No. 122556

IN THE
SUPREME COURT OF ILLINOIS

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, *Plaintiff/Counter-Defendant*, vs. WALTER KROP, individually and as father and next friend of T.K., a minor, LISA KROP, and MARY ANDRELOAS, as next best friend of A.A., a minor, *Defendants/Counter-Plaintiffs.*	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-16-1071 There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 14 CH 17305
WALTER KROP, LISA KROP and TOMMY KROP, *Third-Party Plaintiffs-Appellees*, vs. ANDY VARGA, *Third-Party Defendant-Appellant*.	The Honorable Neil H. Cohen, Judge Presiding.

BRIEF OF THIRD-PARTY DEFENDANT-APPELLANT, ANDY VARGA

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

Plaintiff American Family Mutual Insurance Company brought a declaratory judgment action against defendant Walter Krop, individually and as father and next friend of T.K., a minor, and defendant Lisa Krop. The suit sought a declaration that an American Family insurance policy provided no coverage for a suit against the Krops seeking damages for mental distress, mental abuse, defamation, false light invasion of privacy, and intentional infliction of emotional distress. In response, the Krops brought a counterclaim against American Family and a third party complaint against American Family agent Andy Varga.

Count I of the counterclaim/third party complaint alleged Varga violated section 2-2201 of the Illinois Code of Civil Procedure when he failed to procure for the Krops the insurance coverage they requested. 735 ILCS 5/2-2201(d). Count II sought relief against American Family under the doctrine of *respondeat superior*. Counts III and IV asked that that the policy be reformed to provide coverage for the Krops in the underlying case.

Both American Family and Varga moved to dismiss the counterclaim/third party complaint based on the two-year statute of limitations for actions against insurance producers set forth in the Code of Civil Procedure. 735 ILCS 5/13-214.4. The trial court granted the motions because the counterclaim/third party complaint was not filed within two years of the time that the Krops received the American Family policy.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court correctly ruled that the insured's suit was untimely because it was filed more than two years after they received their insurance policy and had the opportunity to review its contents?

2. Whether the appellate court incorrectly imposed a fiduciary duty (a) on the third party defendant, who was not an insurance broker, but a captive sales; and (b) whether the imposition of a fiduciary duty violates 735 ILCS 5/2-2201, even if the third party defendant had been a broker?

3. Whether the discovery rule applies to this case?

STATEMENT OF JURISDICTION

The trial court entered its order dismissing the Krops' counterclaim/ third party complaint in its entirety on February 4, 2016 (R. C834-C837). On February 18, 2016, the trial court found there was no just reason to delay the appeal or enforcement of its order as to third party defendant Andy Varga (R. C850). On March 17, 2016, the trial court denied the Krops' motion to reconsider and the Krops timely filed their notice of appeal on April 14, 2016 (R.C978-80).

The appellate court reversed the trial court's judgment on May 10, 2017 (A9-A22). Varga filed a petition for rehearing within 21 days on May 31, 2017, which was denied on June 29, 2017 (A23). Varga then timely filed his petition for leave to appeal with this Court on August 3, 2017.

STATUTES INVOLVED

Section 5/13-214.4 of the Code of Civil Procedure (735 ILCS 5/13-214.4) provides the following statute of limitations with respect to actions against insurance producers:

> Actions against insurance producers, limited insurance representatives, and registered firms. All causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer, registered firm, or limited insurance representative concerning the sale, placement, procurement, renewal, cancellation, or failure to procure any policy of insurance shall be brought with two years of the date the cause of action accrues.

Section 5/2-2201 of the Code of Civil Procedure (735 ILCS 5/2-2201) provides the following with respect to "Insurance Placement Liability":

> **Sec. 2-2201. Ordinary care; civil liability**.
>
> (a) An insurance producer, registered firm, and limited insurance representative shall exercise ordinary care and skill in renewing, procuring, binding, or placing the coverage requested by the insured or proposed insured.
>
> (b) No cause of action brought by any person or entity against any insurance producer, registered firm, or limited insurance representative concerning the sale, placement, procurement, renewal, binding, cancellation of, or failure to procure any policy of insurance shall subject the insurance producer, registered firm, or limited insurance representative to civil liability under standards governing the conduct of a fiduciary or a fiduciary relationship except when the conduct upon which the cause of action is based involves the wrongful retention or misappropriation by the insurance producer, registered firm, or limited insurance representative of any money that was received as premiums, as a premium deposit, or as payment of a claim.
>
> (c) The provisions of this Section are not meant to impair or invalidate any of the terms or conditions of a contractual agreement between an insurance producer, registered firm, or limited

> insurance representative and a company that has authority to transact the kinds of insurance defined in Class 1 or clause (a), (b), (c), (d), (e), (f), (h), (i), or (k) of Class 2 of Section 4 of the Illinois Insurance Code.
>
> (d) While limiting the scope of liability of an insurance producer, registered firm, or limited insurance representative under standards governing the conduct of a fiduciary or a fiduciary relationship, the provisions of this Section do not limit or release an insurance producer, registered firm, or limited insurance representative from liability for negligence concerning the sale, placement, procurement, renewal, binding, cancellation of, or failure to procure any policy of insurance.

STATEMENT OF FACTS

Underlying Facts

According to the counterclaim/third party complaint, in March 2012, Walter and Lisa Krop met with Andy Varga, an "insurance producer and sales agent of American Family" (R. C405 at ¶ 3). According to the Krops, they provided Varga with a copy of their Travelers' insurance policy and requested a "homeowners policy of insurance that provided coverages equal to the coverages provided by Travelers" (R. C405 at ¶ 7). The Travelers policy covered "personal liability" for claims seeking damages for "bodily injury," "property damage" or "personal injury" (R. C455). Personal injury was defined under the Travelers contract as including "libel, slander or defamation of character" and "invasion of privacy" (R. C443). The Krops alleged that Varga agreed to obtain a policy with the same or better coverage at a comparable or lower rate (R. C415-16 at ¶ 8).

American Family issued its homeowners policy to the Krops on March 21, 2012 (R. C5 at ¶ 5). The American Family policy covers "personal liability" for "bodily injury" and "property damage," but not "personal injury" (R. C472). Upon receipt of the policy in March 2012, the Krops did not complain that the American Family contract did not include personal injury coverage or include any mention of liability coverage for "libel, slander or defamation of character" and "invasion of privacy." The policy was renewed by the Krops in 2013, 2014 and 2015 (R. C653—the policy "remained in force").

On May 14, 2014, the Krops' son, Tommy Krop, was sued by Mary Andreolas, as next best friend of AA, a minor, in the Circuit Court of Cook County, no. 14 L 005785 (R. C11-23). The complaint, which was subsequently amended to include Walter and Lisa Krop as defendants, seeks damages for defamation, false invasion of privacy and intentional infliction of emotional distress (R. C217-42, C499-531). The Andreolas suit is predicated upon alleged harassment and bullying of AA by minor defendants, including Tommy Krop (*Id.*).

By letter dated August 20, 2014, American Family denied coverage for the Andreolas suit on the basis that the policy did not cover claims for defamation or violation of privacy or provide insurance for emotional distress (R. C532-37). On October 24, 2014, American Family filed the instant case for a declaratory judgment that its policy does not cover the Andreolas suit (R. C3).

Almost a year later, on September 22, 2015, the Krops filed their counterclaim and third-party action against American Family and Varga (R. C414). The Krops alleged that Varga was negligent in failing to obtain the coverage requested by the Krops, in failing to advise that he was unable to procure a policy with the same or better coverage as the Travelers policy and in misrepresenting the insurance, and that American Family was vicariously liable for Varga's conduct because he was its agent (R. C414-19). In response to the counterclaim and third-party complaint, Varga, as well as American Family, filed motions to dismiss, urging, *inter alia,* that the Krops' claims were barred as being filed after the expiration of the two-year statute of limitations for actions against insurance producers, 735 ILCS 5/13-214.4 (R. C561, 572).

Trial Court Decision

Following *Hoover v. Country Mutual Ins. Co.*, 2012 IL App (1st) 110939, the circuit court granted the motions to dismiss, ruling that the Krops' claims as to the negligent procurement of the insurance were time-barred (R. C834-37). The court ruled that while the discovery rule applied in cases involving section 13-214.4, an insured has a duty to know the contents of his or her policy, and it was undisputed that the Krops were provided with a copy of the policy of insurance in March 2012. Thus, they were aware of the alleged breach in procuring the insurance at that time, and their suit, which was filed more than three years later, was barred by violated the statute of limitations (R. C836).

Appellate Court Decision

The appellate court reversed. That court held that agent Varga was a fiduciary with respect to the Krops. Opin. at ¶ 35. According to the appellate court, in the case of an action against a fiduciary, an insured neither knows nor reasonably should know of his injury until coverage is denied, and the cause of action did not accrue until that time. *Id*.

ARGUMENT

I. THE KROPS' SUIT AGAINST THIRD PARTY DEFENDANT VARGA WAS UNTIMELY BECAUSE IT WAS BROUGHT MORE THAN TWO YEARS AFTER THE KROPS RECEIVED THEIR AMERICAN FAMILY INSURANCE POLICY.

The trial court granted Varga's motion to dismiss brought pursuant to section 2-619(a)(5) of the Code. 735 ILCS 5/2-619(a)(5) (R. C835). Section 2-619(a)(5) provides that an action may be dismissed if it "was not commenced within the time limited by law." A dismissal pursuant to section 619 is reviewed *de novo*. *Northern Trust Co. v. County of Lake*, 353 Ill. App. 3d 268, 274 (2d Dist. 2004).

Aplying the two-year limitations period of section 13-214.4, the trial court dismissed this case based upon the rule stated in *Hoover v. Country Mutual Ins. Co.*, 2012 IL App (1st) 110939. *Hoover* held that a cause of action based upon the an alleged failure to procure insurance accrues at the time the policy is received by the insured. *Hoover* at ¶ 52. *Hoover* explained "that for contract actions and torts arising out of contractual relationships, the cause of

action accrues at the time of the breach of the contract, not when a party sustains damages." *Id.*, citing *Indiana Ins. Co. v. Machon & Machon, Inc.*, 324 Ill. App. 3d 300, 303 (1st Dist. 2001). *Machon*, another section 13-214.4 case, says exactly the same thing.

The source of the statement that the cause of action accrues at the time of the breach, cited in *Machon*, is this Court's opinion in *West American Ins. Co. v. Sal E. Lobianco & Son Co.*, 69 Ill. 2d 126 (1977). The *Lobianco* explained the rationale for the rule as being that the breach of contract itself is actionable and a party should be encouraged to bring suit within the period of limitations rather than delay until damages increase. 69 Ill. 2d at132. *Accord*, *State Farm Fire & Cas. Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 565 (1st Dist. 2009); *Del Bianco v. American Motorists Ins. Co.*, 73 Ill. App. 3d 743, 748 (1st Dist. 1979).

A review of the Hoover decision, and another recent appellate decision, *RVP, LLC v. Advantage Ins. Services, Inc.*, 2017 IL App (3d) 160276 (Petition for Leave to Appeal pending, docket 122133), which arose on similar facts, not all that different from those presented in the case at bar, demonstrates a proper working of the limitations period of section 13-214.4.

In *Hoover* the insured maintained that a Country Mutual insurance agent failed to obtain an insurance policy which provided replacement cost coverage for their home as they requested. The policy was issued by Country Mutual in May 2007. In January 2008, an explosion completely destroyed the Hoovers'

home. Alleging the Country Mutual policy was inadequate to cover their loss because it did not cover full replacement cost, the Hoovers sued the agent and Country Mutual in 2010, alleging various contract and negligence causes of action arising out of the agent's failure to procure a full replacement value policy.

In ruling that the suit was not brought within the two-year statute of limitation as provided by section 13-214.4 of the Code of Civil Procedure, the court addressed when the cause of action accrued:

> In this case, the cause of action accrued in May 2007 when Spann allegedly procured an insurance policy for the Hoovers that did not comply with their request and the statute of limitation would have expired in May 2009. Therefore, since the Hoovers filed their initial complaint on March 3, 2010, more than two years after the cause of action accrued, the complaint was untimely . . ..

2012 IL App (1st) 110939 at ¶ 52. The court noted that, notwithstanding plaintiffs' desire for full replacement value, the policy declarations had limits of liability that precluded full replacement costs that the insureds at no time attempted to change. *Hoover* at ¶¶ 56-58

In *RVP* the insured operated a recycling facility and had insurance policies covering its buildings, equipment, stock and inventory. When its insurers decided not to renew those policies, it asked its insurance broker to find same or similar coverage. However, the replacement policies, issued August 1, 2009, did not provide as much coverage for one of RVP's buildings

or for its equipment. On September 2, 2011, a fire destroyed both of RVP's buildings and the contents thereof.

The replacement policies were allegedly inadequate to cover RVP's losses and it sued its broker for negligence and breach of contract for failing to procure the insurance coverage it had requested. The suit was filed on August 30, 2013, which RVP contended was timely because it did not become aware of the lower coverage limits until after the September 2, 2011 fire. The appellate court disagreed, holding the suit barred by the two-year statute of limitations:

> Here, plaintiffs applied for and received $1,545,000 and $545,000 of coverage on the two buildings and $75,000 of coverage for business property. Plaintiffs received copies of the policies reflecting those coverage limits. Under this scenario, at the time plaintiffs received the policies, they should have been aware that they would not be extended any higher coverage than that of the policy coverage limits for which they had applied. Although plaintiffs argue there was no evidence of their actual knowledge of the policy limits, they should have reasonably known of the policy limits upon receiving the policies or the renewals of the policies, both of which indicated the coverage limits. See *Celotex*, 88 Ill. 2d at 414.

2017 IL App (3d) 160276 at ¶ 32.

These decisions follow from two well established rules. First, as stated above and in this Court's decision in *Lobianco*, for torts arising out of a contractual relationship, the cause of action accrues at the time of the breach of the contract, not when the damages are suffered. *West American Ins. Co. v. Sal E. Lobianco & Son Co.*, 69 Ill. 2d 126, 132 (1977). Second, an insured has a duty to read his insurance policy:

> Illinois courts have repeatedly held that when an insured sues his or her insurer after failing to note a discrepancy between the policy issued and received and the policy requested or expected, the insured will be bound by the contract terms because he or she is under a duty to read the policy and inform the insurer of any discrepancy so that a prompt correction may be made without prejudicing the rights of either party.

Perelman v. Fisher, 298 Ill. App. 3d 1007, 1011 (1st Dist. 1998), citing *Black v. Illinois Fair Plan Ass'n*, 87 Ill. App. 3d 1106, 1110 (5th Dist. 1980); *Foster v. Crum & Forster Ins. Cos.*, 36 Ill. App. 3d 595, 598 (5th Dist. 1976). *Accord*, *Gaudina v. State Farm Mut. Auto. Ins. Co.,* 2014 IL App (1st) 131264, ¶ 29 ("a duty is imposed upon the insured to have read the policy and to have informed the insurer of any discrepancy prior to the time of filing a claim"); *Garrick v. Mesirow Financial Holdings, Inc.*, 2013 IL App (1st) 122228, ¶ 49 ("Illinois law places a burden on the insured to know its needs for coverage and the contents of its insurance policies"); and *Industrial Enclosure Corp. v. Glenview Ins. Agency, Inc.*, 379 Ill.App. 3d 434, 440 (1st Dist. 2008) ("[T]he burden was on plaintiff to know the import and meaning of the insurance contract").

Applying *RVP* and *Hoover* to the case at bar, the Krops received their American Family policy in March 2012. After that, they had two years to discover whether it provided the same coverage as their prior Travelers policy, which they simply could have done by comparing the two policies. The two policies were not that long (19 and 16 pages) (R. C443-61; C464-79). Neither are written in legal jargon, nor are they in any way ambiguous with respect to the coverage in issue here. The Travelers policy provided coverage

for "libel, slander or defamation of character" and "invasion of privacy" (R. C443). The American Family policy was silent on the issue.

Given the plain fact that the American Family policy did not provide the same coverage as the Travelers policy, the Krops' duty to read their policy, and the fact that they alleged nothing preventing them from discovering that the American Family policy was not the same as their prior Travelers policy, the statute of limitations in this case began to run in March 2012, when they received their policy. Their suit against Varga, brought in October 2014, was untimely.

II. THE APPELLATE COURT'S APPLICATION OF A FIDUCIARY DUTY CONCEPT TO DELAY THE RUNNING OF THE STATUTE OF LIMITATIONS WAS BOTH LEGALLY AND FACTUALLY INCORRECT.

The appellate court based its opinion upon the rationale that American Family agent Varga was a fiduciary with respect to the Krops. Opin. at ¶ 35. In the case of a fiduciary, according to the court, an action for failure to procure insurance against the agent does not accrue until coverage is denied. *Id*. This issue was not briefed in either the trial or appellate courts (except on a petition for rehearing) because it was not raised by the parties in that third party defendant Varga is not a broker but is a captive sales agent of American Family.

It is undisputed that Varga was not an agent of the Krops, but was an "American Family sales agent." Opin. at ¶ 4. The record is clear. In paragraph 3 of the counterclaim and third-party complaint, the Krops allege

that Varga "was, at all relevant times, an Illinois duly licensed insurance producer and sales agent of AMERICAN FAMILY" (R. C415). Paragraphs 21 and 22 repeat the allegation that Varga was acting as an agent of American Family (R. C419). There is no allegation in the counterclaim and third-party complaint (or anything else in the record suggesting) that Varga ever acted as an agent for the Krops or as an insurance broker. Plainly, he did not. Furthermore, this was all reemphasized to the appellate court in a petition for rehearing.

Two of the principal decisions on which the appellate court here relied in reaching its erroneous decision that Varga owed fiduciary duties to the Krops involved brokers, not captive sales agents. *Perelman v. Fisher*, 298 Ill. App. 3d 1007 (1st Dist. 1998); *Broadnax v. Morrow*, 326 Ill. App. 3d 1074 (4th Dist. 2002). The court also begins its analysis at paragraph 16, citing a number of cases, all of which involved the fiduciary relationship between a broker and an insured, none of which should have been applicable to the case at bar.

At common law, a captive agent like Varga, owed no fiduciary duty to an insured, while an independent broker, retained by the insured often did, depending on the facts of the case. *Skaperdas v. Country Cas. Ins. Co.*, 2015 IL 117021 at ¶¶ 25-26; *Babiarz v. Stearns*, 2016 IL App (1st) 150988 at ¶ 46 ("Insurance brokers owe their clients a fiduciary duty; however this court has consistently held insurance agents do not") (citations omitted).

> A broker is an individual who procures insurance and acts as a middleman between the insured and the insurer, who solicits insurance business from the public under no employment from any special company and who, having secured an order, places the insurance with the company selected by the insured, or in the absence of any selection by the insured, with a company he selects himself. An agent is an individual who has a fixed and permanent relation to the companies he represents and who has certain duties and allegiances to such companies.

Skaperdas at ¶ 19 (citations omitted).

The enactment of section 2-2201 of the Code of Civil Procedure in 1997, changed the common law in some respects. Subsection (b) provides that no insurance producer (which *Skaperdis* said included both agents and brokers) shall be subject to "civil liability under standards governing the conduct of a fiduciary" except with respect to the handling of money (735 ILCS 5/2-2201(b)). Statutes are to be interpreted according to their plain and ordinary meaning. *Skaperdas* at ¶ 15. Thus, it would seem that the appellate court here was in error by applying fiduciary standards at all, as a matter of law, regardless of Varga's status as a captive agent.

Moreover, subsection (a) states that an insurance producer shall exercise "ordinary care" in procuring insurance. *Skaperdis* states: "The duty of ordinary care imposed in subsection (a) is not based on a fiduciary relationship between an insurance producer and the insured." *Id*. at ¶ 26.

In sum, section 2-2201 appears to have erased fiduciary standards of conduct with respect to all insurance producers (except when dealing with

money) which eviscerates the rationale for the appellate court's decision here, which, in any event, should never have been applied to a captive agent like Varga to begin with.

III. THE APPELLATE OPINION IMPROPERLY PRECLUDED ANY INQUIRY INTO WHETHER AN INSURED KNEW OR SHOULD HAVE KNOWN ABOUT THE DEFICIENCIES IN COVERAGE.

This appeal was submitted to the appellate court based upon the Krops' argument, devoid of any factual basis, that the discovery rule tolled the statute of limitations. The appellate court, however, converted the issue into when a cause of action for failure to procure insurance accrues. The appellate opinion holds that the cause of action does not accrue until coverage is denied. Under the appellate holding, it makes no difference whether an insured had knowledge of deficiencies in the policy. Here, there was no remand to see if the Krops knew all along whether the policy would not have covered the Andreolas suit. The opinion absolves insureds of any duty to learn the contents of their policies and continues the statute of limitations indefinitely. Surely, this is not the law.

While third party Varga believes that the discovery rule does not apply to the case at bar for the reasons stated in point I, he has never taken the position that the discovery is inapplicable to failure to procure cases generally. For instance, *General Casualty Co. of Illinois v. Carroll Tiling Service Inc.*, 342 Ill. App. 3d 883 (2d Dist. 2003), illustrates perfectly how the discovery rule applies to some claims and not to others. In *Carroll Tiling*, a company sought

to reduce its premium costs under its policy. Accordingly, in 1993, the company president was excluded from the policy, and in 1997, it had the company vice president and his mother excluded from the policy. 342 Ill. App. 3d at 887. In order to reflect that change, in October 1997, an endorsement was issued to the April 1, 1997 to April 1, 1998 policy excluding the company vice president and his mother. *Id*. at 888. The company president was already excluded under a separate endorsement.

When the policy was renewed for the April 1, 1999 to April 1, 2000 policy period, it failed to include the company vice president as an excluded person on the policy. *Id*. Thus, the *Carroll Tiling* case revolves around an error first made in a renewal policy. As for the vice-president's individual claim against the broker, consistent with *Hoover*, the court found that the breach and accrual date occurred when the policies were renewed without the endorsement attached. *Id*. at 897-98. But because the vice-president would have no way of knowing he was excluded from coverage by looking at the policy, the court ultimately found that the discovery rule tolled the statute of limitations for the vice-president's individual claims. *Id*. at 898-99. As for the claims assigned to the vice-president by Carroll Tiling, the court found that the discovery rule would not toll those claims as Carroll Tiling was found to have knowledge that the vice-president would not be covered. *Id*. at 900-01. Accordingly, those claims were barred by the statute of limitations as they accrued at the renewal date of the policy. The clear lesson of *Carroll Tiling* is that the named

insured is charged with immediate knowledge of the policy, but a party who does not receive a copy of the policy can take advantage of the discovery rule.

While recognizing the validity of *Hoover*, the recent decision in *Scottsdale Ins. Co. v. Lakeside Community Committee*, 2016 IL App (1st) 141845, used the discovery rule to toll the limitations period. *Scottsdale* at ¶¶ 36-37. The basis for the holding was that where "[e]ven if representatives from [insured] had read the policy, they would not know in advance that a claim involving the murder of a child in DCFS custody was not covered until the claim was denied." *Scottsdale* at ¶ 37. The opinion does not explain the factual basis for this conclusion, but the logic of this statement appears sound.

Other cases have also recognized the applicability of the discovery rule in the context of section 13-214.4, without applying it to revive a barred cause of action under the particular circumstances of those cases. *Broadnax v. Morrow*, 326 Ill. App. 3d 1074 (4th Dist. 2002); *State Farm Fire & Cas. Co. v. John J. Rickhoff Sheet Metal Co.,* 394 Ill. App. 3d 548 (1st Dist. 2009); *Indiana Ins. Co. v. Machon & Machon, Inc.*, 324 Ill. App. 3d 300, 303 (1st Dist. 2001).

Hoover recognized that the discovery rule "has been applied across a broad spectrum of litigation to alleviate what has been viewed as harsh results resulting from the literal application of the statute." *Hoover* at ¶ 55, citing *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 414 (1981). Under the rule, the statute of limitations "starts to run when the plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully

caused." *Id*. citing *Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981). The reason it does not apply here is that the Krops pleaded no facts as to what prevented them from reading their policy.

The important thing to note is that the existence of the discovery rule provides enough flexibility to protect insureds, while at the same time fulfilling the purpose of a limitations statute. The appellate decision undermines this goal.

CONCLUSION

Third-party defendant, Andy Varga, respectfully requests that the Court reverse the judgment of the appellate court and affirm the judgment of the circuit court, or for such other relief as may be appropriate.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 4637 words.

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CERTIFICATE OF SERVICE

I, Stephen R. Swofford, one of the attorneys for third-party defendant-appellant Andy Varga, certify that I electronically filed the foregoing Brief with the Clerk of the Supreme Court of Illinois, on the 3d day of January, 2018.

In addition, I have served counsel of record by sending a copy thereof by e-mail on the 3d day of January, 2018, to counsel of record listed below:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/Stephen R. Swofford

APPENDIX

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

AMERICAN FAMILY MUTUAL INSURANCE CO.,	)	
Plaintiff,	)	
v.	)	14 CH 17305
WALTER KROP, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

Counter-Defendant American Family Mutual Insurance Company has filed a Motion to Dismiss the Counterclaim pursuant to 735 ILCS 5/2-615 and 5/2-619(a)(5). Third-Party Defendant Andy Varga has filed a Motion to Dismiss the Third-Party Complaint pursuant to 735 ILCS 5/2-615 and 5/2-619.

I. Background

A. *Amended Complaint*

Plaintiff/Counter-Defendant American Family Mutual Insurance Company ("American Family") has filed an Amended Complaint for Declaratory Judgment against Defendants Walter Krop, individually and as father and next friend of T.K., a minor, Lisa Krop and Mary Andreolas, as mother and next friend of A.A., a minor.

American Family alleges that Andreolas filed suit in the Law Division ("Underlying Suit"), Case No. 14 L 5185, seeking damages for the alleged defamation, false light invasion of privacy and intentional infliction of emotional distress of her minor daughter, A.A., as a result of harassment and bullying by the minor defendants including T.K. (Am. Compl. ¶4 and Ex. A).

American Family further alleges that it issued a homeowners policy to the Krops ("the Policy") commencing on March 21, 2012 and expiring on March 21, 2013. (Id. at ¶5). The Policy was renewed for a one year period on March 21, 2013. (Id. at ¶5 and Ex. B). The Policy provided coverage for bodily injury, but contained language excluding coverage for "emotional or mental distress, mental anguish, or any similar injury" unless arising out of bodily harm, sickness or disease. (Id. at ¶7 and Ex. B).

Count I of the Amended Complaint seeks a declaration that there is no coverage under the Policy for the Underlying Suit because there are no allegations of bodily injury. Count II alleges that the allegations of the Underlying Suit fall within the Policy's "abuse" exclusion. Count III alleges that the allegations of the Underlying suit fall within the Policy's "intentional

injury" exclusion. Count IV alleges that the Policy does not cover punitive damages. Count V alleges that the Krops have not advised American Family of the Underlying Lawsuit.

B. *The Counterclaim and Third-Party Complaint*

The Krops have filed a Counterclaim against American Family and a Third-Party Complaint against Andy Varga (collectively "Counterclaim"). The Krops allege that Varga, an Illinois licensed insurance producer and sales agent of American Family, contacted Walter Krop for the purpose of selling them an American Family homeowners policy. (Counterclaim at ¶5). The Krops allege that Walter Krop produced a copy of his then current policy with Travelers Insurance and informed Varga that any American Family policy would have to provide equivalent coverage. (Id. at ¶¶6-7). Varga advised the Krops that he had reviewed the Travelers policy and could obtain an American Family policy with equal or better coverage. (Id. at ¶8).

Count I of the Counterclaim alleges that Varga was negligent in procuring the Policy because, unlike the Travelers policy, the Policy did not provide coverage for defamation, invasion of privacy, emotional distress, abuse or intentional injury. Count II alleges that American Family is vicariously liable for Varga's negligence. Count III seeks reformation of the Policy. Count IV seeks a declaration that the Policy covers the Underlying Suit.

II. Motions to Dismiss

Varga and American Family have both filed motions to dismiss the Counterclaim. As the motions raise many of the same arguments, they will be addressed together.

A. *Statute of Limitations (§2-619(a)(5))*

Varga and American Family both contend that the Counterclaim is barred by the two-year statute of limitations of 735 ILCS 5/13-214.4. Section 214.4 provides that:

> All causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer, registered firm, or limited insurance representative concerning the sale, placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance shall be brought within 2 years of the date the cause of action accrues.

735 ILCS 5/13-214.4.

Under §13-214.4, a cause of action accrues at the time the policy is issued. Hoover v. Country Mut. Ins. Co., 2012 IL App (1st) 110939, ¶52. Therefore, any cause of action possessed by the Krops concerning procurement and sale of the Policy accrued on March 21, 2012. The statute of limitations expired on March 21, 2014. The Krops did not file the Counterclaim until September 22, 2015.

The Krops do not deny that they received the Policy on March 21, 2012. Instead, they argue that the discovery rule applies. Under the discovery rule, the statute of limitations does not

begin to run until the plaintiff knows or reasonably should have known that he or she has suffered an injury which may have been wrongfully caused. Kadlec v. Sumner, 2013 IL App (1st) 122802, ¶24.

While the discovery rule has been applied in cases involving §13-214.4, Illinois law is clear that although laypersons may not read their insurance policies as a matter of practice, they are not excused from the burden of knowing the contents of those policies. Perelman v. Fisher, 298 Ill. App. 3d 1007, 1011 (1st Dist. 1998). In Hoover, the court applied this principle finding that upon issuance of their policy, the plaintiffs had all the information they needed to determine whether the liability limits of the policy were sufficient to provide them with full replacement coverage for their home. 2012 IL App (1st) 110939 at ¶¶59-60. The First District found that the discovery rule did not toll the statute of limitations because the plaintiffs should have reasonably known "more than two years before they filed their complaint that the policy did not contain liability limits that would provide them with full replacement coverage." Id. at ¶61. The plaintiffs' negligence claim against both the insurance producer and the insurer were time-barred under §13-214.4. Id.

As in Hoover, the Policy's unambiguous language provided the Krops with all the information they needed to determine that: (1) the Policy provided coverage only for bodily injury and property damage; (2) that bodily injury did not include coverage for emotional or mental distress or anguish; (3) that the Policy excluded any coverage for mental abuse; and (4) that the Policy excluded any coverage for bodily injury intentionally caused by the insured. The Krops suggest that they could not have known that the Policy did not provide the same coverage as the Travelers' policy, but the Policy clearly set out what was covered and excluded. To accept the Krops' argument would be to excuse the Krops' failure to know the contents of the Policy. This is contrary to Illinois law.

The Krops cite to Broadnax v. Morrow, 326 Ill. App. 3d 1074 (4th Dist. 2002), and State Farm Fire & Casualty Co. v. John J. Rickhoff Sheet Metal Co., 394 Ill. App. 3d 548 (1st Dist. 2009), in support of their position that the statute of limitations did not begin to run until American Family denied the tender of the Underlying Suit. However, neither case involves a similar fact situation and Hoover, the First District's most recent pronouncement, is on point.

The Krops should have reasonably known at the time they received the Policy that Varga did not procure a policy with the same coverage as the Travelers' policy. The failure to receive a policy with the terms they requested was an injury which triggered the statute of limitations. Because the Krops did not file their Counterclaim within two years of receiving the Policy, and because all of their claims are based on Varga's negligence in procuring the Policy, the Counterclaim is time-barred.

B. *Section 2-615*

Varga and American Family also contend that the Counterclaim should be dismissed pursuant to §2-615. It is unnecessary to consider these arguments.

III. Conclusion

The Counterclaim and Third-Party Complaint is dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(5).

The status date of February 19, 2016 at 9:30 a.m. stands.

Enter: 2/4/16

Judge Neil H. Cohen

ENTERED
Judge Neil H. Cohen-2021
FEB 04 2016
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Plaintiffs, v. WALTER KROP, et al., Defendants.	)	Case No. 2014 CH 17305

~~[PROPOSED]~~ RULE 304(A) ORDER

This cause coming before the Court on Third-Party Defendant Andy Varga's Motion for a Supreme Court Rule 304(a) Finding, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED THAT:

1. Third-Party Defendant Andy Varga's Motion for a Supreme Court Rule 304(a) Finding is granted.

2. The Court hereby makes an express written finding that there is no just reason for delaying the enforcement or appeal or both of the Court's dismissal order of February 4, 2016, dismissing Third-Party Defendant Andy Varga with prejudice.

Dated: 2/18/16

ENTERED:

Judge Neil H. Cohen

2/18/16

ENTERED
Judge Neil H. Cohen-2021
FEB 18 2016
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

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C 850

Order (2/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

ENTERED
Judge Neil H. Cohen-2021
MAR 17 2016
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

American Family Mutual Ins. Co., Π

v.

No. 14 CH 17305

Walter Krop, et al

ORDER

This cause coming to be heard on the Krop's Motion to Reconsider, all Parties having notice & the Court being fully advised, IT IS HEREBY ORDERED:

1) The Motion to Reconsider American Family and Varga's motions to dismiss is denied for the reasons stated in court including that the Hoover case controls the statute of limitations issue;

2) American Family's motion for a 304a finding on the order granting its motion to dismiss is granted, the Court having found no reason to delay enforcement and/or appeal therefrom

3) The status set for April 11, 2016 is stricken and this matter is Continued for further status to May 11, 2016 at 9:30 am

Atty. No.: 44587

Name: Patti Deuel / LEF

Atty. for: Π

Address: 33 W. Monroe

City/State/Zip: Chicago, IL 60603

Telephone: 312-368-4554

ENTERED:

Dated: 3/17/16

Judge

Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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APPEAL TO THE APPELLATE COURT – FIRST DISTRICT
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Plaintiff/CounterDefendant Appellee -v- WALTER KROP, individually and as father and next friend of T.K., a minor, LISA KROP, and MARY ANDRELOAS, as next best friend of A.A., a minor, Defendant/Counter Plaintiff Third Party Plaintiff Appellant -v- ANDY VARGAS, Third Party Defendant/ Appellee	16-1071 Court No. 14 CH 17305

NOTICE OF APPEAL

Defendants/Counter-Plaintiffs/Third Party Plaintiffs-Appellants, WALTER KROP, individually and as father and next friend of T.K., a minor, and LISA KROP, by and through their attorneys, Taylor Miller LLC, appeals to the Appellate Court of Illinois for the First Judicial District from the order entered on February 4, 2016, dismissing its Counterclaim and Third Party Complaint with prejudice. (Exhibit A). The February 4, 2016 order became final as to Plaintiff/Counter-Defendant, American Family Mutual Insurance Company, and Third Party Defendant, Andy Vargas, when Defendants'/Counter-Plaintiffs'/Third Party Plaintiffs' motion to reconsider was denied on March 17, 2016. (Exhibit B).

Defendants/Third Party Plaintiffs-Appellants request that said orders and the dismissal of its Counterclaim and Third Party Complaint be reversed, and that the matter be remanded to the trial court for further appropriate proceedings thereupon. In the further alternative, Defendants/Third Party Plaintiffs-Appellants request such other and further relief as may be deemed appropriate.

C 979

Taylor Miller LLC, Attorneys for
Defendants/Third Party Plaintiffs-Appellant,

By: Kristin L. Matej

TAYLOR MILLER LLC
Attorney No. 43282
175 North Franklin, Suite 400
Chicago, Illinois 60606
(312) 782-6070

C 980

Lawyer

2017 IL App (1st) 161071
No. 1-16-1071

Third Division
May 10, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Plaintiff-Counterdefendant-Appellee, v. WALTER KROP, individually and as father and next friend of T.K., a minor; LISA KROP and MARY ANDRELOAS, as next best friend of A.A., a minor; Defendants-Counterplaintiffs-Third-Party Defendants-Appellants, (Andy Vargas, Third-Party Defendant-Appellee).	Appeal from the Circuit Court of Cook County. No. 14 CH 17305 Honorable Neil Cohen, Judge Presiding.

JUSTICE COBBS delivered the judgment of the court, with opinion.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff American Family Mutual Insurance Company (American Family) brought a complaint for declaratory judgment against Walter Krop and Lisa Krop (collectively, the Krops) seeking a declaration that the Krops were not entitled to coverage or protection under

its home insurance policy procured in 2012. In response, the Krops brought a counterclaim against American Family and a third-party complaint against American Family agent Andy Vargas. Both American Family and Vargas moved to dismiss the counterclaim and third-party complaint pursuant to sections 2-615 and 2-619 of the Illinois Code of Civil Procedure (the Code). 735 ILCS 5/2-615, 2-619 (West 2014). The trial court granted their motions pursuant to section 2-619 and made no ruling as to section 2-615. For the reasons that follow, we reverse and remand.

¶ 2 I. BACKGROUND

¶ 3 This appeal arises from the dismissal of defendants' counterclaim and third-party complaint. Before considering the issues raised on appeal, we first set out the relevant facts as alleged in the counterclaim and third-party complaint.

¶ 4 In March 2012, Walter and Lisa Krop met with Vargas, an American Family sales agent, regarding their homeowner's insurance. At that time, the Krops were insured through Travelers Insurance Company. The Travelers policy provided coverage for certain intentional acts, bodily injury, property damage, and personal injury. Under the Travelers policy, personal injury included libel, slander, defamation of character, and invasion of privacy. The Krops expressed to Vargas that they wanted an insurance policy with equivalent coverage to the Travelers policy. The Krops alleged Vargas stated that American Family could provide equivalent coverage at a lower or comparable rate.

¶ 5 American Family issued its homeowner's policy to the Krops on March 21, 2012. The American Family policy includes coverage for bodily injury and property damage. The policy does not provide coverage for personal injury, injury resulting from intentional acts, or

abuse. After receiving the policy in 2012, the Krops did not complain about the limits of coverage and subsequently renewed the policy in 2013, 2014, and again in 2015.

¶ 6 On May 14, 2014, the Krops' son, T.K., was sued by Mary Andreloas, as next best friend of A.A., a minor, in the circuit court of Cook County. The Andreloas complaint sought damages for defamation, invasion of privacy, and intentional infliction of emotional distress as the result of alleged harassment and bullying by minor defendants including T.K. The Krops made a claim for coverage under the American Family policy. Their request was denied on August 20, 2014.

¶ 7 In the six-page denial letter sent to the Krops, American Family restated the limitations of the Krops' policy, specifically, citing the policy's definition of "bodily harm," which did not include "emotional or mental distress, mental anguish, mental injury, or any similar injury unless it arises out of actual bodily harm to the person" and the exclusion of coverage for damages or injury resulting from abuse or intentional conduct. American Family also stated that the facts that gave rise to the complaint occurred in 2011, thus predating the Krops' policy.[1]

¶ 8 On October 30, 2014, American Family filed a complaint seeking a declaratory judgment regarding coverage for the Krops under the homeowner's insurance policy. Specifically, American Family sought a declaration that the allegations in the Andreloas complaint fell within the exclusions of the Krops' insurance policy, thus requiring no coverage or protection.

¶ 9 The Krops filed a counterclaim against American Family and a third-party complaint against Vargas on September 22, 2015. The Krops alleged that Vargas, as an agent of

[1]On appeal, American Family makes no argument regarding the underlying complaint which gave rise to the insurance claim. Thus, we do not address it.

American Family, negligently failed to procure the level of insurance coverage they requested. Subsequently, both American Family and Vargas filed motions to dismiss alleging that the Krops' claims were filed after the two-year statute of limitations for actions against insurers and thus barred. On February 4, 2016, the trial court granted American Family's and Vargas's motions, finding that the Krops' counterclaim and third-party complaint were filed outside of the two-year statute of limitations.

¶ 10 II. ANALYSIS

¶ 11 On appeal, the Krops argue that both their counterclaim and third-party complaint are timely because the discovery rule tolled the statute of limitations. Specifically, the Krops argue the statute of limitations did not start to run until they were denied coverage in August 2014. In its response, American Family asserts that the Krops' claims were untimely because the statute of limitations began to run once the Krops received the policy in 2012. American Family further argues that the discovery rule is inapplicable to the Krops' claims because they had a duty to read their policy. Vargas filed a separate response making similar arguments. He also argues that the discovery rule does not apply to cases where the alleged deficiency of the policy plainly appeared on the face of the policy.

¶ 12 American Family and Vargas brought their motions to dismiss defendant's counterclaim and third-party complaint pursuant to sections 2-615 and 2-619(a)(9) of the Code. A motion to dismiss under section 2-619 admits the legal sufficiency of the complaint but asserts affirmative matters outside of the complaint barring the claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). A section 2-619 motion admits as true all well-pleaded facts, along with reasonable inferences that can be gleaned from those facts. *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 344 (2010). The purpose of a section 2-619

motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation. *Thurman v. Champaign Park District*, 2011 IL App (4th) 101024, ¶ 18. Specifically, subsection 2-619(a)(9) of the Code permits a court to dismiss a complaint if it was not commenced within the time limited by law. The court should grant a section 2-619 motion if, after construing the documents in the light most favorable to the nonmoving party, there are no disputed issues of material fact. See *Perelman v. Fisher*, 298 Ill. App. 3d 1007, 1013 (1998). We review the dismissal of a cause of action pursuant to section 2-619 *de novo*. *Id.*

¶ 13 In their counterclaim and third-party complaint, the Krops allege that Vargas failed to procure the level of insurance they requested in violation of section 2-2201(d) of the Code. 735 ILCS 5/2-2201(d) (West 2014).[2] Defendants respond that any claims for a violation of the Code are time barred for having not been brought within the applicable two-year limitations period.[3]

¶ 14 Here, the parties do not dispute that claims against an insurance producer must be brought within two years of the date the cause of action accrues. Neither do they dispute that the discovery rule may extend the limitations period based upon when an insured knew or reasonably should have known of his injury. The parties differ, however, on when, in this

[2]Section 5/2-2201(d) provides : "While limiting the scope of liability of an insurance producer, registered firm, or limited insurance representative under standards governing the conduct of a fiduciary or a fiduciary relationship, the provisions of this Section do not limit or release an insurance producer, registered firm, or limited insurance representative from liability for negligence concerning the sale, placement, procurement, renewal, binding, cancellation of, or failure to procure any policy of insurance." 735 ILCS 5/2-2201(d) (West 2014).

[3]Section 13-214.4 of the Code provides that "[a]ll causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer, registered firm, or limited insurance representative concerning the sale placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance shall be brought within 2 years of the date the cause of action accrues." 735 ILCS 5/13-214.4 (West 2014).

case, the insureds knew or reasonably should have known of their injury so as to trigger the running of the statute of limitations.

¶ 15 Our supreme court has distinguished when a cause of action accrues for tort and contract actions. See *West American Insurance Co. v. Sal E. Lobianco & Son Co.*, 69 Ill. 2d 126 (1977). When the cause of action alleges tortious conduct, the cause of action generally accrues when the plaintiff suffers injury. *Id.* at 129-30. In breach of contract actions and torts arising out of contractual relationships, the cause of action accrues at the time of the breach, not when the party sustains damages. *Id.* at 132. Such was the case in *Indiana Insurance Co. v. Machon & Machon, Inc.*, 324 Ill. App. 3d 300, 303 (2001), in which an insurer sued its agent.

¶ 16 Historically, Illinois has recognized that the relationship between an insured and his broker, acting as the insured's agent, is a fiduciary one. See *Garrick v. Mesirow Financial Holdings, Inc.*, 2013 Il App (1st) 122228, ¶ 31; *DOD Technologies v. Mesirow Insurance Services, Inc.*, 381 Ill. App. 3d 1042, 1046 (2008); *AYH Holdings, Inc. v. Avreco, Inc.*, 357 Ill. App. 3d 17, 32 (2005); *Perelman*, 298 Ill. App. 3d at 1011. Thus, for cases in which an insured alleges tortious conduct by its agent, although the cause of action accrues at the time of the breach, the statute of limitations is subject to tolling by application of the discovery rule. *Broadnax v. Morrow*, 326 Ill. App. 3d 1074, 1079 (2002). Accordingly, commencement of the statute of limitations is delayed until the plaintiff knows or reasonably should know of his injury and that it was wrongfully caused. *Id.;* see also *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415 (1981).

¶ 17 Defendants assert that this court's decision in *Hoover v. Country Mutual Insurance Co.*, 2012 IL App (1st) 110939, a case involving claims brought by an insured against its agent, is dispositive. In *Hoover*, the plaintiffs contacted an agent from Country Mutual Insurance for

the purpose of obtaining additional homeowner's insurance coverage sufficient to cover the replacement costs of their home and its contents in the event of a loss. *Id.* ¶ 20. In May 2007, Country Mutual delivered a new policy to the plaintiffs. *Id.* ¶ 4. In January 2008, the home was destroyed by an explosion, which prompted the Hoovers' claim for coverage. *Id.* ¶ 13. After making several payments on the claim, the agent for Country Mutual informed the Hoovers that no further payments would be forthcoming as, under the terms of the policy, they were not entitled to full replacement cost coverage. *Id.* ¶¶ 16-17.

¶ 18 In March 2010, the Hoovers sued both the agent and Country Mutual, alleging breach of contract, bad faith, and negligence. *Id.* ¶ 18. Both Country Mutual and the agent separately moved to dismiss the complaint, asserting, *inter alia*, that the action was time barred. *Id.* ¶¶ 23-24. In response, the Hoovers argued that the statute of limitations was tolled until they actually learned of their injury, which, they maintained, was not until Country Mutual denied additional payment on their claim. *Id.* ¶ 26. The trial court dismissed all claims as time barred. *Id.* ¶ 27.

¶ 19 A division of this court, sitting in the First District, affirmed the trial court's dismissal. *Id.* ¶ 56. In so doing, the court held that when Country Mutual provided the plaintiff with a copy of the policy, they "knew or should have known" of the policies' deficiencies. Rejecting the Hoovers' argument that the discovery rule tolled the statute of limitations, the court found that because the plaintiffs received the policy more than two years before they filed their complaint, the statute of limitations precluded their claims. *Id.* ¶ 61.

¶ 20 Illinois cases decided prior to *Hoover* have applied the discovery rule to toll the statute of limitations in cases like the one now before us. See, e.g. *Broadnax*, 326 Ill. App. 3d 1074 (2002); *General Casualty Co. of Illinois v. Carroll Tiling Service, Inc.*, 342 Ill. App. 3d 883

(2003). In *Broadnax*, the case upon which the Krops rely, the plaintiff insured alleged that the defendant insurer was negligent in failing to procure an insurance policy that met his coverage needs with respect to a parcel of property the plaintiff intended to renovate. *Broadnax*, 326 Ill. App. 3d at 1076. When a fire destroyed the property prior to its renovation, the plaintiff brought a declaratory judgment action against the insurance company regarding coverage. The trial court granted summary judgment in favor of the defendant insurer, citing the plaintiff's failure to comply with the relevant provisions of the policy, which was affirmed on appeal. *Id.*

¶ 21 The plaintiff subsequently filed a separate negligence action against the insurance agent. *Id.* at 1077. The defendants moved to dismiss, asserting the two-year statute of limitations bar. The trial court granted the motion to dismiss, and on appeal to this court, sitting in the Fourth District, we affirmed.

¶ 22 In its analysis, the court distinguished *Indiana Insurance*, the case upon which the insurance agents relied. The court noted that in *Indiana Insurance*, the claims were brought by the insurer against its own agent and, therefore, the cause of action as well as the relationship between the parties differed from those in *Broadnax*. *Id.* at 1079. Although the plaintiff in *Broadnax* did not ultimately prevail, the court noted that the defendant's relationship to the plaintiff, as insurance broker and agent, was that of a fiduciary. *Id.* The court likened the case to legal malpractice cases in which the discovery rule applies to delay commencement of the statute of limitations. Accordingly, the court held that the plaintiff insured's claim against the insurance agent accrued at the time of the denial of coverage as opposed to after damages were sustained as a result of the denial of coverage. *Id.* at 1081.

¶ 23 With the exception of *Hoover*, *Broadnax* has been followed in several cases to hold that a cause of action brought by an insured against an insurance agent accrues when coverage is denied. See, *e.g.*, *State Farm Fire & Casualty Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill. App. 3d 548 (2009); *General Casualty*, 342 Ill. App. 3d at 899-900; see also *Commonwealth Insurance Co. v. Stone Container Corp.*, 323 F.3d 507, 510-11 (7th Cir. 2003) (comparing *Broadnax* and *Indiana Insurance* to the law in other jurisdictions and finding nothing "outside the norm"); but see *Wallace Auto Parts & Service, Inc. v. Charles L. Crane Agency Co.*, No. 14-1377-SMY-DGW, 2015 WL 8606429 (S.D. Ill. Dec. 14, 2015) (expressly rejecting *Broadnax* and following the reasoning in this court's decision in *Hoover*).

¶ 24 In this case, the trial court rejected the Fourth District's decision in *Broadnax*, 326 Ill. App. 3d 1074, as well as *State Farm Fire & Casualty*, 394 Ill. App. 3d 548, as factually inapposite and found the First District's decision in *Hoover*, this court's "most recent pronouncement," to be on point.

¶ 25 More recently, in *Scottsdale Insurance Co. v. Lakeside Community Committee*, 2016 IL App (1st) 141845, a different division of this court, sitting in the First District, found reason not to follow *Hoover*. In so doing, the court reaffirmed that long line of Illinois cases which hold that the cause of action in these types of cases accrues when the insured learns that its insurer is denying coverage, not when the policy was procured.

¶ 26 In *Scottsdale*, the Cook County public guardian sued the Lakeside community committee for the wrongful death of young Angel Hill, a ward of the court. Lakeside agreed to a consent judgment and assigned its claims against its insurer, Scottsdale Insurance Company, and its insurance broker, W.A. George Insurance Agency, to the public guardian. Scottsdale denied

coverage and filed a declaratory judgment action. The public guardian then filed a third-party complaint against W.A. George, alleging fraud, negligence, breach of contract, and breach of fiduciary duty in procuring the insurance policy. *Id.* ¶ 2. The trial court, finding that Lakeside knew or should have known that W.A. George obtained the wrong type of insurance policy when the policy was procured more than two years before the third-party complaint was filed, dismissed the complaint as time barred. *Id.* Lakeside appealed.

¶ 27 On appeal, Lakeside, relying on the discovery rule, contended that the statute of limitations did not begin to run until such time as Scottsdale denied coverage. *Id.* ¶ 21. Contrarily, W.A. George contended that, as in *Hoover*, the discovery rule should not be applied to toll the statute of limitations because Lakeside was put on notice that the policy was inadequate on the date it was first issued. *Id.* In its analysis, the court found *Hoover* distinguishable, noting first that the circumstances in which Lakeside acquired its policy differed from the circumstances in *Hoover*. *Id.* ¶ 36. In *Hoover*, the plaintiffs "already had a homeowners' policy and were negotiating directly with a Country Mutual agent to amend just one portion." *Id.* Further, although "the specific type of loss that could occur *** was unknown, the plaintiffs in *Hoover* were seeking a specific provision." *Id.*

¶ 28 Conversely, Lakeside hired W.A. George to procure a policy that would cover multiple types of claims. *Id.* ¶ 37. Even had Lakeside representatives read the policy in advance, they would not know in advance that a claim involving the murder of a child in Department of Children and Family Services custody was not covered until the claim was denied. *Id.* Relying on that line of cases which hold that the discovery rule applies to toll the running of the statute until the insured has knowledge that coverage has been denied, the court reversed

the trial court's dismissal of Lakeside's third-party complaint against W.A. George and remanded for further proceedings. *Id.* ¶ 38.

¶ 29 Like *Scottsdale*, we also decline to follow *Hoover* but for a different reason. The weight of authority in Illinois remains that the cause of action for claims of negligence between an insured and the insured's agent accrues at the time coverage is denied. A review of the analysis in *Perelman*, 298 Ill. App. 3d 1007, also a First District case, is instructive.

¶ 30 In *Perelman*, the plaintiff retained an insurance broker for the purpose of procuring a disability insurance policy that would contain a provision that would increase the amount of disability payments in order to meet increases in inflation. *Perelman*, 298 Ill. App. 3d at 1008. The broker offered, and the plaintiff accepted, a policy with a monthly disability benefit of $4000. Upon issuance of the policy, an accompanying transmittal letter requested that the plaintiff review the policy and contact the broker if the plaintiff had any questions regarding his coverage. *Id.*

¶ 31 The policy as issued did not contain a provision that would keep pace with inflation. In a sworn statement, the agent averred that he explained to plaintiff prior to issuance of the policy that it did not contain a cost of living adjustment. However, plaintiff averred that during negotiation of the policy, the agent told plaintiff that he was purchasing a " 'premier' " policy, which was the " 'best' " policy available at the time. The plaintiff alleged that when he received the policy, he " 'skimmed' " through it to confirm the monthly disability benefit was for the amount requested. *Id.* at 1008-09.

¶ 32 Sometime later, the plaintiff suffered a disability and sought coverage, which was provided but without any future increases for inflation. *Id.* at 1009. When the policy benefits did not increase with inflation, the plaintiff filed claims against the broker for breach of

contract and negligent misrepresentation. *Id.* Defendant filed a motion to dismiss under section 2-619 of the Code. In support, the defendants argued that when the plaintiff received the policy he reasonably knew or should have known, for the purpose of commencing the limitation period under the discovery rule, that the policy did not contain a provision for an annual increase of benefits to meet the inflation rate. *Id.* at 1009-10.

¶ 33 The policy, having been issued more than two years prior to the filing of the complaint, was dismissed on the agent's motion as time barred. *Id.* at 1010. This court reversed. Citing our earlier decision in *Foster v. Crum & Forster Insurance Cos.*, 36 Ill. App. 3d 595, 598 (1976), we first reaffirmed that in an action where the insured sues his insurer "after failing to note a discrepancy between the policy issued and received versus the policy requested or expected, the insured will be bound by the contract terms because he or she is under a duty to read the policy and inform the insurer of any discrepancy so that a prompt correction may be made without prejudicing the rights of either party." In such cases, plaintiffs are not excused from their burden of knowing the contents of the policy when there are no allegations that the language of the policy was ambiguous. *Perelman*, 298 Ill. App. 3d at 1011.

¶ 34 That said, the court then noted the distinction between an action brought by an insured against the insurer, who issues the policy, and one brought by an insured against the agent, who procures the policy. In the latter, the relationship between the parties is one of fiduciary. *Id.* at 1011. Relying on the reasoning and the holdings in *Black v. Illinois Fair Plan Ass'n*, 87 Ill. App. 3d 1106 (1980), and *Economy Fire & Casualty Co. v. Bassett*, 170 Ill. App. 3d 765 (1988), the court held that the trial court erred in dismissing the plaintiff's case because a genuine issue of material fact existed as to when the plaintiff knew or should have known that the policy was defective. *Perelman*, 298 Ill. App. 3d at 1013. Significantly, in *Perelman*,

the court noted that the insured's failure to read and understand the terms of a policy procured by his broker was not an absolute bar to the insured's right to recover against his broker for breach of the broker's fiduciary duty. *Id.*

¶ 35 As *Perelman* makes clear and *Broadnax* affirms, it is the relationship between the parties that defines their respective duties and, thus, also defines the point in time when the cause of action accrues. Put another way, when an insurance agent owes a fiduciary duty to an insured, a cause of action for breach of that duty accrues at the time of the breach, but the statute of limitations is subject to tolling by application of the discovery rule. *General Casualty*, 342 Ill. App. 3d at 900. The discovery rule inquires of the plaintiff when he or she knew or reasonably should have known of their injury. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 77 (1995). This court has consistently held that in the case of an insured's claim against its agent, the plaintiff knows or reasonably should know of the injury at the moment when coverage is denied. *State Farm Fire & Casualty*, 394 Ill. App. 3d at 566; *Broadnax*, 326 Ill. App. 3d at 1081; *Indiana Insurance*, 324 Ill. App. 3d at 304.

¶ 36 In this case, the Krops, as insureds, filed a claim under the insurance policy procured for them by their agent. On August 20, 2014, coverage was denied. Accordingly, consistent with *Perelman* and its progeny, the Krops knew or reasonably should have known of their injury on August 20, 2014. The Krops filed their third-party complaint against the agent, Vargas, and American Family on September 22, 2015. Thus, their claims are not time barred.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, we find that defendants' counterclaim and third-party complaint were not time barred, as the cause of action accrued upon denial of coverage. Accordingly, we reverse the decision of the circuit court of Cook County granting plaintiff's

motion to dismiss and remand for further proceedings. Because the trial court did not rule on plaintiff's section 2-615 motion to dismiss, we do not address it here.

¶ 39 Reversed and remanded.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Plaintiff-Counter-Defendant Appellee, v. WALTER KROP, et al., Defendants-Counter-Plaintiffs-Third-Party Defendants-Appellants v. ANDY VARGAS Third Party Defendant-Appellant.	)	No. 1-16-1071

ORDER

This cause coming to be heard on the Petition for Rehearing of Third Party Defendant-Appellant, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED THAT:

The Petition for Rehearing is **DENIED**.

JUSTICE

JUSTICE

JUSTICE

ORDER ENTERED

JUN 29 2017

APPELLATE COURT, FIRST DISTRICT

Dated: _____

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