No. 122556

IN THE SUPREME COURT OF ILLINOIS
FROM THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Plaintiff,

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-Third Party Plaintiffs-Appellees,

vs.

ANDY VARGA,

Third-Party Defendant-Appellant.

On appeal from
the Circuit Court of Cook County, Illinois, 2014 CH 17305
The Honorable Neil Cohen, Judge Presiding,
and the Appellate Court of Illinois, First District, Third Division
2017 IL App (1st) 161071

ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL'S *AMICUS CURIAE* BRIEF IN SUPPORT OF THIRD-PARTY DEFENDANT – APPELLANT ANDY VARGA

Robert E. Elworth
HeplerBroom, LLC
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312) 230-9100
relworth@heplerbroom.com

E-FILED
1/9/2018 10:55 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

No. 122556

IN THE SUPREME COURT OF ILLINOIS
FROM THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Plaintiff,

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-Third Party Plaintiffs-Appellees,

vs.

ANDY VARGA,

Third-Party Defendant-Appellant.

On appeal from
the Circuit Court of Cook County, Illinois, 2014 CH 17305
The Honorable Neil Cohen, Judge Presiding,
and the Appellate Court of Illinois, First District, Third Division
2017 IL App (1st) 161071

ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL'S *AMICUS CURIAE* BRIEF IN SUPPORT OF THIRD-PARTY DEFENDANT - APPELLANT ANDY VARGA

Points and Authorities

Argument

Amicus Illinois Association of Defense Trial Counsel submits that the opinion in *American Family Mutual Insurance Company v. Krop*, 2017 IL App (1st) 161071, undercuts this Court's discovery-rule jurisprudence by focusing not on what the plaintiff knew or should have known about his injuries, but on the nature of the relationship he has with the prospective defendant. In particular, the opinion may be read to suggest that the existence of a fiduciary relationship between an insured and his insurance broker relieves the insured from a reasonable inquiry into the broker's potential negligence. The opinion's supposition is in direct conflict with this Court's established discovery-rule decisions.

Furthermore, the continued imposition of a fiduciary duty on insurance brokers, even in circumstances not involving their handling of an insured's monies, creates confusion and is contrary to the Illinois Insurance Placement Liability Act. The appellate Opinion displays the confusion sown by the enduring "fiduciary relationship" between a broker and his client. The Court should take this opportunity to bring Illinois' common law in line with the Act's ordinary-care duty pronouncements.

A. Without regard to the nature of the duty allegedly breached, the discovery rule delays the limitations period until first date the injured party knew or should have known of its injury and cause.

In *Knox College v. Celotex Corp.*, 88 Ill. 2d 407 (1982), this Court affirmed that the discovery rule "has been applied across a broad spectrum of litigation" to "postpone the starting period of limitation until the injured party knows or should have known of his injury." *Knox* College, 88 Ill. 2d at 414.

The rule's underpinning has always focused on the knowledge available to the potential plaintiff, without regard to the nature of the alleged duty breached. "At some point the injured party becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved. At that point, under the discovery rule, the running of the limitations period commences." *Id.* at 416.

The discovery rule is designed to prevent the unfairness of charging a plaintiff with knowledge of facts which were truly "unknown and inherently unknowable." *Golla v. G.M.C.*, 167 Ill. 2d 353, 367 (1995). Furthermore, "the more obvious the injury, the more easily a plaintiff should be able to determine its cause." *Hoffman v. Orthopedic Sys., Inc.*, 327 Ill. App. 3d 1004, 121 (1st Dist. 2002). It is not necessary for a plaintiff to discover the "consequences of the injury or the full extent of her injuries" before the statute of limitations begins to run. *Golla*, 167 Ill. 2d at 364.

B. Any judicial curtailing of discovery-rule jurisprudence thwarts the rationale behind the accrual of any action, to compel a plaintiff to mitigate his damages.

By formulating the discovery rule to not require a plaintiff's absolute certainty on either its wrongful cause or extent of the resultant injuries, this Court balances plaintiff's knowledge and inquiry with the requirement that he bring an action within the limitation's timeframe. To allow a party to wait to bring an action far beyond reasonable notice of a possible invasion of his rights "would seem contrary to the underlying purpose of statutes of limitations, which is to require the prosecution of a right of action within a reasonable time to prevent the loss or impairment of available evidence and to discourage delay in the bringing of claims." *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 21, (citing *Nolan v. Johns-Mansville Asbestos*, 85 Ill. 2d 161, 170-71 (1981)).

Similarly, it is well-established that in the context of failure-to-procure actions against insurance producers, seeking damages for negligence arising out of a contract to procure insurance, "the cause of action accrues at the time of the breach, not when the damages are sustained." *State Farm Fire & Cas. Co. v. Rickhoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 593 (1st Dist. 2009) (citing *West American Ins. Co. v. Sal E. Lobianco & Son Co.*, 69 Ill. 2d 126, 132 (1977)).

These same decisions also explain that the accelerated accrual is designed to force plaintiffs to mitigate their damages. "The rationale behind this rule is to require parties to act quickly after a breach, rather than allowing them to wait until

damages increase, and to recognize that the plaintiff has chosen to deal with the defendant and, as a result, their relationship could have been defined in a way as to minimize loss." *Rickhoff Sheet Metal*, 394 Ill.App.3d at 565; *Indiana Ins. Co. v. Machon & Machon, Inc.*, 324 Ill. App. 3d 300, 304 (1st Dist. 2001); *Del Bianco v. Am. Motorists Ins. Co.*, 73 Ill. App. 3d 743, 748 (1st Dist. 1979).

In other words, because a plaintiff-insured chose to work with the producer in an effort to reduce risk, mitigation of damages is fostered by the earliest accrual date—whether that accrual arrives exactly at the time of breach or only after reasonably-delayed notice to the plaintiff under the discovery rule. Either way, every accrual dovetails exactly with the insured's duty to review policies upon receipt, which facially may reveal the producer's alleged negligence—perhaps allowing for the breach to remedied even before a claim occurs, avoiding a circumstance wherein the plaintiff might otherwise have been left inadequately-insured.

C. The existence of a fiduciary relationship between the producer and insured is not a panacea for an insured's failure to reasonably discover and pursue his potential failure-to-procure cause of action; there is no basis in law to alter the discovery rule's application away from the reasonableness of plaintiff's diligent discovery and pursuit of the claim.

The appellate opinion here sets forth a straightforward assessment of the single issue before it. After recognizing the parties agreed that (1) the claim was subject

to a two-year statute of limitations, and (2) the discovery rule may apply; the panel then distills the issue to "when, in this case, the insureds knew or reasonably should have known of their injury so as to trigger the running of the statute of limitations." *American Family*, 2017 IL App (1st) 161071, ¶14.

The panel's pronounced issue thus seeks an application of the settled discovery rule, with its singular focus on when the Krops became possessed of sufficient information concerning their injury and its cause to put them on inquiry to determine whether their producer Varga had failed to discharge their instructions.

However, the panel then unnecessarily delves into the existence of a producer's fiduciary duty, and that potential duty's impact on the discovery rule's application. And then in resolution, the opinion imposes a "one-size fits all" accrual rule of "when the insurer denies the claim" that simply ignores the discovery rule's actual triggering elements. Each section of the opinion contravenes this Court's discovery rule jurisprudence.

1. Whether a fiduciary relationship exists between the Krops and Varga does not alter the discovery rule's application.

In particular, the appellate opinion relies heavily on *Perelman v. Fisher,* 298 Ill. App. 3d 1007 (1st Dist. 1998), to assert that "it is the relationship between the parties that defines their respective duties and, thus, ***also defines the point in time when the 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." *American Family*, 2017 IL App (1st) 161071, ¶ 35 (***emphasis added***).

Amicus submits that this paragraph misstates Illinois law in a number of manners, starting with whether an "insurance agent" has a fiduciary relationship with his insured.

However, the statement further suggests, without any explanation beyond citation to *Perelman* (which itself includes no explanation,) that the existence of a fiduciary duty impacts the discovery rule, or possibly by an allegation that the duty was breached. This assertion is simply unsupported by this Court's decisions.

For instance, in *Morris v. Margulis*, 197 Ill. 2d 28 (2001), a legal malpractice action, this Court applied the discovery rule to breach of fiduciary duty allegations in the same manner as it has across the "broad spectrum of litigation" spoken of *Knox College*. In *Morris*, the plaintiff-client admitted that he discovered during his criminal fraud trial that he had potentially been damaged by his former counsels' advice, but waited more than two years before filing the breach of fiduciary duty cause of action against them. This Court's opinion suggests no special interpretation of the discovery rule based on the inclusion of breach of fiduciary duty allegations.

See also Khan v. Deutsche Bank AG, 2012 IL 112219, ¶¶ 21-22, (where this Court ruled that breach of fiduciary duty cause of action against an investment and accounting defendants accrued under the same discovery rules as recited above, from *Nolan*, *Knox College*, and *Golla)*.

The appellate opinion here (nor, frankly, the cases upon which it relies) offers no compelling reason or logic why the fiduciary relationship should be injected into ***any*** accrual analysis, but especially when the subject complaint does not even allege the breach of a fiduciary duty. If the discovery rule's accrual analysis is solely focused on the reasonableness of the plaintiff's behavior, then the nature of the duty defendant is alleged to have breached should be of no consequence to whether the plaintiff acted within the limitations period.

Amicus therefore urges the Court to affirm its discovery-rule jurisprudence, focusing the delayed-accrual analysis on the reasonableness of plaintiff's inquiry to determine whether actionable conduct is involved, without regard to the nature of the alleged breach of duty causing the injury. *Knox College*, 88 Ill. 2d at 416.

2. **A plaintiff may reasonably know that his injury was caused by an insurance producer before his claim is denied—especially in cases wherein there is no claim denial—leaving discovery-rule focus always on the reasonableness of the plaintiff's inquiry to determine whether actionable conduct is involved.**

Second, the appellate opinion concludes by stating that "in the case of an insured's claim against its agent, the plaintiff knew or reasonably should know of the injury at the moment when coverage is denied." *American Family*, 2017 IL App (1st) 161071, ¶ 35. Taken literally, as stated, the statement ***can*** certainly be correct, if the case's circumstances dictate.

But to the extent that this conclusion leaves an impression of a ***singular*** rule that the date of accrual can only be when the coverage is denied, it cannot be correct under Illinois law. As with any other discovery-rule analysis, the focus must remain on the earliest date the plaintiff knew or should have known of his injury.

Furthermore, not every alleged failure-to-procure case even ***involves*** a denial of coverage by the carrier. For instance, in *RVP, LLC v. Advantage Insurance Services, Inc.*, 2017 IL App (3d) 160276 (Petition for Leave to Appeal pending, docket 122133), the producer's alleged negligence related solely to the indemnity limits applied for and procured, with plaintiffs asserting they had requested the producer to procure higher limits than obtained. After the subject fire loss the policies (themselves renewals) paid in full up to the limits printed on the declaration pages, without any carrier denial.

The *RVP* appellate panel determined that "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." *RVP, LLC*, 2017 IL App (3d) 160276, ¶ 32. Therefore, because the plaintiffs had received the policies more than two years before filing the action, each clearly showing the indemnity limits, the matter was time barred. *Id.*, ¶ 36.

Importantly, the *RVP* panel resolved that the existence of a fiduciary relationship between plaintiffs and the defendant-producer did not alter the discovery-rule accrual analysis, rejecting *Perelman's* suggestion otherwise:

> We do not reach the issue of whether plaintiffs' failure to read the policy was an absolute bar to recovery or was merely some evidence of contributory negligence because we do not reach the merits of this case. *See Perelman*, 298 Ill. App. 3d at 1013 (finding "that the trial court erred in holding as a matter of law that plaintiff had a duty to 'realize what's in the policy and what is not' regardless of 'whether [plaintiff] is suing the broker or the insurance company'"). Instead, for statute of limitations purposes, we must determine when the plaintiffs should be charged with knowledge of the deficient coverage limits. Based upon the facts of this case, plaintiffs should have known of the deficient coverage limits upon receiving the policies where there was no claim of an ambiguity in the declaration of the coverage limits.

Id., ¶ 37; *see also Hoover v. Country Mutual Insurance Co.*, 2012 IL App (1st) 110939, holding that by virtue the Hoover's possession of the policy, which delineated the liability limits for the house and its contents, they had all the information that they needed to determine the limits of their coverage. Therefore, the discovery rule did not save the untimely action because the Hoovers knew or should have 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.

Therefore, Amicus submits that the Court must reject the assertion that the discovery rules tolls accrual of ***all*** actions against insurance producers until the claim is denied, as the appellate opinion suggests. The issue of when a party has or should have the requisite knowledge under the discovery rule to maintain a cause of action is ordinarily a question of fact to be resolved in each case, as

dictated by the pleadings or through discovered evidence; it is not subject to the singular, one-size-fits-all "date of denial" rule suggested by the appellate opinion here and *Perelman*.

D. The Court should affirm *Skaperdas'* recognition that the Illinois Insurance Placement Liability Act applies equally to all licensed producers, and similarly limit reference any producer's fiduciary relationship to the handling of his insured's money.

In *Skaperdas v. Country Casualty Ins. Co.*, 2015 IL 117021, this Court resolved that under the Illinois Insurance Placement Liability Act all insurance producers—captive agents and independent brokers—owed the same duty of ordinary care to their insureds. The Court stated that the ordinary care duty in 735 ILCS 5/2201(a) "is not based on a fiduciary relationship between an insurance producer and the insured. Rather, it is a duty to exercise ordinary care that may be applied to any insurance salesperson regardless of whether a fiduciary or agency relationship exists." *Skaperdas,* 2015 IL 117021, ¶ 26.

This Court has not interpreted the "insurance producer" language in 735 ILCS 5/2-2201(b), which limits fiduciary liability "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." Amicus submits that the Court should take this opportunity to now

confirm Illinois common-law in line with the subparagraph (b), just as *Skaperdas* did with subparagraph (a).

In light of *Skaperdas*' resolution that subparagraph (a) equalizes the ordinary-care duty owed by every insurance producer, captive agents and independent brokers alike, Amicus submits that subparagraph (b) should likewise be read to impose a fiduciary duty on any producer ***only*** when handling "any [insured's] money that was received as premiums, as a premium deposit, or as payment of a claim." In all other instances, retaining the common law of a "fiduciary relationship" between a broker and his insured imposes a duty, by language at least, beyond the ordinary care standard in subparagraph (a).

The appellate opinion here, *Perelman* and *Babiarz v. Stearns*, 2016 IL App (1st) 150988, all seize that fiduciary relationship as a reason to apply the discovery rule differently, even when none of the cases involve a breach of fiduciary duty cause of action, dependent only on whether the producer is a broker or an agent. This ultimately would lead to a two-tiered discovery rule in actions against insurance producers, differentiating between actions against insurance agents and insurance brokers.

The "fiduciary-relationship" common law is a statutorily-infirm approach to causes of action against insurance producers. Before the Illinois Insurance Placement Liability Act, insureds could allege negligence and breach of fiduciary duty counts for just about any producer misdeed. *See, e.g., Faulkner v. Gilmore*, 251

Ill. App. 3d 34 (3d Dist. 1993) (alleging breach of fiduciary duty for a broker's failure to advise insureds to terminate master surety agreement).

Now, however, the Act limits breach of fiduciary duty counts to the wrongful retention of an insured's money. *See Melrose Park Sundries, Inc. v. Carlini,* 399 Ill. App. 3d 915, 921 (1st Dist. 2010) (cited at length with approval in *Skaperdas,* holding 2-2201(b) "precludes claims against insurance producers for breach of fiduciary duty, except where such claims are based on the wrongful retention or misappropriation of any money that was received as premiums, as a premium deposit, or as payment of a claim.")

Leaving in place the broker's "fiduciary relationship" under common law negates the ordinary care standard actually owed and creates needless confusion and expense among parties and courts. Amicus submits that the Court should affirm *Skaperdas'* ordinary-care breadth and holding, and align owed duties and liabilities with all paragraphs in the Act.

Conclusion

Amicus Illinois Association of Defense Counsel respectfully requests that the appellate court's decision be reversed; and that this Court order the entry of judgment in favor of Andy Varga.

Respectfully submitted,

ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL,

/s/ Robert E. Elworth
Robert E. Elworth
HeplerBroom, LLC
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312) 230-9100
relworth@heplerbroom.com

Rule 341(c) Certificate of Compliance

I certify that this brief conforms the requirements of Rules 341(a) and (b). The number of words in this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, and the Rule 341(c) certificate of compliance, is 2,957 words.

ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL, by

/s/ Robert E. Elworth
Robert E. Elworth
HeplerBroom, LLC
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312) 230-9100
relworth@heplerbroom.com