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.

REPLY BRIEF OF THIRD-PARTY DEFENDANT-APPELLANT, ANDY VARGA

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ORAL ARGUMENT REQUESTED

ARGUMENT

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 Krops' position eviscerates the rule that an insured has a duty to know the contents of his or her policy; makes a mockery of the discovery rule since it disregards whether an insured knows or should have known about any alleged deficiencies in his or her policy; and is contrary to one of the principal cases on which they and the appellate court relied, *Perelman v. Fisher*, 298 Ill. App. 3d 1007 (1st Dist. 1998).

> 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, 298 Ill. App. 3d at 1011, citing cases, and see Varga's principal brief at page 11 for more cases to the same effect. "To allow the opposite rule . . . would simply do away with the Statute of Limitations and leave brokers or companies liable for years and years and years until some event occurred that triggered some financial shortfall." *Id.* at 1010.

Being a case that dealt with facts occurring prior to the enactment of section 2-2201 of the Code of Civil Procedure in 1997 (735 ILCS 5/2-2201), the *Perelman* court recognized that there was "a distinction between an action by the insured against his *insurer,* who issues the policy, and an

insured against his *agent,* who procures the policy." *Id.* at 1011 (emphasis in original). A broker then [prior to section 2-2201] owed the insured a fiduciary duty in procuring insurance coverage. *Id.* It was based upon this fiduciary relationship that the insured was permitted to rely on his agent, the broker, despite the insured's neglect in not reading the insurance policy. *Id.* at 1012.

The foregoing holding of *Perelman*, manifestly, does not apply here because it is undisputed that Varga was not an agent of the Krops, but was an "American Family sales agent." Paragraph 3 of Krops' counterclaim and third-party complaint alleges 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 nothing in the record suggesting that Varga ever acted as an agent for the Krops. Thus, under *Perelman*, the Krops were obligated to know the contents of their policy and the statute of limitations began running when they received their policy.

Moreover, even had Varga been the Krops' agent, that would not have automatically delayed the running of the statute of limitations until the time that coverage was denied as the Krops argue—at least not under *Perelman* or under basic discovery rule principles. After holding that an insured's failure to know the contents of his policy might be excused if he had relied on a broker, *Perelman* went on to hold that the question still remained whether the

insured knew or should have known of the deficiencies in his policy, and the court remanded the case for a hearing on that issue. *Id.* at 1013.

The Krops argue that this is a case like *Scottsdale Ins. Co. v. Lakeside Community Committee*, 2016 IL App (1st) 141845, and that it would be "unthinkable to expect that the Krops knew or should have known that the American Family did not cover event such as those pled in the underlying loss" (Krop Br. at 10). This case is nothing like complicated situation in *Lakeside*. See Varga principal br. at 17. What is at issue here is whether the Krops got the same coverage in their American Family policy as they had with their Travelers policy. As alleged in Krops' counterclaim and third-party complaint: "WALTER KROP advised ANDY VARGA that he required a homeowners policy of insurance that provided coverages equal to the coverages provided by Travelers" (R. C414). As explained in Varga's principal brief, it would have been a simple matter for the Krops to determine whether this had been done when they received their American Family policy by merely comparing the coverage pages of the two polices. See Varga's principal brief at pages 11-12.

The Krops cite the following additional cases in support of their position: *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 (1st Dist. 2001);

General Casualty Co. of Illinois v. Carroll Tiling Service Inc., 342 Ill. App. 3d 883 (2d Dist. 2003) (Krop Br. 5).

The last case, *Carroll Tiling*, has been examined at pages 15-17 of Varga's principal brief and supports his position, not the Krops'. *Broadnax* was expressly based upon the "fiduciary relationship between Broadnax and defendants" as Broadnax' brokers. 326 Ill. App. 3d at 1079. It thus applied professional negligence principles. It did not consider the effect of 735 ILCS 5/2-2201(b), which states that insurance producers no longer owe a fiduciary duty except when handling money. *Machon* is a straightforward application of the discovery rule that has nothing to do with the case at bar. The plaintiff was not in possession of the document which caused it loss. Therefore, it could not discover the breach of contract until the loss occurred. *Rickhoff* presents a complicated state of facts. It involves a broker, not a sales agent. It appears to rely most heavily on *Machon*, which would make sense, since the party seeking coverage had no documents in his possession by which he could have discovered he had no coverage. Thus, the first time he could have discovered a lack of coverage was when it was denied. Those are not the facts in the case at bar. Here, the Krops were in a position to discover Varga's alleged failure to procure the coverage requested as soon as they received a copy of their policy.

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 1,124 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 Reply Brief with the Clerk of the Supreme Court of Illinois, on the 2d day of April, 2018.

In addition, I have served counsel of record by sending a copy thereof by e-mail on the 2d day of April, 2018, to counsel of record listed on the attached Service List.

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

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Matter # 978392

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