, the question posed was limited to a tort action. However, the holding fails to restrict its applicability to only those actions sounding in tort. Moreover, for purposes of determining which state a cause of action arose in order to resolve the statute of limitations question, the policy justifications for utilizing the significant relationship test in determining where a cause of action sounding in tort arose, are equally pertinent and relevant in determining where a cause of action sounding in contract arose. Simply put, there is no logical reason to treat a contract action differently from a tort action with respect to where the cause of action arose for purposes of the limitations issue.

Implied in the Bates holding is the proposition that conflict of law questions concerning the statute of limitations are substantive. Moreover, [m]ost writers are now in agreement that insofar as the statute of limitations and related borrowing sections deny any judicial relief to a tardy plaintiff, they ought to be characterized as substantive. See Goodrich, conflict of law, Section 22 (Third Edition, 1949).

While it is fair to say that a review of the case law reveals there is no accord on the test to be utilized in resolving conflict of law questions in order to determine which states law applies to both interpretation of contracts and substantive questions of law arising out of claims for uninsured motorist benefits under a contract of automobile liability insurance, a majority of Courts, including this Court, have applied the significant relationship. See Safeco Insurance Company of America v. Ware, 424 So.2d 907 (Fla. 4th DCA, 1982), (significant relationship test utilized to determine if Florida had significant relationship with policy issued in New Jersey). Allstate Insurance Company v. Pierce, 468 So.2d 536 (Fla. 3rd DCA, 1985), (significant relationship test used to find North Carolina law governs the scope of uninsured motorist coverage under a North Carolina policy). Petrik v. New Hampshire Insurance Company, 379 So.2d 1287 (Fla. 1st DCA, 1979), (significant relationship test applied to determine which states law controls the interpretation of an uninsured motorist policy issued in California), and State Farm Mutual Automobile Insurance Company v. Olsen, 406 So.2d 1109 (Fla. 1981)(see below). In contrast, see Continental Insurance Company v. Howe, Sr., 488 So.2d 917 (3rd DCA, 1986)(where claim for uninsured motorist benefits filed in Florida for an accident in Florida lex loci contractus utilized to construe Rhode Island Insurance policy).

In Olsen, supra, a Florida resident was killed in an automobile accident in Illinois with an uninsured Illinois

motorist. The deceased was insured under a policy of automobile liability insurance issued in the State of Florida. The decedents wife filed a demand for arbitration for uninsured motorist benefits and asked that arbitration be governed by the substantive law of the State of Florida, i.e., comparative negligence. Id. at 1110. This Court, relying on its ruling in Bishop v. Florida Specialty Paint Company, 389 So.2d 999, (Fla. 1980), applied the significant relationship test as set forth in the Restatement (Second) of Conflict of Laws, Section 145-146 (1971), to determine whether the substantive law of Illinois, where the auto accident occurred, or of Florida, where the uninsured motorist contract was made, should control the substantive law question of comparative negligence. This Court, applying the significant relationship test found Illinois to have the most significant relationship with the occurrence. In reaching its holding, this Court reasoned the automobile accident occurred in Illinois and Illinois had an interest in the rights of its citizen who was subject to subrogation by the insurer on any uninsured motorist coverage the insurer paid to the insured, which interest was paramount to the relevant policies of Florida as the forum state. Id. at 1111.

While reaching the opposite result, similar reasoning is found in Andrews v. Continental Insurance Co., 444 So.2d 479 (Fla. 5th DCA, 1984). In Andrews, a Maine resident was injured in an automobile accident in Florida by an underinsured Florida resident. Unlike Olsen, in Andrews, with insurers consent, had

settled with and released the Florida underinsured motorist who had caused the injuries. Absent the need to protect a citizen of Florida, the Court found Maine, where the contract was made, the state with the most significant relationship to the occurrence, and held that Maine law should apply. Id. at 482.

If Olsen and Bates are construed together, it is clear this Court has retreated from Colhoun in determining where a cause of action for uninsured motorist benefits under a contract for auto insurance arises. Since Olsen shows us that the significant relationship test controls conflict of law questions of substantive law in uninsured motorist claims and Bates tells us that the statute of limitations should be treated as other issues of substantive law in deciding conflicts of law questions, we are led to the inescapable conclusion that the significant relationship test must be utilized here to determine where this action for uninsured motorist benefits under a contract for automobile insurance arose. As this Court noted, the Bates ruling does not do violence to Florida's borrowing statute. We simply hold that the significant relationship's test should be employed to decide in which state the cause of action "arose". The "Borrowing Statute" will only come into play if it is determined that the cause of action arose in another state. Id. at 1113.

III. UNDER SECTION 142 OF THE RESTATEMENT
(SECOND) OF CONFLICT OF LAWS, FLORIDA
HAS THE MOST SIGNIFICANT RELATIONSHIP
TO THIS OCCURRENCE.

Once we reach the inevitable conclusion that the significant relationship test must be utilized in determining where this cause of action arose, we must next resolve which significant relationship test is to be applied. Petitioners erroneously assert that if this Court adopts the significant relationship test to determine where this cause of action arose, this Court must choose either section 188, Restatement (Second) of Conflict of Laws which governs general contract actions, or Section 193 of the Restatement (Second) of Conflict of Laws, which governs contracts of fire, surety or casualty insurance. To the contrary, those sections do not control here where there is no question of the rights and liabilities of the parties to the contract, nor is there a question as to the validity of the contract.

In deciding the question of which State's statute of limitations should control, Bates cited and adopted the significant relationship test set out in Section 142 of the Restatement (Second) of Conflict of Laws, (1986) which reads as follows:

An action will be maintained if is not barred by the Statute of Limitations of the forum unless the action would be barred in some other state which, with respect to the issue of limitations, has a more significant relationship to the parties and the occurrence.

Id. at 1113. The key under Section 142 is which state has the most significant relationship to the issue of the statute of limitations.

Clearly, Florida's statute of limitations would apply to any tort action arising out of an automobile accident in the state of Florida regardless of the residence of the parties. Moreover, as in Olsen, the Florida resident, third party tortfeasor is subject to subrogation by the insurer for any benefits paid to SUSAN AUGUST. Protection of its citizens from subrogation, coupled with the fact that the accident occurred here, renders Florida the state with the most significant relationship to the substantive issue of the statute of limitations.

Applying the principles of Kilbreath, Bates and Olsen to the facts at bar, it is clear this Court has departed from Colhoun, at least with respect to actions for uninsured motorist benefits under a policy for automobile insurance. Accordingly, this Court must conclude either:

a. This cause of action for uninsured motorist benefits under a contract for auto insurance accrued and the statute of limitations began to run on the date of the accident in Florida and thus Florida's statute of limitations controls. Kilbreath at 633.

b. Or alternatively, the significant relationship test set out in section 142 of the Restatement (Second) of Conflict of Laws (1986) should be employed to decide in which state this claim for uninsured motorist benefits "arose" and thus resolve the conflict of laws question concerning the substantive issue of the applicable statute of limitations. See Bates at 397.

c. Since the accident occurred in Florida and Florida has a paramount interest in protecting its resident tortfeasor from subrogation, Florida has the most significant relationship to the occurrence. See Olsen at 1111 and 1112.

d. Because Florida has the most significant relationship to the occurrence, there the cause of action arose and Florida's "Borrowing Statute" is inapplicable. Accordingly, Florida's statute of limitations controls.


CONCLUSION

Based on the foregoing law and argument, the Respondent, SUSAN AUGUST, respectfully requests this Court affirm the decision of the 4th District Court of Appeal allowing SUSAN AUGUST to pursue her claims for uninsured motorist benefits against Petitioner LUMBERMENS MUTUAL CASUALTY COMPANY.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing has been furnished by mail the 14th day of March, 1988 to: Pyszka, Kessler, Massey, Weldon, Catri, Holton & Douberley, P.A., 707 Southeast Third Avenue, 100 Blackstone Building, Fort Lauderdale, Florida 33316.

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