2020 IL App (5th) 190206-U

NO. 5-19-0206

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

STANLEY K. RYAN and NORMA K. RYAN,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Christian County.
	)	
v.	)	No. 17-L-13
	)	
COUNTRY MUTUAL INSURANCE COMPANY	)	
and JEFF PEABODY,	)	Honorable
	)	Amanda S. Ade-Harlow,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE WHARTON delivered the judgment of the court.
Justice Barberis concurred in the judgment.
Justice Overstreet dissented.

ORDER

¶ 1 *Held*: In this case involving allegations of negligent procurement of an insurance policy, summary judgment on the basis of the statute of limitations was not appropriate where genuine issues of material fact existed as to whether the insureds could reasonably be expected to know the extent of the coverage simply from reading their policy.

¶ 2 The plaintiffs, Stanley and Norma Ryan, insured their home with a policy from defendant Country Mutual Insurance Company (Country Mutual). Defendant Jeff Peabody became their agent in 1999, after the original policy was issued. The plaintiffs renewed their policy every six months. In April 2016, their home was destroyed in a fire. They allege

that it cost $1.2 million to rebuild their home. However, it is undisputed that their policy provided only $544,000 in coverage. The plaintiffs filed a petition alleging that Peabody was negligent in procuring an insurance policy for them that did not provide full replacement coverage. Both defendants filed motions for summary judgment. The trial court found that the plaintiffs' claim was time-barred and entered summary judgment for the defendants on that basis. We reverse.

¶ 3 The plaintiffs built a home in 1993. Stanley Ryan estimates that it cost approximately $300,000 to construct the original home. Although they had an appraisal of the home performed shortly after it was constructed, that appraisal does not appear in the record, and there is no evidence concerning the market value of the home, either at the time of construction or near the time of the fire.

¶ 4 In March 1998, Country Mutual issued an "AgriPlus" insurance policy to the plaintiffs through its agent, Steve Mitchell. This policy covered their home and various outbuildings and pieces of machinery associated with their farming business. The policy provided $300,000 in coverage on the home along with "inflation protection." Although the plaintiffs' home was insured through Country Mutual prior to 1998, the AgriPlus policy was not available until that time.

¶ 5 In September 1999, Peabody began working for Country Mutual. He took over Mitchell's existing clients, including the plaintiffs.

¶ 6 The plaintiffs renewed their AgriPlus policy with Country Mutual every six months. It remained in force when their home was destroyed by a fire in April 2016. Because of the inflation protection provision, the coverage for replacement of the home had increased

from $300,000 to $544,000. The actual cost of rebuilding the home was $1.2 million. We note that although the plaintiffs alleged that they rebuilt their home as it existed before the fire, their deposition testimony revealed that they made some modifications and upgrades. However, what, if any, impact these modifications may have had on the cost of rebuilding is not relevant to the issues currently before us.

¶ 7 On April 19, 2017, the plaintiffs filed a complaint asserting claims of negligent procurement of an insurance policy against both Country Mutual and Peabody. They alleged that sometime before April 23, 2016, they directed Peabody to procure for them an insurance policy for their home "that would provide full coverage should the home ever be totally destroyed." They alleged that on March 21, 2016, an insurance policy was issued to them that provided "a limited amount of inflation coverage," for a total of $544,000. They further alleged that their home was destroyed by a fire on April 23, 2016, and that the cost of rebuilding the home as it existed before the fire was $1.2 million. They argued that the defendants were reckless in failing to provide them with full coverage.

¶ 8 In August 2018, both defendants filed motions for summary judgment. Peabody alleged that the plaintiffs never discussed the coverage of their home with him. He argued that an insurance agent's duty to exercise reasonable care and skill in the procurement of an insurance policy is triggered only when the insured makes a specific request for coverage (see *Skaperdas v. Country Casualty Insurance Co.*, 2015 IL 117021, ¶ 37); and a request for "full replacement cost" coverage is too vague to trigger that duty (see *id*. ¶ 42; see also *Furtak v. Moffett*, 284 Ill. App. 3d 255, 259 (1996) (finding that an insurance agent's alleged "promise that the policy would 'fully cover' the home" was "too vague to

be enforceable")). Country Mutual argued that an insurer has no duty to determine the adequacy of an insured's coverage (see *Nielsen v. United Services Automobile Ass'n*, 244 Ill. App. 3d 658, 663 (1993)) and that the plaintiffs' allegations were refuted by undisputed deposition testimony.

¶ 9 In support of their motions, the defendants presented the discovery depositions of both Stanley and Norma Ryan and portions of Peabody's discovery deposition. In relevant part, Stanley Ryan testified that although he did discuss the coverage he had relating to his farming operation with Peabody over the years, he did not recall discussing the coverage for his home with Peabody prior to the fire. He noted that he assumed they had "full replacement coverage" for the home. Asked if this meant that he did not ask Peabody about coverage for the house because he assumed he already had the coverage he wanted, Ryan replied, "I don't remember that for sure." Norma Ryan testified that she was not involved in any discussions with Peabody concerning coverage for their property. She further testified that she left all decisions concerning insurance of the property to her husband. Peabody testified that the plaintiffs never discussed the coverage for their home with him, although Stanley Ryan occasionally called to request additional coverage for outbuildings or farm equipment.

¶ 10 In addition, the defendants provided the court with copies of the declarations pages that accompanied the plaintiffs' original AgriPlus policy in March 1998 and the March 2015 renewal of the policy. The layouts of the two declarations pages are identical in relevant part. Under the heading "Description of Property Covered," each declarations page is divided into eight columns. The third column from the left is titled "Description of

Coverage." Among the items listed in this column are the dwelling and inflation. The next column is titled "Section/Coverage." Under this heading, there is a statement directing the insured to "Refer to the policy booklet." Further to the right is a column labeled "amount insurance" on the March 1999 declarations page and "limit of liability" on the March 2015 declarations page. The 1999 declarations page indicates that section 2 and coverage C are appliable to the dwelling and the amount of insurance for the dwelling is $300,000. It indicates that section 8 and coverage CC are applicable to the inflation coverage. The 2015 declarations page indicates that the limit of liability on the dwelling is $536,600. The two relevant lines are otherwise identical to the 1999 declarations page. Although both declarations pages specifically reference the policy booklet, no portion of the policy booklet appears in the record.

¶ 11 In response to the defendants' motions, the plaintiffs filed a statement of facts in opposition to the summary judgment motions and the affidavit of David Stegall, a risk management consultant with experience as an insurance agent, underwriter, and adjuster. In their statement of facts, the plaintiffs alleged that Peabody met with them in 1999, when he began handling their account, "in connection with the various lines of insurance they had" with Country Mutual, and that he met with them multiple times between 1999 and 2016. They further alleged that Peabody never asked them what type of coverage they wanted.

¶ 12 Stegall averred in his affidavit that he reviewed pertinent Illinois cases and statutes. He opined that it is impossible for an insurance agent to satisfy his duty under applicable statutes without asking what type of insurance his client is requesting. Stegall further

averred that he reviewed the plaintiffs' policy and declarations. He stated, "I don't believe that the declarations page and policy language is such that a lay person could be able to tell if full replacement cost coverage for the plaintiffs' home is included."

¶ 13 On October 18, 2018, while this matter was pending before the trial court, the Illinois Supreme Court issued its decision in *American Family Mutual Insurance Co. v. Krop*, 2018 IL 122556. As we will discuss in more detail later, that case addressed the question of when the statute of limitations begins to run in a case involving allegations of negligent procurement of an insurance policy. Specifically, the court held that, unless certain exceptions apply, the statute of limitations begins to run when an insurer issues a policy that does not conform to the customer's request. See *id*. ¶¶ 35-36. Relying on *Krop*, the defendants raised the issue of the statute of limitations at the hearing on their summary judgment motions.

¶ 14 That hearing took place in February 2019. Both defendants reiterated the arguments they made in their written motions. They also addressed Stegall's affidavit, arguing that both of the matters he addressed—the duty of an insurance agent and whether the policy was too ambiguous to be understood—were legal questions for the court and were not proper subjects for an expert witness to address. Country Mutual asked that the affidavit be stricken. Both defendants also argued that under *Krop*, the statute of limitations begins to run when the policy is initially purchased and that, as such, the plaintiffs' cause of action was time-barred.

¶ 15 The plaintiffs argued that because neither defendant raised the statute of limitations in their motions for summary judgment, they should not be able to raise it now. They further

argued that each policy renewal was a new policy for purposes of the statute of limitations, and the applicable policy was therefore issued in April 2016. We note that both defendants filed their motions before *Krop* was decided and that the applicable renewal was actually issued on March 21, 2016.

¶ 16 The court took the matter under advisement and granted the plaintiffs leave to respond in writing to the defendants' arguments concerning *Krop* and the statute of limitations. On April 24, 2019, the court entered a written order in which it found that under *Krop*, the statute of limitations ran in March 2000, two years after the plaintiffs' policy was originally issued. The court found that because the plaintiffs never made any specific requests concerning the applicable coverage after that date, no subsequent renewal of the policy could serve as the trigger for the statute of limitations. The court also found that no exception to the *Krop* rule was applicable. The court therefore granted the defendants' motions for summary judgment. This appeal followed.

¶ 17 We review *de novo* the trial court's ruling on motions for summary judgment. *Myers v. Health Specialists, S.C.*, 225 Ill. App. 3d 68, 72 (1992). The purpose of summary judgment is to determine whether triable issues of fact exist. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). To survive a motion for summary judgment, plaintiffs need not prove their case; they must, however, "present a factual basis that would arguably entitle" them to relief. *Id*.

¶ 18 Summary judgment is appropriate only if the pleadings, depositions, affidavits, and other evidence on file show that there are no genuine issues of material fact to be tried and the moving party is entitled to judgment as a matter of law. *Thompson v. Gordon*, 241 Ill.

2d 428, 435 (2011). In making this determination, we must "view the factual record in the light most favorable to the nonmoving party." *Gvillo v. DeCamp Junction*, 2011 IL App (5th) 100262, ¶ 9. Summary judgment is a drastic remedy, which should not be granted unless the moving party's right to judgment is "free and clear from doubt." *Kohn v. Laidlaw Transit, Inc.*, 347 Ill. App. 3d 746, 750 (2004).

¶ 19 Here, the court found that the defendants were entitled to judgment because the complaint was time-barred. For the reasons that follow, we believe there are genuine issues of material fact on that question.

¶ 20 The applicable statute of limitations provides that claims for negligence in procuring an insurance policy must be brought within two years. 735 ILCS 5/13-214.4 (West 2016). The more complicated question is when that limitations period began to run.

¶ 21 The Illinois Supreme Court addressed that question in *Krop*. There, homeowners (the Krops) asked an agent of an insurance company (American Family) to procure for them a homeowners' insurance policy equal to the coverage provided under their old policy with a different company. *Krop*, 2018 IL 122556, ¶ 4. Pursuant to their request, American Family issued an insurance policy in March 2012, which the Krops renewed annually for the next three years. *Id*.

¶ 22 In 2014, the Krops were sued for defamation, invasion of privacy, and intentional infliction of emotional distress. *Id*. ¶ 5. American Family denied coverage and filed a declaratory judgment action, claiming the policy did not cover liability for these alleged torts. *Id*. ¶¶ 5, 7.

¶ 23 In September 2015, the Krops filed a counterclaim against American Family and a third-party claim against the agent who procured the policy. They alleged that the agent negligently failed to provide them with the coverage they requested. *Id*. ¶ 8. Both American Family and the agent filed motions to dismiss these claims based on the two-year statute of limitations. *Id*. ¶ 9. The trial court granted the motions to dismiss, and the Krops appealed. *Id*. ¶¶ 10-11.

¶ 24 The first issue on appeal was when the two-year statute of limitations began to run. In answering that question, the supreme court explained that negligent procurement of an insurance policy is a tort arising from a contractual relationship. *Id*. ¶ 18. The court further explained that a cause of action for a tort arising from a contractual relationship accrues on "the date of the breach of the duty or the contract, not the date of the damages." *Id*. It is worth noting that in *Krop*, the underlying issue was whether the policy covered the type of loss sustained by the homeowners, not whether the amount of coverage was sufficient to cover their loss. See *id*. ¶¶ 5-7. There was no dispute that the alleged breach—that is, the agent's procurement of a policy that did not include such coverage—occurred when the original policy was issued. *Id*. ¶ 35. Thus, the supreme court concluded that the Krops' cause of action accrued the day they received that policy in 2012. *Id*. ¶¶ 2, 19.

¶ 25 The second issue before the Illinois Supreme Court in *Krop* was whether the discovery rule delayed the start of the limitations period until the Krops "knew or reasonably should have known" that they had a claim. *Id*. ¶ 21. In addressing this question, the court first noted that Illinois courts have "imposed on insurance customers an obligation to read their policies and understand the terms." *Id*. ¶ 22. The court explained that this rule

exists because "[c]ustomers generally know their own goals better than their insurance agent does," and expecting customers "to read their policies and understand the terms incentivizes them to act in good faith to purchase the policy they actually want." *Id*. ¶ 29.

¶ 26 The court recognized, however, that there is "a narrow set of cases in which the policyholder reasonably [cannot] be expected to learn the extent of coverage simply by reading the policy." *Id*. ¶ 36. That narrow set of cases includes cases where policies "contain contradictory provisions or fail to define key terms," cases in which "the circumstances that give rise to the liability" are so unusual or unexpected that a typical insurance customer cannot "be expected to anticipate how the policy applies," and cases in which a customer reasonably relies on an insurance agent's representations about the policy. *Id*. The *Krop* court found that none of these unusual circumstances existed in the case before it. *Id*. ¶ 37.

¶ 27 In this case, the plaintiffs argue that the limitations period began to run on March 21, 2016, when they renewed their policy. They recognize that *Krop* "can be interpreted to stand for the proposition that, absent any applicable exception, the claim accrues on the date that the original policy was issued." They argue, however, that this interpretation is inconsistent with statutory language requiring an insurance agent to "exercise ordinary care and skill in *renewing*, procuring, binding, or placing the coverage requested by the insured." (Emphasis added.) See 735 ILCS 5/2-2201(a) (West 2014). We are not persuaded.

¶ 28 Although we agree with the plaintiffs that the *Krop* court did not hold that the statute of limitations always accrues when the original policy is issued, we do not believe the

record in this case raises a genuine question of material fact as to whether it accrued later. As we explained earlier, the *Krop* court held that a cause of action for negligent procurement accrues when an insurer delivers to the insured a policy that does not conform with the insured's request. *Krop*, 2018 IL 122556, ¶ 35. As the defendants correctly contend, the duty to use ordinary care and skill is triggered by a specific request for insurance. See *Skaperdas*, 2015 IL 117021, ¶ 37. In light of these two principles, it stands to reason that a cause of action for negligent procurement may accrue upon renewal of an existing policy if the insured makes some sort of request concerning the coverage.

¶ 29 The trial court in this case considered that possibility in its written order. The court expressly found that there was no evidence that the plaintiffs ever made any specific request regarding coverage for their home after they initially purchased the policy. For this reason, the court concluded that no renewal date could serve as the trigger for the two-year statute of limitations. The plaintiffs did not allege that they made any requests concerning coverage on the house at any time after the original policy was issued, and they presented no evidence to refute Peabody's deposition testimony that they did not make any such requests. We therefore believe that the trial court's findings are supported by the record.

¶ 30 The plaintiffs also contend, however, that there is a genuine issue of material fact as to whether they could reasonably have been expected to determine the extent of their coverage by reading their policy. We agree.

¶ 31 We note that although the declarations page the plaintiffs received when they renewed their policy in March 2016 does not appear in the record, the parties do not dispute that it stated that the limit of liability on the dwelling at that time was $544,000. However,

the declarations page must be read in conjunction with the policy language. *Hess v. Estate of Klamm*, 2020 IL 124649, ¶ 22; *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 23 (2005). This is because an insurance policy, like any other contract, must be interpreted in its entirety, not based on an "isolated part." *Zurich Insurance Co. v. Raymark Industries, Inc.*, 118 Ill. 2d 23, 50 (1987). Here, the policy itself has not been made part of the record. It is also worth emphasizing that the declarations page explicitly made reference to the policy. As such, it was impossible for the court to determine whether the policy contained contrary provisions, failed to define important terms, or was otherwise ambiguous enough that the plaintiffs reasonably could not have been expected to understand what type of coverage they had just by reading it. Thus, we find that a genuine question of fact remains on that material question.[1]

¶ 32 In reaching the opposite conclusion, the trial court emphasized evidence that Stanley Ryan had requested additional coverage for his farm equipment and outbuildings over the years. Peabody testified in his deposition that he made changes to the plaintiffs' policy over the years by adding coverage to cover outbuildings that were added to the property. Similarly, Stanley Ryan testified that he purchased additional farm equipment over the years and that he had discussions with Peabody's secretary concerning the amount of coverage he had "primarily relating to farm machinery." Although this evidence indicates that Mr. Ryan understood that he could request additional coverage or make changes to his

[1]We note, parenthetically, that we agree with the dissent that the conclusory opinions given by the plaintiff's expert witness in his affidavit were not sufficient to create a genuine question of material fact. We have not addressed the parties' arguments regarding the affidavit because we have found that summary judgment is precluded by a genuine question of material fact for other reasons.

existing policy, we do not believe it answers the question of whether the plaintiffs could reasonably have been expected to understand the extent of the coverage on their home from reading their policy. See *Krop*, 2018 IL 122556, ¶ 36. For these reasons, we conclude that the court erred in finding that there were no genuine issues of material fact concerning the applicability of the *Krop* exception and the running of the statute of limitations.

¶ 33 For the foregoing reasons, we reverse the court's judgment.

¶ 34 Reversed.

¶ 35 JUSTICE OVERSTREET, dissenting:

¶ 36 I respectfully dissent. The majority concludes that the trial court erred in entering summary judgment in favor of the defendants because there remains a genuine issue of material fact as to whether the plaintiffs reasonably could have been expected to determine the extent of their coverage by simply reading their policy. *Supra* ¶¶ 31-32. The majority arrives at this conclusion by reasoning that because the policy itself has not been made part of the record, it was impossible for the trial court to determine whether the policy contained contrary provisions, failed to define important terms, or was otherwise ambiguous. *Supra* ¶ 31. The portions of the policy that were submitted for the trial court's consideration supported the court's determination that the policy unambiguously described the extent of the plaintiffs' coverage, however, and "[a]n appellate court's review of a summary judgment order must be confined to the record as it existed when the trial court ruled on the motion." *First of America Trust Co. v. First Illini Bancorp, Inc.*, 289 Ill. App. 3d 276,

283 (1997). Moreover, speculation as to what the unsubmitted portions of the policy might have revealed is insufficient to raise a genuine issue of material fact (*In re Estate of Frakes*, 2020 IL App (3d) 180649, ¶ 16), and to the extent that the entire policy was necessary to fairly resolve the parties' dispute, it was the plaintiffs' burden to provide it, and they failed to do so.

¶ 37 "Summary judgment is appropriate where 'the pleadings, depositions, and admissions *on file*, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " (Emphasis added.) *Blanchard v. Berrios*, 2016 IL 120315, ¶ 12 (quoting 735 ILCS 5/2-1005(c) (West 2014)). In pertinent part, section 2-606 of the Code of Civil Procedure provides that "[i]f a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein." 735 ILCS 5/2-606 (West 2016). In pertinent part, Illinois Supreme Court Rule 191(a) states that an affidavit submitted in a summary dismissal proceeding "shall have attached thereto sworn or certified copies of all documents upon which the affiant relies" and "shall not consist of conclusions but of facts admissible in evidence." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

¶ 38 In the present case, the plaintiffs' complaint identified the policy at issue by its policy number but did not include a copy of the policy or recite any of its relevant provisions. When Peabody was deposed in May 2018, however, the policy was used as an exhibit, *i.e.*, Exhibit D, as were the policy's declarations pages that had been in effect in March 1998 and March 2015, *i.e.*, Exhibits A and B, respectively. The policy identified as

Exhibit D was specifically described as a "45-page document entitled Country Financial AgriPlus policy." The declarations pages identified as Exhibits A and B stated that the policy consisted of "the policy booklet, applications, declarations[s] pages[,] and any endorsements." The declarations pages further stated that the plaintiffs had "only the coverages and amounts of insurance as stated in this declaration, subject to all provisions of [the] policy." The March 1998 declarations page identified as Exhibit A indicated that the plaintiffs' home was insured for $300,000, and the March 2015 page identified as Exhibit B indicated that the home was insured for $536,600. Both pages also indicated that section 2 and coverage C of the policy booklet were applicable, and both directed the plaintiffs to "[r]efer to [the] policy booklet." In June 2018, in response to Peabody's request to admit facts, the plaintiffs acknowledged that Exhibits A and B were true and correct copies of the policy's declarations pages that had been in effect in March 1998 and March 2015, respectively, and that Exhibit D was a true and correct copy of the terms of the policy.

¶ 39 Shortly after our supreme court issued its decision in *Krop*, Peabody filed a supplement to his motion for summary judgment, arguing that the two-year limitations period applicable to claims arising from the procurement of an insurance policy applied to the plaintiffs' cause of action. See 735 ILCS 5/13-214.4 (West 2016). Peabody specifically noted, *inter alia*, that the *Krop* court found that "when customers have the opportunity to read their insurance policy and can reasonably be expected to understand its terms, the cause of action for negligent failure to procure insurance accrues as soon as the customers receive the policy."

¶ 40 The plaintiffs subsequently filed a memorandum in opposition to Peabody's supplement to his motion for summary judgment, contending that the limitations period recognized in *Krop* was inapplicable because they reasonably could not have been expected to understand the terms of the policy by simply reading it. See *Krop*, 2018 IL 122556, ¶ 36 (recognizing that "there will be a narrow set of cases in which the policyholder reasonably could not be expected to learn the extent of coverage simply by reading the policy," such as where the policy contains contradictory provisions or fails to define key terms). In support of their suggestion that the policy was ambiguous, the plaintiffs referenced their expert's affidavit, which conclusionally stated, "I have reviewed the declaration and the policy in effect for the plaintiffs at the time of the April 23, 2016, fire," and "I don't believe that the declarations page and policy language [are] such that a lay person could be able to tell if full replacement cost coverage for the plaintiffs' home is included." On appeal, the plaintiffs do not dispute that their expert's affidavit failed to comply with Illinois Supreme Court Rule 191(a)'s requirements that an affidavit submitted in a summary dismissal proceeding "shall have attached thereto sworn or certified copies of all documents upon which the affiant relies" and "shall not consist of conclusions but of facts admissible in evidence." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

¶ 41 Peabody and Country Mutual both filed responses to the plaintiffs' memorandum in opposition to Peabody's supplement to his motion for summary judgment. In its response to the plaintiffs' contention that the limitations period recognized in *Krop* was inapplicable because they reasonably could not have been expected to understand the terms of their policy by simply reading it, Country Mutual noted that the plaintiffs had failed to present

"any facts demonstrating contradiction or ambiguity in the terms of their insurance policy." See *Krop*, 2018 IL 122556, ¶ 38 (holding that the two-year statutory limitations period was applicable where the customers failed to plead facts showing that they could not have read their policy and understood its terms). Country Mutual further asserted that the affidavit of the plaintiffs' expert was insufficient to raise a genuine issue of material fact and could not properly be considered. See, *e.g.*, *Robidoux v. Oliphant*, 201 Ill. 2d 324, 339 (2002) ("[A]n expert's affidavit in support of or in opposition to a motion for summary judgment must adhere to the requirements set forth in the plain language of Rule 191(a)."); *Barrett v. FA Group, LLC*, 2017 IL App (1st) 170168, ¶ 32 (holding that where the expert's affidavit amounted to conclusions unsupported by admissible facts, it had "no basis under the law and should not have been considered"); *Board of Education, Pleasantdale School District No. 107 v. Village of Burr Ridge*, 341 Ill. App. 3d 1004, 1013 (2003) ("[A]n expert's opinion is only as valid as the basis and reasons for that opinion."); *Northrop v. Lopatka*, 242 Ill. App. 3d 1, 9 (1993) ("Plaintiff cannot create a trial issue of fact by the conclusory affidavit of its expert."); see also *William J. Templeman Co. v. Liberty Mutual Insurance Co.*, 316 Ill. App. 3d 379, 390 (2000) ("[A]s the construction and interpretation of an insurance policy is a question of law, we fail to see the relevance of plaintiffs' expert witness."). Peabody's response included similar arguments and specifically alleged that the language of the plaintiffs' policy was "clear and readily understandable." In support of that allegation, Peabody attached a copy of Exhibit A to his response and recited the advisement that the plaintiffs had "only the coverages and amounts of insurance as stated in this declarations, subject to all provisions of [the] policy." Peabody also attached a copy of

page 39 of the 45-page policy booklet identified as Exhibit D and recited the following language from the page's "Conditions" provisions:

> "A. Insurable Interest and Limit of Liability
>
> Even if more than one person has an insurable interest in the property covered, [Country Mutual] will not be liable in any one 'occurrence':
>
> 1. To an 'insured' for more than the amount of such 'insured's' interest at the time of loss; or
>
> 2. For more than the applicable limit of liability."

Thereafter, the plaintiffs did not respond to either of the defendants' pleadings. Nor did they provide the trial court with a copy of the AgriPlus policy booklet or otherwise direct the court's attention to any of its other provisions.

¶ 42 When the trial court subsequently granted the defendants' motions for summary judgment, the court found, *inter alia*, that the plaintiffs' insurance policy was not so complicated that they reasonably could not have been expected to learn the extent of their coverage by simply reading it. The trial court also observed that their expert's opinion notwithstanding, the plaintiffs had previously made a request to increase the coverage on their farm machinery. The court indicated that none of the evidence presented for its consideration warranted a finding that the two-year limitations period recognized in *Krop* should not be applied to the plaintiffs' cause of action and accordingly concluded that "the statute of limitations ran in approximately 2000."

¶ 43 A violation of a statute of limitations is an affirmative defense that a defendant must plead and prove to prevail on a motion to dismiss pursuant to section 2-619 of the Code of

Civil Procedure. 735 ILCS 5/2-619(a)(5) (West 2016); *Hubble v. Bi-State Development Agency of the Illinois-Missouri Metropolitan District*, 238 Ill. 2d 262, 267 (2010); *CACH, LLC v. Moore*, 2019 IL App (2d) 180707, ¶ 13. Where a defendant presents evidence adequate to support the defense, the defendant's initial burden of moving forward on the motion to dismiss is satisfied. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). The burden then shifts to the plaintiff, who must present evidentiary matter establishing that the asserted defense is unfounded or requires the resolution of an essential element of material fact before it is proven. *McIntosh v. Walgreens Boots Alliance, Inc.*, 2019 IL 123626, ¶ 16; *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997). If the plaintiff fails to do so, then the defendant's properly asserted facts are deemed admitted, and the defendant's motion to dismiss the cause of action may be granted. *Epstein*, 178 Ill. 2d at 383; *Kedzie*, 156 Ill. 2d at 116; see also *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995) ("When supporting affidavits have not been challenged or contradicted by counter-affidavits or other appropriate means, the facts stated therein are deemed admitted."); *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 380 (1974) ("If the party moving for summary judgment supplies facts which, if not contradicted, would entitle such a party to a judgment as a matter of law, the opposing party cannot rely upon his complaint or answer alone to raise genuine issues of material fact."). Although the defendant bears the burden of persuasion on a motion to dismiss, the burden of production "may shift several times in one case." 54 C.J.S. *Limitations of Actions* § 427 (2020).

¶ 44 Here, when the defendants asserted that the statutory two-year limitations period was applicable to the plaintiffs' cause of action, the burden shifted to the plaintiffs to

establish that *Krop*'s ambiguity exception applied or arguably applied. See 54 C.J.S. *Limitations of Actions* § 427 (2020) ("If the defendant shows that the statute of limitations has run, the burden shifts to the plaintiff to disprove the allegation *** by either establishing an exception to the statute of limitations or raising an issue of fact as to whether such an exception applies."). The plaintiffs were thus required to establish that they reasonably could not have been expected to learn the extent of their coverage by simply reading their policy or that it was arguable that such was the case. To that end, the plaintiffs relied solely on their expert's affidavit, but the affidavit failed to comply with Rule 191(a), and the trial court was not bound to accept the expert's opinion as sufficient to raise a genuine issue of material fact. Because the affidavit stood uncontradicted at the time, however, the burden nevertheless shifted back to the defendants. See *1350 Lake Shore Associates v. Healey*, 223 Ill. 2d 607, 629 (2006) ("[T]he defendant must, as in any other case, put forth evidence to counter the plaintiff's proof."). The defendants, in turn, supported their contention that the policy was readily understandable by providing the court with copies of the specific provisions that they asserted were dispositive of the issue, *i.e.*, the provisions identified from Exhibit A and page 39 of Exhibit D. At that point, the burden shifted to the plaintiffs again, but they did not respond to the defendants' pleadings or otherwise offer any additional proof that would have allowed for a finding that the policy contained contrary provisions, failed to define terms that required defining, or was somehow so ambiguous that they reasonably could not have been expected to learn the extent of their coverage by simply reading it. As a result, the identified provisions from

Exhibit A and page 39 of Exhibit D were ultimately deemed admitted as the relevant and controlling portions.

¶ 45 In my view, the plaintiffs cannot now argue that the policy *might* have contained additional provisions that *might* have led to a different conclusion. As previously indicated, the portions of the policy on file were deemed admitted as the relevant and controlling provisions; our review of the trial court's judgment is "limited to the record as it existed at the time the trial court ruled" (*McCullough v. Gallaher & Speck*, 254 Ill. App. 3d 941, 947 (1993)); speculation is insufficient to raise a genuine issue of material fact, and the plaintiffs have effectively waived any claim that the trial court should have considered the entire policy before entering judgment on the defendants' motions to dismiss. A party cannot withhold available evidence only to later contend that summary judgment should not have been entered in the evidence's absence. See, *e.g.*, *Colonial Inn Motor Lodge, Inc. v. Gay*, 288 Ill. App. 3d 32, 39 (1997); *Enblom v. Milwaukee Golf Development*, 227 Ill. App. 3d 623, 631 (1992); *Rahill Corp. v. Urbanski*, 123 Ill. App. 3d 769, 776 (1984); see also *Vantage Hospitality Group, Inc. v. Q Ill Development, LLC*, 2016 IL App (4th) 160271, ¶ 49 ("It has long been the law of the State of Illinois that a party who fails to make an argument in the trial court forfeits the opportunity to do so on appeal."). Rather, "upon appellate review of a summary judgment ruling[,] the appellant may only refer to the record as it existed at the time the trial court ruled, outline the arguments made at that time, and explain why the trial court erred in granting summary judgment." *Rayner Covering Systems, Inc. v. Danvers Farmers Elevator Co.*, 226 Ill. App. 3d 507, 509-10 (1992). I lastly note that the plaintiffs do not argue that the provisions of the policy that the

defendants presented for the trial court's consideration failed to support the court's conclusion that the plaintiffs' cause of action was untimely. The plaintiffs' briefs and arguments wholly ignore, in fact, that the identified provisions from Exhibit A and page 39 of Exhibit D were even submitted. For these several reasons, I respectfully dissent.