

SC93792

**IN THE SUPREME COURT OF MISSOURI**

---

SCOTTSDALE INSURANCE COMPANY and WELLS TRUCKING, INC.,

*Plaintiffs-Appellants,*

v.

ADDISON INSURANCE COMPANY and UNITED FIRE & CASUALTY CO.

*Defendants-Respondents*

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Appeal from the Circuit Court of Linn County

Cause No. 10LI-CC00022

The Hon. Gary E. Ravens, Judge Presiding

9<sup>th</sup> Circuit

**SUBSTITUTE BRIEF OF APPELLANTS**

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## I. JURISDICTIONAL STATEMENT

Appellant Scottsdale, an excess insurer, brought this civil action for damages for a breach of the implied covenant of good faith and fair dealing by respondent United Fire, a primary insurer. The trial court granted United's motion for summary judgment on December 4, 2012. Scottsdale timely appealed to the Western District Court of Appeals on December 14, 2012. On October 1, 2013, the Court of Appeals issued an Opinion reversing the trial court's decision, in part, and remanding. On November 13, 2013, United Fire filed an Application for Transfer to this Court, which this Court sustained on February 4, 2014. As such, this Court has jurisdiction over this case pursuant to Art. V, Sec. 10 of the Missouri Constitution. This Court now decides the case as if it were on original appeal. *Buchweiser v. Estate of Laberer*, 695 S.W.2d 125, 127 (Mo. banc 1985).

## II. INTRODUCTION

This is a dispute between an excess insurer, appellant Scottsdale, and a primary insurer, respondent United Fire ("United"). It arises out of an auto accident that occurred on August 27, 2007. On that date, there was a collision between Eric Probst, an employee of appellant Wells Trucking ("Wells"), and Scott Childress. Childress died as a result of the accident, and his family members sued Wells and Probst for wrongful death.

At the time of the accident, Wells had a primary auto policy with United with \$1 million liability limits. United defended the *Childress* action through its retained defense counsel. United's records indicate it was aware of the likelihood of a verdict in excess of

its \$1 million limits. It recognized there was strong evidence that Probst was speeding, and that the lost earnings claim would be significant because Childress was a 50-year-old bank President. United's internal notes specifically reflect its belief that the claim was worth \$1.5 million.

The *Childress* claimants, Wells, and Probst made numerous demands that United settle for its \$1 million limits. United responded to the claimants' \$1 million demands with lowball offers comprising a fraction of its \$1 million limits.

Appellant Scottsdale, who issued a \$2 million excess policy to Wells, became aware of United's bad faith failure to settle ("BFFS"). Scottsdale insisted that United discharge its duty to settle for \$1 million. However, United refused to pay its \$1 million limits and continued to make lowball offers. United also expressed relief when it learned of the Scottsdale excess policy, noting this "eased the pressure" (to settle).

After nearly a year of making \$1 million demands and offering numerous extensions of time, the claimants withdrew their \$1 million demand. They made a much higher demand of \$3 million. Although United had no new or different information, it agreed to pay its \$1 million limits towards any settlement. However, United demanded that Scottsdale pay the balance of any settlement. Scottsdale responded that United was responsible for the excess amount, which would have never been incurred had United settled for \$1 million when it had the chance. Nevertheless, when the claimants agreed to accept \$2 million in settlement, Scottsdale contributed \$1 million over and above United's \$1 million. In exchange, Scottsdale received an assignment of Wells' rights against United.

Scottsdale and Wells brought the instant action against United for its BFFS. They alleged that Scottsdale was entitled to recover its \$1 million payment based on the principles of, *inter alia*, assignment, contractual subrogation, equitable subrogation and a direct duty of good faith running from United to Scottsdale. United brought a motion to dismiss ("MTD"), arguing Scottsdale had no right to pursue United under Missouri law. The trial court overruled the MTD, finding that Scottsdale stated a viable claim for at least assignment and contractual subrogation, and finding no occasion to address the remaining claims.

United then moved for summary judgment ("MSJ"). Its MSJ was late under the summary judgment rule, Rule 74.04, and the trial court's Scheduling Order. There was also no evidence attached to United's motion. Instead, United relied on select allegations from Scottsdale's own First Amended Petition ("FAP") which United mischaracterized. United argued that since Scottsdale "admitted" that United paid \$1 million, there was no failure to settle within policy limits. United further argued that an excess "judgment" was required for a BFFS claim, and there was no such judgment here. United did not address, much less did it controvert, Scottsdale's claim that United acted in "bad faith" by failing to resolve the case for \$1 million when it could, forcing Scottsdale to pay an additional \$1 million. In addition, United failed to address authorities holding that an excess judgment *or settlement* is sufficient to support a BFFS claim.

United's counsel consented to two short extensions of time for Scottsdale to respond to the MSJ. Scottsdale filed memoranda setting forth United's consent to the extensions with the trial court. After Scottsdale filed its response within the time to

which United had consented, the trial court entered an interlocutory order granting the MSJ. The trial court reasoned that Scottsdale's response was "untimely" and that the trial court had "no authority" to enlarge the time for a response.

Scottsdale filed a motion for reconsideration of the trial court's MSJ order. It argued that Scottsdale's reliance upon the parties agreed-upon extensions of time, if in error, was "excusable" under Rule 44.01(b) and 74.06(b) such that Scottsdale was entitled to relief. Scottsdale further argued that United's own MSJ was late, such that if the trial court lacked discretion under Rule 44.01(b), it should deny United's MSJ as untimely.

At the hearing of Scottsdale's reconsideration motion, the trial court insisted it had no discretion because the summary judgment deadlines under Rule 74.04 are "mandatory." The trial court then signed a Judgment drafted by United's counsel which mischaracterized the facts and law. Among other things, the Judgment purported to rule in United's favor on the merits, although the trial court never reached the merits. According to the Judgment, Missouri law prohibits an excess carrier like Scottsdale from pursuing a primary carrier like United for a BFFS. This contradicts the trial court's earlier ruling in Scottsdale's favor on the MTD, in which the trial court observed that at a minimum, Scottsdale had viable claims based on assignment and contractual subrogation. In addition, this finding constitutes clear error, since the Missouri appellate courts have never addressed whether an excess carrier may pursue a primary carrier for a BFFS. As such, the issue is one of first impression in Missouri. Nevertheless, the majority of other jurisdictions nationwide have held that excess carriers effectively "stand in the shoes" of insureds *vis-à-vis* primary carriers. Both suffer financial harm if the primary carrier

wrongfully refuses to settle within its policy limits. Moreover, permitting excess carriers to sue primary carriers for a BFFS promotes sound public policy. It encourages quick and just settlements, keeps excess insurance premiums low, and ensures primary insurers are held accountable for their wrongful conduct. Therefore, courts around the country have permitted excess insurers to pursue primary insurers for BFFS under theories of assignment, equitable subrogation, contractual subrogation and/or a direct duty of good faith running from primary insurers to excess insurers. Since the same legal and public policy considerations prevail in Missouri, this Court should likewise find that as a matter of first impression, Missouri law permits an excess carrier to sue a primary carrier for BFFS.<sup>1</sup> This Court should then remand this case for further proceedings due to the trial court's clear error in granting summary judgment.

### **III. STATEMENT OF FACTS**

#### **A. Parties**

Appellant Wells is an interstate trucking company that engages in trucking operations throughout the United States, including in Missouri. (L.F. 972.) During the times in question, Wells had a primary trucking policy with respondent United and an excess policy with appellant Scottsdale. (L.F. 40-110, 111-163, 1197-1198 (¶¶2, 6).)

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<sup>1</sup> In its October 1, 2013 Opinion, the Court of Appeals correctly found that excess insurers may pursue primary insurers for BFFS under an equitable subrogation theory. However, the Court of Appeals erroneously declined to find such a right under assignment, contractual subrogation and "direct duty" theories, as set forth below.

While the policies were in force, Wells employee Eric Probst was involved in a collision with Scott Childress. (L.F. 18, 908.) Childress died as a result of the collision, and his surviving family members sued Wells and Probst for wrongful death. After the settlement of *Childress*, Wells and Scottsdale brought the instant action against United for BFFS. (L.F. 12-163, 346-497).

**B. Underlying Accident**

On or about August 27, 2007, Wells employee Eric Probst was operating a truck pulling a flatbed trailer in Knox County, Missouri. (L.F. 18, 908.) Wells owned the truck and the trailer. Probst was involved in an automobile accident with Scott Childress, who sustained severe bodily injuries from which he died. (L.F. 18, 908.)

**C. The United Primary Policy and Scottsdale Excess Policy**

Addison Insurance Company is part of the United group of companies. (L.F. 1150, 1151 (No. 4).) Addison and United are collectively referred to as "United." United issued commercial auto coverage primary policy number 60346435, effective June 1, 2007 to June 1, 2008, to Wells. ("United Policy"). (L.F. 40-110.) The United Policy contained primary liability limits of \$1 million per occurrence for vehicles the insured owned. (L.F. 53, 65-67.)

Scottsdale issued commercial liability umbrella policy number UMS0021297, effective June 1, 2007 to June 1, 2008 to Wells ("Scottsdale Policy"). (L.F. 111-163, 1197-1198 (¶¶2, 6).) The Scottsdale Policy was specifically excess to the United primary policy, and contained a liability limit of \$2 million. (L.F. 111, 113.) The Scottsdale Policy stated it would not apply unless and until the underlying United Policy was

exhausted through the payment of a judgment or settlement. (L.F. 116, 126, 131.)

**D. The Underlying *Childress* Claim**

*Childress'* wife and two children retained counsel to pursue their claims against Wells in Missouri. (L.F. 12, 18-19 (¶33).) They notified United about the accident and provided relevant facts and documents. (L.F. 1069, 239, 243 (¶33).)

**E. United's Failure to Accept Numerous Offers to Settle for Its Policy Limits Despite Excess Exposure**

United retained defense counsel to represent Wells regarding the *Childress* claim. Wells also retained its own personal counsel. (L.F. 1000.) In April of 2008, the *Childress* attorney furnished United's retained defense counsel with over 800 pages of documents evidencing claimants' damages. (L.F. 1069, 1197, 1199, (¶7).) These documents made clear that there were significant liability issues, and that the settlement value of the case was well in excess of United's \$1 million limits. The Missouri Highway Patrol Report stated that Probst was speeding at the time of the incident, and there were criminal charges against Probst for exceeding the speed limit. (L.F. 530, 632:9-13, 752, 760:2-9, 788:9-19, 829:21-831:16.)

In addition, United's own retained expert was adamant Probst was speeding at the time of the collision. (L.F. 292, 305 (¶13), 537, 562:20-563:14, 591:21-592:22, 597:23-598:2, 752, 827:20-828:4, 877, 875-876, 1075, 1103:8-1104:10.) United was aware of this position, and wanted to avoid documenting it. (L.F. 292, 305 (¶14), 530, 565:16-566:8, 591:11-17, 592:21-22, 752, 782:2-17.)

United's retained defense counsel also reported early on that there were significant

liability issues. Not only was there evidence that Probst was speeding, but Probst was only 20 years old at the time of the collision. Therefore, it may have been illegal for him to operate the vehicle in question. (L.F. 752, 800:12-20, 817:17-818:12, 876, 883, 889, 891, 1075, 1085:17-1086:1.) As United recognized, these were important factors in evaluating the settlement value of the case. (L.F. 752, 800:12-88:19, 817:17-818:9.)

The evidence also indicated that Probst was driving in the wrong lane. Had Probst been driving in the correct lane, the accident would not have occurred or would have been less severe. (L.F. 1069.)

United's internal records reflect that it was aware that the speeding claim was indefensible and that exposure was "extensive" by August of 2007:

"Our exposure is being reserved at this time with the information that we will not have a defense for the speed of the insured vehicle. MO is a pure comparative State, the claimants [sic] damages are extensive." (Emphasis added.)

(L.F. 1011.)

As such, United recognized that liability was likely, and that the case involved significant exposure.

As United admittedly realized as of 2007, Missouri is a "pure comparative" state. Thus, even minimal liability on Probst's part would allow Childress' heirs to recover. In addition, United had already concluded Probst was at least 20% at fault for the accident due to his excessive speed. (L.F. 1129:24-35, 752, 762:19-763:4, 784:16-785:6, 789:2-790:3, 791:11-20.)

According to United's internal notes, it also recognized as of late 2007 that the *Childress* case had a value in excess of United's \$1 million primary limits. United noted that since Childress was a 50-year-old bank President, the case could be worth \$1.5 million. (L.F. 752, 762:19-763:4, 864, 907-908)

The personal attorneys for Probst and Wells also recognized the potential for an excess verdict, and urged United to resolve the case within its \$1 million policy limits. (L.F. 752, 806:15-19, 873, 875, 877, 891, 999.) In an April 29, 2008 letter, counsel for Probst demanded United protect Probst's interests by offering its \$1 million limits. Similarly, in a May 5, 2008 letter, personal counsel for Wells demanded that United settle the claim for an amount within its policy limits. (L.F. 530, 578:18-579:7; 580:14-581:4; 586:11-16; 595:24-596:19, 596:10-19, 752, 811:20-813:13, 999, 1000, 1069.)

On April 14, 2008, counsel for the *Childress* claimants made a \$1 million policy limits demand on United. The demand letter included family pictures and emphasized the devastating effect the loss of Scott Childress had on his family's emotional and financial well-being. (L.F. 530, 574:10-575:2, 752, 808:9-809:3, 976-979, 980, 998.) Between April and July of 2008, the *Childress* claimants gave United numerous extensions of time and opportunities to settle within its \$1 million policy limits. (L.F. 530, 549:9-13, 577:11-21, 586:11-587:3, 752, 809:4-8, 815:20-113:19, 1007-1009, 1009.) Although United's records showed it recognized there was exposure in excess of \$1 million, it responded to the Childress demand with a \$50,000 offer. (L.F. 968-969.) When United's retained defense counsel advised that the offer was inadequate, United instructed him to make it regardless. (L.F. 530, 550:12-22, 551:7-19, 552:9-16, 553:7-25,

556:19-557:9, 558:1-5, 752, 762:19-763:4, 864, 892, 1069, 1197, 1200 (¶¶9).)

F. **The Childress Claimants File Suit After United Rejects Their \$1 Million Policy Limits Demands**

After United rejected the claimants' \$1 million policy limits demands, the Childress claimants filed a wrongful death suit against Wells and Probst on July 17, 2008. The lawsuit was venued in Knox County, Missouri, and was styled *Childress v. Probst and Wells Trucking, Inc.*, Case No. 08KN-CC00030. On or about September 11, 2008, the action was transferred to Linn County, Missouri, and assigned case number 08LI-CC00032. The *Childress* lawsuit alleged wrongful death and aggravating circumstances. (L.F. 21, 1115-1127.)

After filing suit, the *Childress* claimants again provided United with several opportunities to settle for \$1 million. (L.F. 21, 1020-1024.) By that time, United had obtained additional evidence that made an excess verdict even more likely. (L.F. 12, 21-22 (¶¶50), 930-936, 1043-1049.) Probst was the only living witness, and had no memory of the 10 minutes leading up to the collision. Thus, he could not refute the evidence that he was speeding. (L.F. 752, 798:7-21, 799:2-18, 800:12-801:19, 813:21-814:6) Further, the "black box" data concerning Probst's speed could not be obtained from the vehicle he was driving. (L.F. 752, 818:13-819:9.)

United also learned that Childress was alive after the accident, and called his wife. His wife located the accident scene and followed the ambulance in which Childress ultimately died. United recognized that this evidence would allow the *Childress* claimants to recover pain and suffering damages, which would likely increase any

damage award. (L.F. 530, 630:13-22, 633:2-4, 843:7-844:14.)

Notwithstanding the mounting evidence there would be an excess verdict, United continued to reject the claimants' \$1 million demands. (L.F. 12, 22 (¶51), 1050.) It countered with "lowball" settlement offers of \$250,000. (L.F. 537, 606:9-19, 1019, 1070.)

**G. United Learns of the Scottsdale Excess Policy**

In September of 2008, United's retained defense counsel learned of the existence of the Scottsdale excess policy with limits of \$2 million in excess of United's policy. (L.F. 530, 554:4-555:6, 606:25-607:25). When counsel advised United about the Scottsdale excess policy, United expressed relief: "[T]hat certainly helps ease the pressure [to settle for United's \$1 million policy limits]." (L.F. 530, 606:25-607:25.)<sup>2</sup> After receiving the Scottsdale policy, defense counsel provided the same to counsel for the *Childress* claimants. (L.F. 146:8-25.)

**H. Scottsdale Learns of the Pending *Childress* Action and Demands that United Settle for Its Policy Limits**

In September of 2008, Scottsdale learned of the pending *Childress* action. (L.F. 12, 22 (¶52), 1025-1026, 1197, 1198 (¶3).) It also learned that United was unreasonably refusing to accept the claimants' \$1 million settlement demands. (L.F. 1070.) In January of 2009, Scottsdale demanded that United settle the lawsuit for its \$1 million limits while

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<sup>2</sup> Interestingly, this email was not contained in the claim file documents United ultimately produced to Scottsdale in this action. (L.F. 752, 835:18-836:23.)

it still had the opportunity to do so. (L.F. 12, 22 (¶53), 530, 633:7-9, 752, 846:7-18, 1039-1040, 1070, 1197, 1201 (¶13).) The evidence continued to indicate that Wells would likely face a verdict well in excess of \$1 million. (L.F. 752, 762:19-763:4, 864, 876, 1075, 1091:17-1092:10, 1075, 1091:17-1092:10, 1107:4-8.) Notwithstanding, United rejected Scottsdale's settlement demand. (L.F. 215, 752, 846:23-847:14; 1197, 1201 (¶14).) United also continued to respond to the Childress' \$1 million settlement demands with "lowball" settlement offers. (L.F. 12, 22 (¶54), 1183-1184.)

#### **I. The Childress' Claimants' Final \$1 Million Settlement Demand**

In March of 2009, claimants' counsel again demanded that United settle for its \$1 million limits. This was despite the claimants' awareness of Scottsdale's \$2 million excess policy. Claimants' counsel agreed to leave the settlement demand open for several more months. (L.F. 12, 22 (¶55), 1050-1061, 1070, 530, 624:24-626: 21, 1075, 1093:7-1094:1, 752, 849:16-24, 850:18-851:9, 852:13-853:4.) During this time, United's retained defense counsel took the depositions of the claimants, and advised that they would make compelling witnesses. (L.F. 530, 626:11-21, 752, 849:16-24.) Despite this, United continued to reject the Childress' efforts to settle for United's \$1 million limits. (L.F. 530, 625:8-25.) United continued to respond with lowball settlement offers of \$250,000, although its reserves were set at \$750,000. (L.F. 12, 22-23 (¶56), 530, 626:8-24, 627:16-22, 628:4-20 752, 822:7-16, 530, 608:2-9.) In rejecting the claimants' \$1 million demand, United claimed that Childress was to blame for the accident by pulling in front of Probst, although United knew the evidence was to the contrary. (L.F. 530, 593:8-24, 626:22-627:5, 627:16-22.) In addition, rather than conducting further

investigation and discovery, United quickly rejected the claimants' final \$1 million demand months before it expired. (L.F. 530, 628:4-20.)

**J. The Childress Claimants Finally Withdraw Their \$1 Million Demand and Seek \$3 Million**

After enduring repeated rejections of their \$1 million settlement demand, the claimants withdrew the demand. (L.F. 12, 23 (¶57), 752, 815:20-816:19, 1070.) In August of 2009, a year after their initial demand, the claimants raised their demand to \$3 million. They made clear that that they would no longer accept \$1 million. (L.F. 12, 23 (¶57), 928-929, 530, 608:2-9, 752, 768:1-7, 1070.) The claimants proposed that if United offered its \$1 million limits, they would negotiate with Scottsdale concerning the payment of the remaining \$2 million. (L.F. 12 (¶58), 23, 930, 935.)

After the claimants increased their demand to \$3 million, United's retained defense counsel prepared his first and only written analysis concerning a potential verdict range and settlement recommendations. He opined that a likely verdict range was from \$1.5 million to \$3 million (or more). (L.F. 530, 609:1-610:18, 752, 769:7-23, 930, 935-936, 1070.) Counsel based his analysis on information that had been in United's possession since at least the time it rejected the claimants' final \$1 million settlement demand. (L.F. 520, 609:1-610:18, 752, 769:7-23.)

After the claimants increased the settlement demand to \$3 million, United agreed to contribute its \$1 million policy limits. (L.F. 12 (¶59), 23, 752, 807:13-19, 868-870, 1067, 1075, 1106:6-18.) However, United did not have any new or additional information that would have changed its analysis. (L.F. 12, 23 (¶60).) Further, United was aware that

since the claimants had withdrawn their \$1 million demands, United's \$1 million payment would no longer be sufficient to resolve the case. (L.F. 12, 23 (¶61).) As a result, United knew that Wells and/or Scottsdale would be forced to either contribute additional money to settle the action or would face a potential judgment of up to \$3 million (or more). (L.F. 12, 23 (¶61), 930, 935-936, 1067.)

**K. Scottsdale's Agreement to Participate in the Mediation Under a Reservation of Rights**

On September 14, 2009, Scottsdale's coverage counsel wrote to United regarding the claimants' \$3 million settlement demand. He stated that United's unreasonable rejection of multiple settlement demands for \$1 million, which eventually led the claimants to increase their demand to \$3 million, constituted bad faith. (L.F. 530, 631:24-632:1, 752, 858:1-9, 1069-1071.) Nonetheless, Scottsdale agreed to participate in an October 2009 mediation with the expectation that United would fully fund the settlement. Counsel stated that Scottsdale would seek reimbursement of any amounts it was forced to pay towards the settlement due to United's BFFS. (L.F. 1071, 752, 858:1-9.)

United responded to the letter from Scottsdale's coverage counsel on September 21, 2009. It invited Scottsdale's participation in the mediation. However, it refused to discuss Scottsdale's claims of BFFS in connection with the mediation. (L.F. 1072-1073, 752, 858:10-24, 859:4-25.)

**L. The Underlying Mediation and Settlement for \$2 Million**

In October of 2009, there was a mediation at which the claimants demanded \$3

million in settlement. (L.F. 12, 24 (¶¶66), 239, 246 (¶¶66-67), 530, 615:4-16, 752, 772:5-9, 867-868, 871, 1172-1173, 752, 772:5-773:6, 1075, 1091:17-34:10, 1107:4-8.) United attended, and agreed to pay only up to its \$1 million limits. United maintained that Scottsdale was responsible for paying the balance of any settlement, and demanded that Scottsdale contribute. (L.F. 24-25 (¶¶66-69), 232, 239, 246, 752, 772:5-9, 867-868. 1217.) Ultimately, Scottsdale's representatives convinced the claimants to accept a total of \$2 million in settlement. United would pay \$1 million toward the settlement, and Scottsdale would pay an additional \$1 million. (L.F. 867-868, 1172-1173, 1197, 1203 (¶19.) The United representatives present at the mediation agreed that the case had a reasonable settlement value of \$2 million. (L.F. 12, 26 (¶75), 530, 616:23-617:9, 752, 775:3-10, 860:14-22, 867-868, 1075, 1088:20-1091:11.)

**M. Scottsdale's Payment of an Additional \$1 Million and Reservation of the Right to Pursue United**

Scottsdale ultimately paid an additional \$1 million toward the \$2 million settlement to prevent a potential judgment in excess of \$2 million. (L.F. 12, 26 (¶76).) It did so under an express reservation of the right to pursue United for BFFS. In exchange for Scottsdale's \$1 million payment, Wells assigned its rights *vis-à-vis* United to Scottsdale. (L.F. 12 (¶77), 25 (¶¶25, 70-73), 26, 530, 559:4-9, 616:16-22, 868, 752, 762:19-763:4, 1173.) Following the \$2 million settlement, the claimants sought and obtained court approval, which is required in wrongful death cases in Missouri. (L.F. 12, 25 (¶¶71-72), 1173.)

**N. The Instant Action by Scottsdale and Wells Against United**

On or about July 7, 2010, Scottsdale and Wells (collectively, "Scottsdale") filed the instant action against United. On December 17, 2010, Scottsdale filed the operative FAP. (L.F. 12-163, 346-497). It alleged that since United was aware that any judgment was likely to exceed \$1 million, United's failure to accept repeated settlement demands within its \$1 million policy limits was wrongful and/or in bad faith. (L.F. 12, 14-15 (¶¶12-15), 19 (¶38), 20 (¶40), 21023, 26-32.) Moreover, United's conduct ultimately led to an increase in the settlement demand to \$3 million, which forced Scottsdale to contribute an additional \$1 million to effectuate the ultimate \$2 million settlement. This would not have occurred had United timely and properly paid its \$1 million limits in settlement. (L.F. 12, 23 (¶¶57-59).) Scottsdale's FAP set forth the following Counts: (1) BFFS, by Assignment; (2) BFFS, Based Upon Equitable Subrogation; (3) BFFS, Based Upon Contractual Subrogation; (4) As Third Party Beneficiary, for BFFS; (5) Violation of Legal Duties to Settle Within Policy Limits; (6) *Prima Facie* Tort; (7) Declaratory Relief and Attorney Fees. (L.F. 12, 26-39.) Scottsdale prayed for damages in the sum of \$1 million plus interest, consequential damages, punitive damages and declaratory relief. (L.F. 12, 37-38.)

**O. Trial Court's Denial of United's MTD the FAP**

United brought a MTD Scottsdale's FAP. (L.F. 164-186.) It argued that excess insurers like Scottsdale have no right to pursue primary carriers like United for BFFS. (L.F. 164, 173-177.) Scottsdale filed an opposition to the MTD. (L.F. 187-229.) Scottsdale argued that while the Missouri courts have yet to squarely address the issue of

whether an excess carrier may pursue a primary carrier for BFFS, basic legal principles in Missouri would support such an action. (L.F. 187, 210-211.)

**P. Trial Court's Order Overruling the MTD**

On March 21, 2012, the trial court overruled United's MTD. (L.F. 230, 237 (¶2)-238, 526-528, 1186, 1188 (¶7).) It held that at least two of Scottsdale's causes of action, those for BFFS via assignment (Count I) and BFFS based on contractual subrogation (Count III) were legally sufficient. The trial court declined to rule on the legal sufficiency of the remaining causes of action, since it was unnecessary for it to do so to overrule the MTD. (L.F., 237 (¶2).)

**Q. Scheduling Order Imposing Deadline for Summary Judgment Motions**

On March 6, 2012, Judge Ravens set a trial date of December 11, 2012 and issued a Scheduling Order stating, *inter alia*, that summary judgment motions were to be "argued before the court and submitted no later than October 1, 2012." (L.F. 264, 265 (¶7).)

**R. United's Motion for Summary Judgment**

**1. United's MSJ Was Untimely**

On August 30, 2012, United filed an MSJ. (L.F. 271-286.) The MSJ was untimely based on the trial court's Scheduling Order. (L.F. 264, 265.) To accommodate the filing of the opposition, reply and sur-reply under Rule 74.04, the MSJ should have been filed 60 days before the deadline of October 1, 2012, or by August 2, 2012. However, United filed its MSJ only 32 days before the October 2, 2012 deadline, on August 30, 2012. (L.F. 271.)

**2. United Relied Solely on Certain Allegations from Scottsdale's Own Petition as "Evidence"**

In its MSJ, United argued that an excess insurer cannot pursue a primary insurer for BFFS. (L.F. 267, 278-279) In addition, United asserted that Scottsdale did not allege the required elements of a BFFS. United maintained that a BFFS requires an unreasonable failure to settle for an amount within the carrier's limits. Moreover, United asserted, it did not unreasonably fail to settle because it contributed its \$1 million limits towards the \$2 million settlement. (L.F. 267, 268, 272, 276- 277.) The only "evidence" United submitted was 17 facts drawn from Scottsdale's own FAP. (L.F. 267, 268-269.) United did not reference or acknowledge Scottsdale's core allegation the United acted in bad faith by rejecting numerous opportunities to resolve the case for an amount within its \$1 million policy limits.

**S. The Parties' Stipulation to Extend the Time for Scottsdale's Response to the Summary Judgment Motion**

Counsel for United agreed to extend Scottsdale's deadline for filing a response to the MSJ from October 1, 2012 to October 5, 2012. (L.F. 1275-1277.) Scottsdale fax-filed a memorandum reflecting United's consent to the extension with the trial court on October 2, 2012. (L.F. 287-288, 1266, 1268 (¶5).) United consented to a second extension to October 12, 2012. (L.F. 1283, 1266, 1268 (¶6).) On October 5, 2012, Scottsdale fax-filed a second memorandum reflecting United's consent to the second extension. (L.F. 289, 1266, 1268 (¶7).)

**T. Scottsdale's Opposition to United's MSJ**

On October 11, 2012, Scottsdale filed its opposition to United's MSJ. (L.F. 291-1215.) Scottsdale argued that the MSJ was simply a repackaged version of the earlier MTD, which the trial court overruled. Like the MTD, the MSJ was based solely on allegations from Scottsdale's own FAP. Moreover, the trial court had already found the FAP stated at least two legally viable claims for BFFS. (L.F. 1186, 1188 (¶9), 292, 302 (¶2), 1216, 1217-1223.) Further, United's motion was devoid of any "evidence" refuting Scottsdale's claims of bad faith. Rather, United simply failed to acknowledge Scottsdale's allegations that United repeatedly refused to resolve the case for its \$1 million limits when it had the opportunity to do so. Necessarily, then, United had not refuted these allegations of bad faith as required to sustain its initial burden on summary judgment. As such, United's motion failed for that reason alone. (L.F. 1216, 1219-1220.)

As to United's contention that Missouri law does not permit an excess carrier to sue a primary carrier for BFFS, Scottsdale noted that this was a purely legal question. Moreover, the trial court had already resolved the question in Scottsdale's favor when it overruled United's MTD and held Scottsdale stated at least two legally valid claims for bad faith. Further, while Missouri had not expressly addressed the issue, there was no reason to believe it would disagree with the majority of courts nationwide which uphold an excess insurer's right to pursue a primary insurer for a BFFS. (L.F. 1216, 1224-1232, 1233-1234, 1235-1240.)

**U. United's Request for an Extension of Time to File Its Reply**

On November 1, 2012, United requested an extension of time until November 7, 2012 to file its Reply Brief on MSJ. Scottsdale consented to United's request. (L.F. 1318-1319, 1266, 1269 (¶9-10).)

**V. Court's Order Granting United's Motion for Summary Judgment**

In the interim, on October 26, 2012, defense counsel filed a Joint Application for a Continuance of the trial-setting conference set for December 11, 2012. The hearing of the Joint Application was set for hearing Tuesday, November 6, 2012 (the trial court's **one** motion date per month). However, on November 1, 2012, Judge Ravens unilaterally denied the Joint Application for a Continuance, and then unilaterally entered an order granting United's MSJ. The trial court notified counsel of the ruling by fax that day. (L.F. 1250-1251.) The trial court reasoned that Scottsdale's response to United's motion was untimely, and that the court had no authority to enlarge Scottsdale's time for filing a response under Rule 74.04. (L.F. 1250.) The trial court thus deemed all of the facts in United's moving papers "admitted." (L.F. 1250, 1251.)

**W. Proposed Judgments Submitted by United**

Following the trial court's order granting United's MSJ, United submitted a Proposed Judgment. Judge Ravens emailed counsel for United (with a copy to Scottsdale's counsel), suggesting that defense counsel might wish to include Findings of Fact in its Proposed Judgment. (L.F. 1252, 1263.)

Thereafter, United submitted an amended Proposed Judgment. This version contained inaccurate and incomplete Findings of Fact, and Conclusions of Law that the

trial court never made. (L.F. 1252, 1263.) The Proposed Judgment omitted the key fact that United twice agreed to extend Scottsdale's time to file a response. (L.F. 1252, 1263-1264.) It also mischaracterized the trial court's ruling, stating that the trial court did have discretion to enlarge the time for a response, but simply declined to do so. (L.F. 1378-1379 (¶21).) In addition, the Proposed Judgment purported to rule in United's favor on the merits. It stated that Missouri does not permit an excess insurer to pursue a primary insurer. This was despite the fact that the trial court did not purport to address the merits of the MSJ, instead granting it on the sole ground that Scottsdale's response was "untimely." (L.F. 1252, 1262-1263.)

**X. Scottsdale's Objections to the Proposed Judgment**

Scottsdale objected to United's Proposed Judgment on the ground that it was inaccurate and extended well beyond the trial court's actual ruling. (L.F. 1360-1363.) In fact, the Proposed Judgment actually contradicted the trial court's ruling. In its earlier Order, the trial court found that it lacked the authority to enlarge the time for a response. However, the Proposed Judgment stated that the court had such authority but declined to exercise it. (L.F. 1360, 1362 (¶2).) The Judgment also contained numerous Conclusions of Law that the trial court never made. (L.F. 1360, 1362 (¶3))

**Y. Scottsdale's Motion for Reconsideration of the Trial Court's Order Granting Summary Judgment**

Scottsdale also filed a motion for reconsideration of the trial court's November 1, 2012 Order granting summary judgment. (L.F. 1252-1349.) Scottsdale argued that contrary to the trial court's holding, the court had discretion under Rule 44.01(b) to

enlarge Scottsdale's time to file a response. (L.F. 1252.) Moreover, the trial court should have exercised this discretion under the circumstances. Before filing its response on summary judgment, Scottsdale obtained an extension of time from United and relied upon this extension in good faith. Scottsdale also memorialized the stipulated extensions in notices that it filed with the court. (L.F. 1252, 1253-1254.)

Furthermore, irrespective of the timing of Scottsdale's response, United's motion should have failed because United did not meet its initial burden of production. First, United failed to submit any legally cognizable evidence, relying solely on select allegations from Scottsdale's own Petition. Second, these select allegations did nothing to address, much less disprove, Scottsdale's claim that United acted in bad faith by refusing to resolve the case within its \$1 million policy limits when it had the opportunity to do so. Thus, United did not and could not meet its initial burden on summary judgment, and its motion failed regardless of any response on Scottsdale's part. (L.F. 1252, 1255-1257.)

Scottsdale also argued that if the trial court believed it had no discretion to entertain late summary judgment papers under Rule 74.04, it should apply this rule equally to United and Scottsdale. Since United's MSJ was filed late, the court should have denied the motion on that ground alone. It was unfair to refuse to consider Scottsdale's response as "untimely," while granting United's late motion. (L.F. 1252, 1258-1261.)

**Z. United's Response to Scottsdale's Motion for Reconsideration**

United filed a response to Scottsdale's Motion for Reconsideration. (L.F. 1351-

1359.) It appeared to recognize that the trial court's Order granting summary judgment was in error. Contrary to the November 1, 2012 Order, United argued that the trial court did have discretion to entertain a late response under Rule 44.01. Nevertheless, United asserted, the trial court properly declined to exercise this discretion because Scottsdale purportedly did not move for relief. (L.F. 1351, 1352-1354.)

**AA. United's Further Amended Proposed Judgment, Which Failed to Correct the Deficiencies Noted**

In addition to submitting a response to the reconsideration motion, United submitted yet another version of the Proposed Judgment on November 26, 2012. Although United claimed that the Proposed Judgment addressed Scottsdale's concerns, this version suffered from the same defects as the earlier versions. The Proposed Judgment again stated that the trial court had, but declined to exercise, discretion to consider Scottsdale's untimely response. Moreover, the Proposed Judgment again failed to reference the parties' stipulated extensions, and again claimed to make numerous "Conclusions of Law" that the trial court never made. (L.F. 1364, 1367-1368.)

**BB. Scottsdale's Reply Brief in Support of its Motion for Reconsideration**

Scottsdale submitted a reply brief regarding its motion for reconsideration. (L.F. 1364-1375.) It argued that as United correctly recognized, the trial court had discretion to consider Scottsdale's response under Rule 44.01. Moreover, the trial court should have exercised this discretion, because any error on Scottsdale's part was "excusable" given its good faith reliance on the parties' stipulated extensions. (L.F. 1364.) Scottsdale argued that under the circumstances, the trial court should reconsider its November 1, 2012

ruling and either: (1) Deny United's motion as late; (2) Deny United's motion on the ground that it failed to meet its threshold burden on summary judgment; or (3) Permit the filing of Scottsdale's response, United's reply and any sur-reply, and decide the motion on its merits (although this was unnecessary to the extent United clearly failed to meet its initial burden on summary judgment). (L.F. 1364, 1372.)

**CC. December 4, 2012 Hearing of Scottsdale's Motion for Reconsideration**

On December 4, 2012, the trial court heard Scottsdale's motion for reconsideration. (L.F. 1375, 1382; Tr. 1-14.) At the hearing, counsel for Scottsdale argued that under Rule 44.01, the trial court had discretion to consider Scottsdale's response. (Tr. 2:12-3:1.) Moreover, the trial court should exercise such discretion to the extent that any error on Scottsdale's part was "excusable" due to the parties' agreed-upon extensions. (Tr. 4:23-5:8.) The trial court disagreed that it had discretion under Rule 41.01, stating that the MSJ deadlines were mandatory under Rule 74.04 and the following cases: *Butler v. Tippe*, 943 S.W.2d 323 (Mo.App. E.D. 1997); *Siemens Building Technologies v. St. John's Regional Medical Center*, 124 S.W.3d 3 (Mo.App. S.D. 2004); *Chopin v. American Automobile*, 969 S.W.2d 248 (Mo.App. S.D. 1998); *Estate of Clifton*, 69 S.W.3d 500 (Mo.App. S.D. 2001) and *Bilyeu v. Vaill*, 349 S.W.3d 479 (Mo.App. S.D. 2011). (Tr. 3:16-4:9.)

Counsel for Scottsdale responded that Rule 44.01 specifically listed the types of motions to which it did not apply. Moreover, the Rule made no reference to SJ motions under Rule 74. Accordingly, the trial court had discretion to consider Scottsdale's response under Rule 44.01. (Tr. 4:13-20.) Further, counsel argued the trial court should

find that any error on Scottsdale's part was excusable under Rule 74.06(b) because United filed its own motion late and then expressly granted Scottsdale two extensions of time to respond. Scottsdale filed notice of these agreed-upon extensions with the trial court, and also brought a motion for reconsideration arguing that any neglect on its part was "excusable." (Tr. 4:23-5:8; 6:5-12, 7:21-8:7.)

Significantly, counsel for United acknowledged that he had granted Scottsdale's counsel an extension of time. However, he claimed, Scottsdale had failed to submit a motion asking for an order granting the extension. (Tr. 11:25-12:8.) Notably, the trial court seemed to recognize that United's position was disingenuous:

"THE COURT: You understand one of these days the shoe may be on the other foot?

MR. SCHULTZ: I'm not denying that." (Tr. 12:9-11.)

Therefore, the trial court seemed to perceive that it was unfair for United to grant an extension and to later claim it was inapplicable. The trial court took the matter under advisement. (Tr. 13:15-16.)

**DD. Trial Court's Judgment on its Order Granting Summary Judgment to United**

On December 4, 2012, the trial court signed and entered a Judgment granting United's MSJ. (L.F. 1376-1381.) The Judgment was nearly identical to the Proposed Judgment that United submitted to the trial court. However, the trial court changed the portion of the Proposed Judgment which stated that it had discretion under Rule 44.01 to

consider an untimely response. As the trial court had done in its original November 1, 2012 Order, it stated that it had no such discretion because the deadlines under Rule 74.04 are "mandatory." (L.F. 1376, 1378 (¶21).)

Although the trial court had not considered the merits of the action, the Judgment made numerous findings on the merits. (L.F. 1376, 1378-1380.) The trial court held that there was no failure to settle on United's part as required for a BFFS claim. (L.F. 1376, 1388-1390 (¶25, 27).) In addition, it held that there must be an excess "judgment" for a BFFS claim to lie, and that there was no such excess judgment in the case before it. (L.F. 1376, 1388-1390 (¶26-27).) The trial court also held that an excess carrier cannot pursue a primary carrier for BFFS under Missouri law. It held that primary insurers do not owe excess insurers a duty of good faith, and that excess insurers may not proceed against primary insurers for a BFFS under theories of assignment, contractual subrogation or equitable subrogation. (L.F. 1376, 1379 (¶¶25, 26), 1380 (¶¶27-30).)

**EE. Trial Court's Ruling Denying Scottsdale's Motion for Reconsideration**

The trial court did not rule on Scottsdale's motion for reconsideration at the hearing on December 4, 2012. (Tr. 1-14.) According to the trial court's docket, the trial court took up the motion again on December 7, 2012 and denied it. (L.F. 1382.)

**IV. POINTS RELIED ON**

- A. POINT ONE - THE TRIAL COURT ERRED IN GRANTING UNITED'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT THE MISSOURI COURTS DO NOT ALLOW AN EXCESS CARRIER LIKE SCOTTSDALE TO PURSUE A PRIMARY CARRIER LIKE UNITED FOR BAD FAITH FAILURE TO SETTLE, BECAUSE THE MISSOURI COURTS HAVE IN FACT NOT YET ADDRESSED THIS ISSUE, AND THIS COURT SHOULD FIND AS A MATTER OF LAW THAT A PRIMARY CARRIER CAN SUE AN EXCESS CARRIER FOR BAD FAITH FAILURE TO SETTLE UNDER THE THEORIES OF EQUITABLE SUBROGATION, ASSIGNMENT, CONTRACTUAL SUBROGATION AND/OR A DIRECT DUTY OF GOOD FAITH RUNNING FROM PRIMARY INSURERS TO EXCESS INSURERS.**

*Missouri Public Entity Risk Management Fund v. American Casualty Co. of Reading*,  
399 S.W.3d 68 (Mo.App. 2013)

*Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554 (Mo.App. 1990)

*Allstate Insurance Company v. Reserve Insurance Company* 116 N.H. 806 (N.H. 1997)

*National Union v. Liberty Mut. Ins. Co.*, 696 F.Supp. 1099 (U.S.D.C. E.D. La.)

**B. POINT TWO - THE TRIAL COURT ERRED IN GRANTING UNITED'S MOTION FOR SUMMARY JUDGMENT, BECAUSE UNITED DID NOT MEET ITS THRESHOLD BURDEN ON SUMMARY JUDGMENT UNDER RULE 74.04(C)(1), IN THAT THE UNITED WAS REQUIRED TO BUT DID NOT ATTACH TO THE MOTION LEGALLY COGNIZABLE EVIDENCE CONTROVERTING SCOTTSDALE'S CLAIM OF BAD FAITH BUT INSTEAD RELIED SOLELY ON SELECT ALLEGATIONS FROM SCOTTSDALE'S OWN FIRST AMENDED PETITION WHICH WERE MISCHARACTERIZED AND TAKEN OUT-OF-CONTEXT.**

Rule 74.04(c)(1)

*ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. 1993)

*Landmark North County Bank & Trust Co. v. National Cable Training Centers, Inc.*, 738 S.W.2d 886, 890. (Mo. App. E.D. 1987)

*Frazier v. Riggle*, 844 S.W.2d 71 (Mo. App. E.D.)

C. POINT THREE--THE TRIAL COURT ERRED IN GRANTING UNITED'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THE COURT HAD "NO AUTHORITY" TO CONSIDER SCOTTSDALE'S "UNTIMELY" RESPONSE TO THE MOTION, BECAUSE UNDER RULES 44.01(B) AND 74.06(B), THE COURT HAS AUTHORITY TO ENLARGE THE TIME WITHIN A RESPONSE ON SUMMARY JUDGMENT MAY BE FILED UPON A SHOWING OF "EXCUSABLE NEGLIGENCE," AND HERE SCOTTSDALE PRESENTED UNDISPUTED FACTS SHOWING ANY NEGLIGENCE ON ITS PART WAS "EXCUSABLE" BECAUSE IT RELIED IN GOOD FAITH ON THE PARTIES' STIPULATED EXTENSION OF TIME TO FILE THE RESPONSE.

Rule 44.01(b)

Rule 74.06(b)

*Crabtree v. Bugby*, 967 S.W.2d 66, 72 (Mo. banc 1998).

**D. POINT FOUR - -THE TRIAL COURT ERRED IN DENYING SCOTTSDALE'S MOTION FOR RECONSIDERATION OF THE TRIAL COURT'S ORDER GRANTING UNITED'S MOTION FOR SUMMARY JUDGMENT, BECAUSE UNDER RULES 44.01(B) AND 74.06(B) A PARTY MAY MOVE FOR RELIEF FROM A SUMMARY JUDGMENT ORDER BASED ON "EXCUSABLE NEGLIGENCE," AND UNDER THESE RULES THE TRIAL COURT WAS REQUIRED TO TREAT SCOTTSDALE'S MOTION FOR RECONSIDERATION AS A MOTION FOR RELIEF BASED ON "EXCUSABLE NEGLIGENCE" AND TO FIND THAT BASED ON THE UNDISPUTED FACTS, ANY NEGLIGENCE ON SCOTTSDALE'S PART IN FILING AN UNTIMELY RESPONSE TO UNITED'S MSJ WAS "EXCUSABLE" DUE TO SCOTTSDALE'S GOOD-FAITH RELIANCE ON THE PARTIES' STIPULATED EXTENSION OF TIME FOR FILING THE RESPONSE.**

Rule 44.01(b)

Rule 74.06(b)

*Crabtree v. Bugby*, 967 S.W.2d 66, 72 (Mo. banc 1998).

V. POINT ONE - THE TRIAL COURT ERRED IN GRANTING UNITED'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT THE MISSOURI COURTS DO NOT ALLOW AN EXCESS CARRIER LIKE SCOTTSDALE TO PURSUE A PRIMARY CARRIER LIKE UNITED FOR BAD FAITH FAILURE TO SETTLE, BECAUSE THE MISSOURI COURTS HAVE IN FACT NOT YET ADDRESSED THIS ISSUE, AND THIS COURT SHOULD FIND AS A MATTER OF LAW THAT A PRIMARY CARRIER CAN SUE AN EXCESS CARRIER FOR BAD FAITH FAILURE TO SETTLE UNDER THE THEORIES OF EQUITABLE SUBROGATION, ASSIGNMENT, CONTRACTUAL SUBROGATION AND/OR A DIRECT DUTY OF GOOD FAITH RUNNING FROM PRIMARY INSURERS TO EXCESS INSURERS.

*Missouri Public Entity Risk Management Fund v. American Casualty Co. of Reading*,  
399 S.W.3d 68 (Mo.App. 2013)

*Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554 (Mo.App. 1990)

*Allstate Insurance Company v. Reserve Insurance Company* 116 N.H. 806 (N.H. 1997)

*National Union v. Liberty Mut. Ins. Co.*, 696 F.Supp. 1099 (U.S.D.C. E.D. La.)

A. Standard of Review

Since the trial court's ruling that Missouri law bars excess carriers from suing primary carriers for a BFFS involves a pure issue of law, a *de novo* standard of review applies. *Jablonowski v. Logan*, 169 S.W.3d 128, 129 (Mo.App. E.D. 2005).

**B. As an Issue of First Impression in Missouri, This Court Should Find That Excess Carriers May Pursue Primary Carriers for a BFFS**

**a. Missouri Law Recognizes the Tort of a Bad Faith Failure to Settle**

Missouri recognizes that when a liability insurer places its own interests above those of its insured by failing to settle within policy limits, this gives rise to the tort of "bad faith." Under Missouri law as it currently stands<sup>3</sup>, the elements of a claim for BFFS are as follows:

"(1) [T]he liability insurer has assumed control over the negotiation, settlement, and the legal proceedings brought against the insured; (2) the insured has demanded that the

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<sup>3</sup> In its Opinion, the Court of Appeals cited the *Shobe* decision with approval in articulating the elements of a BFFS claim: "We conclude that the essential elements of the tort of bad faith failure to settle are those supported by the discussion in *Zumwalt* and found to be sufficient in *Shobe*. Those essential elements are: (1) that the insurer has the authority to settle a claim against its insured within (or by payment of) [fn omitted] the policy limits; [para.] (2) that the insurer has the opportunity to settle a claim against its insured within (or by payment of) the policy limits [fn omitted]; [para] (3) that the insurer fails to settle a claim against its insured within (or by payment of) the policy limits in bad faith; and (4) that the insured suffers damage as a proximate result [fn omitted]." (A47)

insurer settle the claim brought against the insured; (3) the insurer refuses to settle the claim within the liability limits of the policy; and (4) in so refusing, the insurer acts in bad faith, rather than negligently." *Shobe v. Kelly*, 279 S.W.3d 203, 210 (Mo.App. 2009).

Therefore, when an insurer unreasonably refuses to settle for an amount within its policy limits, this supports a cause of action for BFFS.

By unreasonably refusing to settle a matter for an amount within its policy limits, the insurer improperly exalts its own interests above those of its insured. As the court in *Johnson v. Allstate Ins. Co.*, 262 S.W.3d 655, 662 (Mo. App. 2008) observed, an insurer must place the insured's interests above its own: "[A]n insurer has a duty to consider the insured's interest, and if his interest conflicts with its own, good faith obligates the insurer to sacrifice its interest in favor of the insured's." *Id.* at 662. As *Johnson* further observed, an insurer's BFFS may be evidenced by its failure to recognize the potential severity of a claim and its refusal to consider a settlement demand:

"An insurer's bad faith in refusing to settle is a state of mind, which is indicated by the insurer's acts and circumstances and can be proven by circumstantial and direct evidence.

[Citation.] Circumstances that indicate an insurer's bad faith in refusing to settle include the insurer's not fully investigating and evaluating a third-party claimant's injuries, not recognizing the severity of a third-party claimant's

injuries and the probability that a verdict would exceed policy limits, and refusing to consider a settlement offer.

[Citations.]" *Id.* at 662.

Therefore, *Johnson* held that a failure to recognize the seriousness of a claim and the refusal to consider a settlement offer are indicators of bad faith on the insurer's part.

Similarly, the Missouri Supreme Court has held that an unreasonable failure to settle that exposes the insured to a potential excess verdict constitutes bad faith. *Overcast v. Billings Mutual Ins. Co.* 11 S.W.3d 62, 67-68 (Mo. 2000.) Moreover, a primary carrier's duty to avoid exposure to an excess settlement runs equally to insureds and excess insurers under Missouri law: "When there is excess liability coverage, the duty owed the excess carrier by the primary carrier is identical to that owed to the insured." *Ibid.*<sup>4</sup> As such, the Missouri courts recognize that a primary insurer's wrongful failure to

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<sup>4</sup> In its Opinion, the Court of Appeals held as a matter of first impression that excess insurers may pursue primary insurers for BFFS. (A14, A37) The Court of Appeals then set forth the required elements of such a claim as follows: "(1) that the primary insurer had the authority to settle a claim against its insured within (or by payment of) the primary policy limits; [para.] (2) that the primary insurer had the opportunity to settle a claim against its insured within (or by payment of) the primary policy limits; [para.] (3) that the primary insurer failed to do so in bad faith; [para.] (4) that the excess insurer made a payment within the limits of its excess policy to discharge an obligation it owed to the insured; and [para.] (5) that but for the excess insurer's payment, the insured would

settle within its policy limits gives rise to a cause of action for BFFS.

**b. The Majority of Jurisdictions Recognize an Excess**

**Carrier's Right to Sue a Primary Carrier for a BFFS**

Although Missouri has yet to address the issue head-on, it should join the growing ranks of courts nationwide which have upheld an excess insurer's right to pursue a primary carrier for a BFFS. As legal commentators have observed, the modern trend is for the courts to recognize a primary carrier's duty of good faith towards an excess carrier: "[T]he modern trend [is] for courts and legislatures to impose duties of good faith and fair dealing on the relationship between primary and excess carriers." *14 Couch on Insurance* §198:20. In recognizing an excess insurer's right to pursue a primary insurer, the courts have reasoned that the excess insurer is in a similar position to the insured itself. Both are subject to financial harm if the primary insurer unreasonably refuses to settle an action for an amount within its policy limits:

"The logic underpinning the doctrine of 'equitable subrogation' is that when an insured purchases excess coverage, he has in effect substituted the excess carrier for himself. Where no excess insurance is available the insured is, in essence, his own excess insurance insurer and the primary insurer owes him a duty of good faith to protect the

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have incurred damages in the amount of the payment as a proximate result of the primary insurer's conduct." (A50-A51)

insured from an excess judgment and personal liability.

Under the doctrine of equitable subrogation, it follows that the excess insurer should assume the rights as well as the obligations of the insured in that situation. Therefore, the excess insurer steps into the shoes of the insured. In that regard, the duty the primary insurer owed to the insured is not fundamentally increased because the primary insurer will be evaluating the claim on the same basis as if there had been no excess coverage available. The duties of the primary insurer are not lessened in any way by the existence of excess liability insurance. When the insurance company gives an equality of consideration to the interests of the insured, it must do so without reference to its own policy limits."

See Plitt & Plitt, 1 *Practical Tools for Handling Insurance Cases*, §7:7 (2012 Westlaw).

As such, courts and legal commentators throughout the country have recognized that an excess carrier essentially stands in the shoes of the insured. Accordingly, the excess insurer, like the insured itself, should have a right to pursue the primary carrier for a BFFS within the primary limits.

Generally, the courts have permitted excess insurers to pursue primary insurers under one of three theories: Equitable subrogation, contractual subrogation, or a direct duty of "good faith." At least twenty-six jurisdictions have adopted the doctrine of equitable subrogation: Alaska, Arizona, California, Florida, Georgia, Illinois, Louisiana,

Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Washington and West Virginia.<sup>5</sup> New

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<sup>5</sup> See, e.g., *R.W. Beck & Associates v. City and Borough of Sitka*, 27 F.3d 1475, 1486 (9<sup>th</sup> Cir. 1994) (construing Alaska law); *Hartford Accident & Indem. Co. v. Aetna Cas. & Sure Co.*, 164 Ariz. 286, 291 (1990) (Arizona); *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 21 Cal.App.4<sup>th</sup> 1586, 1596-1559, 1601 (4<sup>th</sup> Dist. 1994) (California); *General Accident Fire & Life Assur. Corp., Ltd. v. American Cas. Co. of Reading, Pa.*, 390 So.2d 761, 765 (Fla. Dist. Ct. App. 3d Dist. 1980) (Florida); *Home Ins. Co. v. North River Ins. Co.*, 192 Ga. App. 551, 555 (1989) (Georgia); *U.S. Fire Ins. Co. v. Zurich Ins. Co.*, 329 Ill.App.3d 987, 1103-1004 (1<sup>st</sup> Dist. 2002) (Illinois); *Great Southwest Fire Ins. Co. v. CNA Ins. Co.*, 557 So.2d 966, 967 (La); *Fireman's Fund Ins. Co. v. Continental Ins. Co.*, 308 Md. 315, 320 (Md.1987) (Maryland); *Hartford. Cas. Ins. Co. v. New Hampshire Ins. Co.*, 417 Mass. 115, 124 (1994) (Massachusetts); *Auto-Owners Ins. Co. v. Amoco Production Co.*, 468 Mich. 53, 61-62 (2003) (Michigan); *Continental Cas. Co. v. Reserve Ins. Co.*, 307 Minn. 5, 8 (Minn. 1976) (Minnesota); *American Fidelity & Cas. Co. v. U.S. Fidelity & Guaranty Co.*, 305 F.2d 633, 635 (Miss. 5<sup>th</sup> Cir. 1962) (Mississippi); *Allstate Insurance Company v. Reserve Insurance Company* 116 N.H. 806, 808 (N.H. 1997) (New Hampshire); *Fireman's Fund v. Security Ins. Co. of Hartford*, 72 N.J. 63, 69 (N.J. 1976) (New Jersey); *Home Ins. Co. v. Royal Indem. Co.*, 68 Misc. 2d 737, 739-740 (N.Y. Sup 1972) (New York); *Jamestown Mut. Ins. Co. v.*

Hampshire and Louisiana also recognize a right of contractual subrogation.<sup>6</sup> The following jurisdictions hold that primary insurers owe a direct duty to excess insurers to effect a settlement within the primary insurer's limits: New Mexico, New York, South Dakota, Tennessee, Michigan and New Jersey.<sup>7</sup> See Plitt & Plitt, *supra*, 1 Practical Tools

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*Nationwide Mut. Ins. Co.*, 277 N.C. 216, 221 (N.C. 1970) (North Carolina); *Centennial Ins. Co. v. Liberty Mut. Ins. Co.*, 62 Ohio St. 2d 221, 762 (Ohio 1980) (Ohio); *American Fidelity & Cas. Co. v. All Am. Bus Lines*, 179 F.2d 7, 11 (Ok. 10<sup>th</sup> Cir. 1949) (applying Oklahoma law); *Maine Bonding & Cas. Co. v. Centennial Ins. Co.*, 298 Or. 514, 520 (Or. 1985) (Oregon); *U.S. Fire Ins. Co. v. Royal Ins. Co.*, 759 F.2d 306, 309 (P.A. 3d Cir. 1985) (Pennsylvania); *Lombardi v. Merchants Mut. Ins. Co.*, 429 A.2d 1290, 1291 (Rhode Island); *North River Ins. Co. v. St. Paul Fire and Marine Ins. Co.*, 600 F.2d 721, 723-724, fn4 (S.D. 8<sup>th</sup> Cir. 1979) (applying South Dakota law); *Electric Ins. Co. v. Nationwide Mut. Ins. Co.*, 384 F.Supp.2d 1190, 1192 (W.D. Tenn. 2005) (applying Tennessee law); *American Centennial Ins. Co. v. Canal Ins. Co.*, 810 S.W.2d 246, 251-252 (Tex. App. Houston 1st Dist. 1991) (Texas); *First State Ins. Co. v. Kemper Nat. Ins. Co.*, 94 Wash.App. 602, 609 (Div. 1 1999) (Washington); and *Vencill v. Continental Cas. Co.*, 433 F.Supp. 1371, 1376 (S.D. W. Va. 1977) (applying West Virginia law).

<sup>6</sup> See *Allstate Ins. Co. v. Reserve Ins. Co.*, 116 N.H. 806 (1976); *Great Southwest Fire Ins. Co. v. CNA*, 547 So.2d 1339 (La.App. 1989).

<sup>7</sup> *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28 (N.M. 1984); *New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.*, 295 F.3d 232 (N.Y. 2d

for Handling Insurance Cases, §7:7.

**c. This Court Should Find That Excess Insurers May Pursue  
Primary Insurers for Equitable Subrogation**

**i. The Right to Equitable Subrogation Is Well-  
Established in Missouri**

Based on existing Missouri law, this Court should find that excess insurers like Scottsdale are permitted to pursue primary insurers like United for BFFS under the doctrine of equitable subrogation. Missouri recognizes a right to subrogation:

"[T]he right of subrogation. . .is a device adopted or invented by equity to compel the ultimate discharge of a debt or obligation by the one who in fairness and in good conscience ought to pay it. Though the doctrine is equitable in origin, the right acquired is generally referred to as legal subrogation. . .  
.' Legal subrogation has its rise in equity, and arises out of a

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Cir. 2002), *Hartford Accident & Indem. Co. v. Michigan Mut. Ins. Co.*, 93 A.D. 337 (NY 1983), *aff'd*, 61 NY.2d 569 (N.Y.2d 1984); *North River Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 600 F.2d 721 (8<sup>th</sup> Cir. 1979); *Continental Cas. Co. v. Great American Ins. Co.*, 25 F.3d 1047 (6<sup>th</sup> Cir. 1994); *Commercial Union Ins. Co. v. Medical Protective Co.*, 136 Mich. App. 412, 418-19 (Mich App. 1984); *Western World Ins. Co. v. Allstate Ins. Co.*, 150 N.J. Super. 481, 486 (N.J. Sup. 1977); *Estate of Penn v. Amalgamated Gen. Agencies*, 148 N.J. Super. 419, 424 (1977), *aff'd* 61 NY.2d 569 (N.Y. 1984).

condition or relationship by operation of law. So it has been held that legal subrogation arises by operation of law where a person having a liability. . .in the premises pays a debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditors whom he has paid. [Citation omitted.]" 30 Mo. Prac., Insurance Law & Practice Section 5:42 (2d ed. 2013)

Therefore, subrogation is an equitable device to ensure that the person responsible for a loss is compelled to pay for it.

In *American Nursing Resources, Inc. v. Forrest T.*, 812 S.W.2d 790, 794 (Mo.App. 1991), the court articulated the doctrine of equitable subrogation in Missouri. In *American Nursing*, an insurer's administrator negligently paid health care benefits to the insured which were supposed to be paid directly to the insured's health care provider. *Id.* at 793. The insured wrongfully retained the insurance money. The health care provider sued the insurer for the benefits it was supposed to receive. Pursuant to an indemnity agreement, the insurer demanded that the administrator defend and settle the health care provider's claim against the insurer. The administrator settled the health care provider's claim on behalf of the insurer. The administrator then sued the insured for equitable subrogation of the amount paid in settlement. *Ibid.* The *American Nursing* court upheld the administrator's right to sue the insured for equitable subrogation, since the administrator paid on behalf of the insurer an amount the insured should have rightfully borne:

"The doctrine of subrogation. . . is one of equity. Its aim is to do perfect justice and prevent injustice among all the parties, and to that end does not stand on form to give its aid. [Citation omitted.] That the primary debt of another may have been paid to the creditor indirectly rather than directly, or even prematurely, therefore, does not cut off the right of subrogation to the person under legal obligation to make the payment. [Citation omitted.] To succeed to the shoes of the primary debtor, rather, it is enough that the person pay the debt in self-protection against a perceived loss should the debt not be discharged. [Citation omitted.] The payment by Jones [administrator] to American Nursing [health care provider] was the response to the demand by N.Y. Life [insurer] not only for indemnity but also to defend against the suit by American Nursing brought against N.Y. Life for the cost of the medical services to Antoinette Ryan. The avoidance of the cost of the defense of that suit was alone sufficient reason for Jones to intervene by payment directly to American Nursing, and so be subrogated to the rights of N.Y. Life in relation to that debt." *Id.* at 796.

Therefore, the *American Nursing* court held that the administrator, by paying the insurer's debt to the health care provider, succeeded to the insurer's right to pursue the

responsible party (the insured) for equitable subrogation.

In *Missouri Public Entity Risk Management Fund v. American Casualty Company of Reading*, 399 S.W.3d 68 (Mo.App. 2013) ("*MOPERM*"), the Court applied the principles articulated in *American Nursing* to find that an excess insurer was entitled to pursue a primary insurer for wrongfully failing contribute to an underlying settlement. In *MOPERM*, the plaintiff insurer ("excess insurer") provided primary coverage for a nursing home and its employees and excess coverage for a charge nurse, with a limit of \$2 million per occurrence. The defendant insurer ("primary insurer") provided primary coverage for the charge nurse and no coverage for the remaining defendants. The primary insurer had a limit of \$1 million per claim. *Id.* at \*1.

While in the nursing home's care, an over-medicated patient fell and died. Her estate sued the nursing home, employees and charge nurse for wrongful death, alleging joint and several liability. The excess and primary insurers agreed to provide a joint defense to the nurse, and the excess insurer funded a portion of the defense. There was one set of joint defense counsel for all defendants. Before discovery commenced, defense counsel received a settlement demand of \$450,000. *Id.* at \*1. Counsel advised the insurers that based on his investigation, the charge nurse was heavily involved in the circumstances leading to the death, and also falsified training records. Claimants were not yet aware of these facts because discovery had not commenced. *Id.* at \*1. Defense counsel advised the insurers that these facts would double the value of the wrongful death case, and indicated it was imperative to settle prior to discovery. Defense counsel asked for \$400,000 in settlement authority. The charge nurse's separate attorney also demanded

the primary carrier settle the claims against the charge nurse. *Id.* at \*2.

The excess insurer advised the primary insurer that the primary insurer owed 50% of any settlement due to the nurse's substantial role in the loss. The primary insurer responded that it was defending under a reservation of rights and planned to deny coverage. It stated the excess insurer was responsible for any settlement, although it offered to contribute \$75,000. *Id.* at \*2.

Ultimately, the excess insurer settled the case for \$350,000 as to all defendants. It sought one-half of this amount, \$175,000, from the primary insurer. *Id.* at \*2. The insurers failed to reach an agreement, and the excess insurer sued the primary insurer for, *inter alia*, equitable subrogation and unjust enrichment. The insurers filed cross-motions for summary judgment, and the trial court granted summary judgment to the primary insurer without explanation. *Id.* at \*1, 3.

On appeal, the excess insurer argued that the trial court erred in granting summary judgment to the primary insurer. *Id.* at \*3. This Court agreed, observing that an excess carrier who pays a loss "stands in the shoes" of the insured *vis-à-vis* claims against the primary insurer. The Court held that under the doctrine of equitable subrogation, an excess carrier who pays a loss under a policy "stands in the shoes" of the insured and possesses the same causes of action for reimbursement against the primary insurer. *Id.* at \*4. Moreover, the excess insurer in the case before it alleged facts which, if true, showed a basis for equitable subrogation. The excess insurer had an interest in quickly settling the action before additional damaging facts were disclosed and increased the value of the claim. Further, the primary carrier was refusing to participate in the settlement.

Therefore, the excess insurer was entitled to pursue the primary insurer for equitable subrogation. *Id.* at \*6.

Under these authorities, the trial court's holding in the instant case that Missouri law does not allow excess insurers to pursue primary insurers for equitable subrogation constituted clear and reversible error.<sup>8</sup> As in *MOPERM*, United was faced with a "multitude of facts" showing a potential for a judgment in excess of its \$1 million limits. Nevertheless, it unreasonably rejected numerous settlement demands within its \$1 million policy limits. (L.F. 12, 22 (¶51), 215, 530, 628:4-20, 752, 846:23-847:14; 968-969, 1050, 1197, 1201 (¶14).) Eventually, the claimants became frustrated and tripled their demand to \$3 million, forcing Scottsdale to step in as the excess insurer and contribute \$1 million to the ultimate \$2 million settlement. (L.F. 12, 23 (¶57), 530, 608:2-9, 752,

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<sup>8</sup> The Court of Appeals correctly recognized this in its October 1, 2013 Opinion (A14-A57). It held, as a matter of first impression, that excess insurers may pursue primary insurers for a BFFS under the doctrine of equitable subrogation. (A14, A42) In so holding, the Court of Appeals observed that as the majority of courts nationwide have observed, permitting excess insurers to pursue primary insurers for BFFS under the doctrine of equitable subrogation advances public policy by encouraging settlement, ensuring equitable allocation of primary and excess insurance proceeds, and keeping excess insurance premiums low. In addition, since the primary insurer receives a premium to honor its duty to settle claims within its policy limits in good faith, such a rule would not increase the scope or nature of the primary insurer's duty. (A37-38)

768:1-7, 815:20-816:19, 928-929, 1070.) Like in *MOPERM*, these facts support Scottsdale's claim against United for amounts United rightfully owed under the doctrine of equitable subrogation.

**ii. Most Jurisdictions Allow Excess Insurers to Sue  
Primary Insurers for Equitable Subrogation**

Like the majority of courts nationwide, this Court should find that permitting excess insurers to pursue primary insurers for equitable subrogation advances important public policy goals. Like Missouri, courts across the country have observed that equitable subrogation is a device used to ensure the wrongdoer is held responsible for the loss. In *Westchester Fire Ins. Co. v. Allstate Ins. Co.*, 236 Conn. 362, 371 (Conn. 1996), the Connecticut Supreme Court explained that "[Equitable subrogation is] the mode which equity adopts to compel the ultimate payment of a debt by one who, in justice, equity and good conscience, should pay it. [Citations and internal quotation marks omitted]." The Connecticut Supreme Court emphasized that the doctrine should be broadly applied: "[Equitable subrogation is] broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter." *Ibid.*

Other courts have observed that equitable subrogation appropriately fastens the responsible party with the loss and prevents that party from securing a windfall: "Equitable subrogation is an equitable doctrine, the purpose of which is to prevent injustice. [Citation omitted.] It is intended 'to compel the ultimate payment of a debt by

one who in justice and good conscience ought to pay it' and to prevent a windfall at the expense of another. [Citations omitted.]" *Sourcecorp, Inc. v. Norcutt*, 227 Ariz. 463, 467 (Ariz. App. 2011), *aff'd* 229 Ariz. 270 (Ariz. *En Banc* 2012). In fact, the overarching purpose behind equitable subrogation is to prevent unjust enrichment: "'The general purpose of equitable subrogation is to prevent unjust enrichment.' [Citation omitted.]" *Pioneer Austin East Development I., Ltd. v. Pionerg, LLC*, 2013 WL 620445, \*4 (U.S.D.C. Tex. 2013).

Generally, courts across the country have recognized three main elements of equitable subrogation: (1) the defendant insurer must be primarily liable to the insured for a loss under a policy of insurance; (2) the plaintiff insurer must be secondarily liable to the insured for the same loss; and (3) the plaintiff insurer must have discharged its liability to the insured and at the same time extinguished the liability of the defendant insurer. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill.2d 307, 323 (Ill. 2004).

Applying these elements, the majority of jurisdictions nationwide have held that an excess insurer may pursue a primary insurer for equitable subrogation. In so doing, these courts have reasoned that the excess insurer is in essentially the same position as an insured whose primary insurer has acted in bad faith. In *Perera v. United States Fidelity and Guaranty Co.*, 35 So.3d 893 (Fla. 2010), the Florida Supreme Court held that the excess insurer stands in the shoes of the insured whom the primary insurer is contractually obligated to protect: "[T]he excess insurer 'stands in the shoes of the insured,' to whom the primary insurer directly owes a duty to act in good faith. [Citation

omitted.]" *Id.* at 900.

In *Continental Cas. Co. v. Reserve Ins. Co.*, 238 N.W.2d 862 (Minn. 1976), the Minnesota Supreme Court likewise noted that the insured and the excess insurer stand in the same position *vis-à-vis* the primary insurer:

"When there is no excess insurer, the insured becomes his own excess insurer, and his single primary insurer owes him a duty of good faith in protecting him from an excess judgment and personal liability. If the insured purchases excess coverage, he in effect substitutes an excess insurer for himself. It follows that the excess insurer should assume the rights as well as the obligations of the insured in that position [including the right to pursue the primary insurer for equitable subrogation]." *Id.* at 864, 868.

Therefore, the Minnesota Supreme Court in *Reserve* held that the excess insurer stands in the same position as the insured *vis-a-vis* the primary insurer.<sup>9</sup>

In *Centennial v. Liberty Mut. Ins. Co.*, 62 Ohio St.2d 221 (Ohio 1980), the Ohio Supreme Court cited the *Reserve* decision with approval. The *Centennial* Court further emphasized that strong equitable considerations support permitting an excess insurer to

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<sup>9</sup> *See also Home Ins. Co v. Royal Indem. Co.*, 68 Misc.2d 737, 740 (N.Y. 1972) (an excess insurer is an "insured" *vis-à-vis* the primary insurer, and is entitled to pursue the primary insurer as an equitable subrogee).

pursue a primary insurer for subrogation. First, the existence of excess insurance should not reduce the primary insurer's duty. Rather, the primary insurer receives a premium to fulfill this duty. Therefore, permitting the excess insurer instead of the insured to enforce this duty does not increase the primary insurer's obligations: "An insurance company's duty to act in good faith in settling claims within its policy limits is well established and is reflected in its premiums. That an excess insurer may recover from the primary for a breach of duty does not increase the duty or the liability of the primary." *Id.* at 223. In contrast, excess premiums would increase if excess insurers would be forced to pay amounts properly allocated to the primary insurer. In addition, allowing primary insurers to escape their obligations merely because the insured purchased excess insurance would reduce primary insurers' incentive to settle. In turn, this would contravene the strong public policy in favor of settlement. *Id.* at 223.

In *American Centennial Ins. v. Canal Ins. Co.*, 843 S.W.2d 480, 483 (Tex. 1992), the Texas Supreme Court similarly observed that permitting an excess insurer to sue a primary insurer for equitable subrogation advances the key public policy goals of encouraging settlement and keeping excess premiums low:

"In recognizing a cause of action for equitable subrogation, [the] courts have sought to encourage fair and reasonable settlements of lawsuits. [Citations omitted.] If the excess carrier had no remedy, the primary insurer would have less incentive to settle within the policy limits. [Citations omitted.] ([A]llowing the excess insurer to enforce the

primary insurer's duty to settle in good faith serves the public and judicial interests in fair and reasonable settlements of lawsuits by discouraging primary carriers from 'gambling' with the excess carrier's money when potential judgments approach the primary insurer's policy limits.' [Citation omitted.]) Additionally, the wrongful failure to settle would likely result in increased premiums by excess carriers.

[Citation omitted.]" *Id.* at 483.

Thus, the *American Centennial* Court noted that allowing an excess insurer to pursue a primary insurer for equitable subrogation encourages settlement and keeps excess premiums low.

Numerous other courts across the country have recognized that permitting an excess insurer to sue a primary insurer for equitable subrogation serves important public policy goals. *See, e.g., Northwestern Mut. Ins. Co. v. Farmers' Ins. Group*, 76 Cal.App.3d 1031, 1046 (Cal.App. 1978) (permitting an excess insurer's equitable subrogation claim does not increase the obligations of the primary insurer, keeps excess premiums low, encourages settlement and prevents an unfair distribution of loss among the primary and excess insurers); *Peter v. Travelers*, 375 F.Supp. 1347, 1350-51 (D.C. Cal. 1974) (if primary insurers were relieved of their duty to accept reasonable settlement offers by the existence of excess insurance, this would increase excess premiums and discourage settlement); *Certain Underwriters v. General Accident*, 909 F.2d 228, 232 (C.A.7 Ind. 1990) ("The primary insurer's duty to act with due care and in good faith does

not disappear simply because the insured purchased excess insurance"; a contrary rule would cause an increase in excess insurance premiums).

Since Missouri has the same interest in encouraging settlement, keeping excess premiums low, and ensuring a fair distribution of losses among primary and excess insurers, this Court should hold that it was error for the trial court to find that Scottsdale had no right to pursue United for equitable subrogation. If Wells had not purchased excess insurance from Scottsdale, it would have been Wells who faced a large excess judgment due to United's BFFS. Under the above authorities, Scottsdale thus stands in exactly the same position as Wells and, like Wells, is entitled to pursue United for its BFFS. As the above cases note, such a rule does not impose any greater burden on primary insurers like United. Rather, such insurers receive a premium to settle claims against the insured in good faith. In fact, a contrary rule would actually harm Missouri insureds, since it would cause *excess* insurance premiums to increase.

**d. This Court Should Find an Excess Carrier May Sue a Primary Carrier As an Assignee Under Missouri Law**

**i. Missouri Law Recognizes the Assignability of An Insured's Claims Against its Liability Insurer**

Missouri law recognizes that an insured's claims against its liability insurer are assignable. As the Missouri courts have observed, the term "assignment" refers to a transfer to another of real or personal property or of a cause of action. *General Exchange Ins. Corp. v. Young*, 357 Mo. 1099, 1106-07 (Mo. 1948). An assignment vests legal title in the assignee, who then has the right to maintain an action in its own

name. *Ibid.*

Moreover, Missouri statutory law recognizes that an insured may transfer its claims against a liability insurer to a third-party. As V.A.M.S. section 537.065 states, an insured tortfeasor may contract with the claimant to permit any judgment to be collected solely from the tortfeasor's liability insurance proceeds:

**"537.065. Claimant and tort-feasor may contract to limit recovery to specified assets or insurance contract--effect**

Any person having an unliquidated claim for damages against a tort-feasor, on account of bodily injuries or death, may enter into a contract with such tort-feasor or any insurer in his behalf or both, whereby, in consideration of the payment of a specified amount, the person asserting the claim agrees that in the event of a judgment against the tort-feasor, neither he nor any person, firm or corporation claiming by or through him will levy execution, by garnishment or as otherwise provided by law, except against the specific assets listed in the contract and except against any insurer which insures the legal liability of the tort-feasor for such damage and which insurer is not excepted from execution, garnishment or other legal procedure by such contract. Execution or garnishment proceedings in aid thereof shall lie only as to assets of the tort-feasor specifically mentioned in the contract or the

insurer or insurers not excluded in such contract."

Thus, V.A.M.S. 537.065 authorizes a third-party claimant to obtain a contractual assignment from the insured to collect any recovery from the liability insurance proceeds.

Moreover, the Missouri courts have at least implicitly held that BFFS claims are assignable in conjunction with a V.A.M.S. 537.065 agreement. In *Truck Ins. Exch. v. Prairie Framing, LLC*, 162 S.W.3d 64, (Mo.App. 2005), the insured entered into a V.A.M.S. 537.065 agreement with the claimants after the insurer rejected a settlement demand within the policy limits. *Id.* at 69, 72. The trial court granted the summary judgment motion of the insured and claimants, finding that the insurer committed BFFS as a matter of law. Although the court of appeals reversed the summary judgment on the ground that there were fact issues, it never addressed the assignability of BFFS claims. As such, the court of appeals apparently assumed that such claims were assignable. *Id.* at 95.

Since Missouri law expressly authorizes the assignment of an insured's claims against its insurer under V.A.M.S. 537.065, this Court should find that Scottsdale is entitled to pursue United as an assignee of Wells as a matter of law.<sup>10</sup>

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<sup>10</sup> In its Opinion, the Court of Appeals purported to distinguish an assignment pursuant to V.A.M.S. 537.065 on the ground that such an assignment only pertains to the policy proceeds, and not extracontractual damages for a BFFS. The court viewed the question of whether BFFS claims were assignable under Missouri law as "unresolved" question that it declined to resolve. (A26, fn 7.)

**ii. The Missouri Courts Have Recognized the  
Assignability of BFFS Claims**

In addition to the Missouri legislature, the Missouri courts have recognized that an insured may assign claims against its insurer to a third party. In fact, the courts have expressly recognized an insured's right to assign BFFS claims. In *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554 (Mo.App. 1990), the insured driver caused an accident that injured his passenger. In the ensuing litigation, the insurer allegedly failed to settle within its policy limits, resulting in an excess judgment. *Id.* at 555. Thereafter, there was an involuntary bankruptcy petition filed against the insured. The insured's trustee in bankruptcy assigned the insured's BFFS claim to the claimant. The bankruptcy court expressly found the BFFS claim to be assignable. *Id.* at 560.

The *Ganaway* claimant sued the insurer for BFFS as the insured's assignee. The insurer argued that the BFFS claim was not assignable under Missouri law. The *Ganaway* court disagreed, observing that "The general law, as we understand it, is that a cause for bad faith refusal to settle may be assigned to a judgment creditor either by the insured or his trustee in bankruptcy. [Citations omitted.]" *Id.* at 565.

In *Freeman v. Basso*, 128 S.W.3d 138, 143 (Mo.App. 2004), the court cited *Ganaway* with approval and observed that "Even prior to *Ganaway*, bad faith claims against insurance companies were assignable. *Magers v. National Life & Accident Ins. Co.*, 329 S.W.2d 752, 756 (Mo. banc 1959); *see also Citicorp Indus. Credit Inc. v. Federal Ins. Co.*, 672 F.Supp. 1105, 1106-08. (N.D.Ill. 1987) (interpreting Missouri law)."

Other Missouri courts have held *sub silentio* that an insured's BFFS claims are assignable. In *State Farm v. Metcalf*, 861 S.W.2d 751 (Mo.App. 1993), the claimants' parents were killed in an automobile accident, and the claimants sued their father's estate for their mother's death. The father's auto liability insurer refused to settle for an amount within its policy limits. The claimants obtained an excess judgment against the father's estate and sued the insurer for a BFFS. The *Metcalf* court found in favor of the insurer on the ground there was no evidence it had an opportunity to settle within its policy limits. The court did not discuss whether BFFS claims were assignable, apparently assuming that they are. *Id.* at 755-56.

In *Bonner v. Automobile Club Inter-Insurance Exchange*, 899 S.W.2d 925 (Mo.App. 1995), the claimants were involved in an auto accident with the insured. *Id.* at 926. They sued the insured and demanded that the insured's liability carrier defend the suit. The insurer refused, and there was an excess default judgment against the insured. The insured assigned her BFFS claims against the insurer to the claimants. The Court of Appeals never addressed whether the assignment of the bad faith failure to settle claim was valid, apparently assuming that it was. *Id.* at 927.

In *White v. Auto Club Inter-Insurance Exch.*, 984 S.W.2d 156 (Mo.App. 1998), the insured assigned to the claimants his claims against his insurer for BFFS and his claims against the insurer's panel defense attorney for malpractice. *Id.* at 158. The *White* court held that *malpractice* claims are not assignable under Missouri law. *Id.* at 159-61. However, the court made no such finding regarding the assignability of BFFS claims, holding *sub silentio* that unlike malpractice claims, BFFS claims are assignable.

In *Johnson v. Allstate Ins. Co.*, 262 S.W.3d 655 (Mo. App. 2008), the insured drunk driver injured the claimants in an auto accident, and the claimants sued. The insured's auto liability insurer failed to accept the claimant's settlement demand within the policy limits. Thereafter, the insured settled with the claimants and consented to an excess judgment in exchange for a covenant not to execute. In addition, the insured assigned the claimants 90 percent of his claim against the insurer for BFFS. *Id.* at 658. There was a judgment for BFFS that was upheld on appeal. *Id.* at 666. In a footnote, the *Johnson* court noted that in his concurring opinion, Judge Smart questioned whether BFFS claims are assignable. However, the *Johnson* court stated that the insurer had not properly preserved this issue for review. Therefore, the majority found no occasion to address it. *Id.* at 667, fn 6. In his concurring opinion, Judge Smart acknowledged the Missouri cases finding BFFS claims assignable. However, he noted that, in his view, they failed to address the public policy concerns regarding the assignability of BFFS claims, and opined that the issue was one that was ripe for review. *Id.* at pp. 669-675.

Nonetheless, the Missouri courts that have squarely addressed the issue have found that BFFS claims are assignable. A host of other Missouri courts have allowed BFFS claims to proceed via assignment without comment, apparently assuming that such claims are assignable. Moreover, the trial court itself recognized in denying United's MTD that Scottsdale, at a minimum, had viable claims against United based on the assignment (and as a contractual subrogee). (L.F., 237 (¶2).) As such, this Court should likewise find that the trial court erred in holding that Missouri law does not permit the

assignment of a BFFS claim.<sup>11</sup>

**iii. Courts Nationwide Have Recognized that BFFS  
Claims Are Assignable**

Missouri should follow the majority of courts nationwide, which recognize the assignability of a BFFS claim. As numerous authorities have recognized, the weight of authority holds that BFFS claims are assignable. *See 14 Couch on Ins., section 204:18* (bad faith actions are currently deemed to be assignable in most jurisdictions); *Barr v. General Accident Group Ins. Co.*, 360 Pa. Super. 334, 340 (Pa. Super. 1987) ("The practice of assigning claims for bad faith refusal to settle is widespread and the view that such claims are assignable is accepted in a majority of jurisdictions. [Citation omitted.]"); *Kaplan v. Harco National Ins. Co.*, 708 So.2d 89, 92 (Miss. App. 1998)

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<sup>11</sup> In finding that BFFS claims are not assignable, the trial court relied on the non-binding and inapposite Eighth Circuit decision of *Quick v. National Auto Credit*, 65 F.3d 741 (8<sup>th</sup> Cir. 1995). In *Quick*, the defendant was not an insurance company but a rental car company. The *Quick* court found that no BFFS lies against a non-insurer defendant. *Id.* at 745. The Eighth Circuit's discussion as to whether BFFS claims are assignable was thus pure *dicta*. Moreover, the Court of Appeals here appeared to recognize that the federal decisions were not helpful. Although the Court of Appeals ultimately deemed it unnecessary to decide the issue of whether BFFS claims are assignable, it surveyed Missouri state court cases on the issue. (A24-A25) Nowhere did the Court of Appeals mention non-binding federal authorities such as *Quick*.

(noting that 35 jurisdictions have expressly held that BFFS claims are assignable and that this is the majority rule); *In re Katrina Canal Breaches Consol. Litig.*, 601 F.Supp.2d 809, 822 fn. 9 (U.S.D.C. E.D. La. 2009) (in the majority of jurisdictions, bad faith claims are assignable).<sup>12</sup>

As the courts have held, permitting the assignment of BFFS claims promotes sound public policy protecting the insured (*e.g.*, in cases in which multiple insurers dispute their respective coverage obligations):

"[A]n insured person may frequently find himself the helpless victim of a technical dispute between insurers each of which claims that primary responsibility or sole responsibility rests with an insurance carrier other than itself. Under such

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<sup>12</sup> Of the jurisdictions that have considered the assignability of BFFS claims, only Tennessee has declined to find such claims non-assignable. The following jurisdictions have permitted the assignment of BFFS claims: Alaska, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Wisconsin, Texas, Virginia and West Virginia. *V. Woerner, Assignability of Insured's Right to Recover Over Against Liability Insurer for Rejection of Settlement Offer*, 12 A.L.R.3d 1158 (originally published in 1967); *Russ, Segalla et al.*, 14 Couch on Ins. Section 204:18 (2014 Thomson Reuters).

circumstances, a company that pays the loss and absolves the insured from liability, except for the right to proceed against the other carrier, has performed a function that furthers rather than impedes public policy. Such agreements ought not to be rendered void of impeded by the simplistic maxim that the common-law assignments of personal-injury claims were unenforceable." *Mello v. General Ins. Co. of America*, 525 A.2d 1304, 1305-06 (RI 1987).

Therefore, the courts have observed that permitting an insurer to pay a settlement and pursue another insurer *via* assignment helps protect insureds.

**iv. BFFS Claims Are Not The Type of "Purely Personal" Claims that Are Non-Assignable**

In finding that BFFS claims are assignable, the courts have observed that BFFS claims are not personal injury claims, which many courts, including Missouri, view as non-assignable.<sup>13</sup> Rather, BFFS claims are more akin to claims for damage to the

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<sup>13</sup> *See Beall v. Farmers' Exch. Bank of Gallatin*, 76 S.W.2d 1098 , 1099 (Mo. 1934) ("Practically the only classes of choses in action which are not assignable are those for torts for personal injuries, and for wrongs done to the person, the reputation, or the feelings of the injured party, and those based on contracts of a purely personal nature such as promises of marriage.")

insured's property or estate, which are assignable. In *Selfridge v. Allstate Ins. Co.*, 219 So.2d 127, 129 (Fla.App. 1969), the court recognized the common-law rule prohibiting the assignment of "personal injury" claims. However, *Selfridge* disagreed that BFFS claims fall into this category: "[W]e are persuaded that this cause of action [negligent failure to settle within limits], at least, is not based on a personal tort of a nonassignable nature." (*accord, Nationwide Mut. Ins. Co. v. McNulty*, 229 So.2d 585, 587 (Fla. 1970).

In *Brown v. Guarantee Ins. Co.*, 155 Cal.App.2d 679, 695 (Cal.App. 1957), the court likewise observed that claims based on purely personal torts are non-assignable. However, the *Brown* court found that BFFS does not affect the insured's person, but his pocketbook, and is thus assignable: "The act [BFFS] strikes the insured in his pocketbook and diminishes his estate [citation omitted]; it does not harm his person or his personality. If the act is a tort, it is a tort affecting the insured's property and is not personal to him.")

In *Essex Ins. Co. v. Five Star Dye House, Inc.*, 38 Cal.4th 1252 (Cal. 2006), the California Supreme Court noted that certain damages potentially available for bad faith are purely personal, such as emotional distress damages and punitive damages. Nevertheless, the bad faith cause of action itself falls within the broad rule permitting assignability of claims:

"We start from the proposition that assignability is the rule. [Citation omitted.] From that general rule we except those tort causes of actions "'founded upon wrongs of a purely personal nature.'" [Citation omitted.] Actions for bad faith

against an insurer have generally been held to be assignable [citation omitted], including claims for breach of the duty to defend [citation omitted]. Although some damages potentially recoverable in a bad faith action, including damages for emotional distress and punitive damages, are not assignable [Citation omitted], the cause of action itself remains freely assignable as to all other damages [Citation omitted]." *Id.* at 1263.

Therefore, the California Supreme Court held that bad faith claims are freely assignable, although claims for emotional distress damages and punitive damages are not. Significantly, Scottsdale and Wells are not seeking emotional distress damages or punitive damages here (nor could they seek "purely personal" damages because they are corporations). Rather, Scottsdale and Wells are seeking damages for the financial loss occasioned by United's repeated and unwarranted rejection of offers to resolve the underlying action for its \$1 million limits, which exposed the insured to personal liability and ultimately forced Scottsdale to contribute an additional \$1 million to protect the insured. Under governing law, this BFFS claim implicates the financial and/or property interests of the insured. As such, it falls within the broad rule that generally permits the assignment of claims.<sup>14</sup>

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<sup>14</sup> In the instant case, Scottsdale and Wells are only suing for *liquidated* damages, namely, the \$1 million incurred due to United's BFFS, plus interest.

**v. BFFS is Not Fraud, so Rules Barring the  
Assignment of Fraud Claims Are Inapplicable**

The courts have also found that BFFS claims do not fall with the fraud exception to the general rule in favor of assignability. Many jurisdictions prohibit the assignment of fraud claims, at least those arising out of purely personal injuries. In Missouri, for example, fraud claims arising out injury to a person are non-assignable. In contrast, fraud claims arising out of injury to real or personal property or an estate *are* assignable. *See Beall v. Farmers' Exch. Bank*, 78 S.W.2d 1098, 1099 (Mo. 1934) ("a right of action for fraud or deceit is generally held nonassignable in those cases in which the wrong is regarded as one to the person, but assignable where the injury is regarded as affecting the estate, or arising out of contract.")<sup>15</sup>

Significantly, however, the courts have rejected the idea that BFFS claims are necessarily "fraud" claims. In the Michigan Supreme Court case of *Commercial Union Ins. Co. v. Liberty Mutual Ins. Co.*, 426 Mich. at 133 (Mich. 1986), the Court found that an insurer who wrongfully places its interests above those of the insured can act in "bad faith" even if its conduct is not fraudulent:

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<sup>15</sup> In its Opinion, the Court of Appeals stated that fraud claims are generally non-assignable, without noting the distinction between claims involving personal injury and claims relating to property. (A25) Since the courts have found BFFS claims to involve the insured's property rather than his person as set forth above, the failure to make this distinction was not insignificant.

"Because bad faith is a state of mind, there can be bad faith without actual dishonesty or fraud. If the insurer is motivated by selfish purpose or by a desire to protect its own interests at the expense of its insured's interest, bad faith exists, even though the insurer's actions were not actually dishonest or fraudulent." *Id.* at 136-37.

Therefore, the Michigan Supreme Court held that BFFS claims are not necessarily "fraud" claims.

In *Benkert v. Medical Protective Company*, 842 F.2d 144, 150 (6<sup>th</sup> Cir. 1988), the court observed that *Commercial Union's* holding that BFFS is not necessarily "fraud" dovetails with the majority rule that BFFS claims are assignable: "We note that the overwhelming weight of authority favors the assignability of an insured's claims for bad faith failure to settle within policy limits. [Citation omitted]. . . . [T]hat such a claim is not necessarily a claim for fraud, which is nonassignable, implicitly follows the majority view." *Id.* at 150.

In Missouri, as in Michigan, bad faith liability can rest upon the insurer's act of placing its own interests above those of the insured. In *Truck Ins. Exchange v. Prairie Framing, LLC, supra*, 162 S.W.3d 64, 95 the court stated: "'As *Zumwalt* [228 S.W.2d 750, 756] explains, where the insurer's and the insured's interests conflict, an insurer cannot protect its own interests to the detriment of its insured's interests, but instead, the insurer must "'sacrifice its interests in favor of those of the [insured].'" Therefore, Missouri, like Michigan, has held that an insurer's act of placing its own interests above

those of its insured gives rise to bad faith liability. Since a BFFS in Missouri thus does not necessarily involve "fraud," any rule regarding the non-assignability of fraud claims has no application here. There is no "fraud" claim being made.

**vi. In Missouri, the Insured Is Not Required to Make a Payment to Have an Assignable Right**

Courts applying Missouri law have held that the insured need not pay the excess judgment (or settlement) in order to suffer actionable damage. In *Wessing v. American Indemnity*, 127 F.Supp. 775 (1955 U.S.D.C., W.D. Mo.), the insured had an auto policy with the defendant. There was an auto accident involving the insured vehicle. Litigation ensued, and there was a settlement demand within the policy limits. The insurer refused to settle, and the matter proceeded to trial, resulting in an excess verdict. The insurer paid the portion of the judgment within its policy limits, refusing to pay the excess portion of the judgment. *Id.* at 777-78.

The insured sued the insurer for a BFFS. The insurer argued that that the insured had no right of action unless and until they paid the part of the underlying judgment in excess of the insurer's policy proceeds. *Id.* at 779. The *Wessing* court first observed that the insured suffered at least nominal damages at the time of the breach: "The defendant, insurer, owed to plaintiffs, the insureds, the duty to exercise good faith in respect to settlement of Mrs. Douglas' [claimant] claim and suit, and if it, in 'bad faith', breached that duty, then it became liable to plaintiffs, the insureds, for at least nominal damages, even though there be no proof of actual damages or loss suffered by plaintiffs, [citations omitted], and, for this reason, alone, defendants' motion to dismiss (for want of allegation

of damage), cannot be sustained." *Id.* at 780. The *Wessing* court noted that the jurisdictions were split as to whether the insured's payment of the judgment was required, or whether the mere fact of an excess judgment against the insured was sufficient. It noted that several jurisdictions, Wisconsin, Tennessee, and Texas, have held that "the mere existence of the liability of the judgment sufficiently establishes the damage, and its measure, and that payment of the judgment is not a necessary prerequisite to recovery of damage from the insurer." *Id.* at 780.

The *Wessing* court then concluded that this view, *i.e.*, that the existence of the excess judgment is sufficient to support an actionable claim against the insurer, best comports with Missouri law:

"I believe the conclusion of the latter cases [of Wisconsin, Tennessee and Texas] is right, certainly in the light of the general law in Missouri. I believe this not only because of the reasoning in those cases, but also because of the following: It has always been the law in Missouri, that in an action for damages for a bodily injury, the plaintiff, who has been required, as a result of the injury, to incur medical, medicine, nursing and hospital expense, is entitled to have that element of his damage submitted to the jury though there be no evidence of payment. The question was squarely decided, long ago, by the Supreme Court of Missouri in *Curtis v. McNair*, 173 Mo. 270, 73 S.W. 167, 172, stating "There is no

difference, so far as the right to compensation in a case like this (a personal injury case) is concerned, between expending sums and incurring obligations. The plaintiff is entitled to recover for either.' [Notation omitted.] The same principle is announced and followed in many other Missouri cases, including *Cordray v. City of Brookfield*, Mo.Sup., 88 S.W.2d 161 [citation omitted]. This is hornbook law in Missouri. It would be the clearest kind of error for a Missouri Court to instruct a jury that they could not consider the element of damage consisting of medical, nursing and hospital expenses which had been incurred by the plaintiff but not paid. I think the analogy between that element of damage in a bodily injury suit, on the one hand, and the element of damage to the plaintiffs here, through suffering or 'incurring' this judgment, on the other hand, is so close as to be indistinguishable, and, I think, too, that payment is no more a condition precedent to suit for recovery of the damage in the one case than in the other." *Id.* at 781.

Therefore, the *Wessing* Court observed that under Missouri precedent, the mere "incurring" of the judgment in excess of the policy limits was sufficient. The insured was not required to show payment of the judgment to have an actionable claim against its insurer.

*In Truck Ins. Exchange v. Prairie Framing, supra*, 162 S.W.3d 64, 92-94, the insurer argued that the motion for summary judgment of the insured and underlying claimant for BFFS should be denied because the insured was insulated from liability by the V.A.M.S. 537.065 agreement. The Court of Appeals rejected this argument, noting that the very purpose of BFFS liability is to avoid the insured's exposure to excess amounts in the first instance:

"We find no attraction to a rule that rewards bad faith by relieving the insurer of excess liability if it forces harsh choices onto an insured facing a huge judgment. When the insurer refuses to settle, the insured loses the benefit of an important obligation owed by the insurer. An insurer's 'mere payment' of a judgment up to the policy limits does not make the insured whole or put the insured into the same position as if the company had performed its obligations under the policy. [Citation omitted.] The insurer has no incentive to act in good faith. In fact, if we were to hold as TIE [insurer] suggests, the insurer could receive a windfall if, to its good fortune, the insured is indigent or is forced into the protection of a bankruptcy or a section 537.065 agreement so that the insured cannot be held legally liable on the judgment. Likewise, requiring a business or individual to pay the judgment before the insurer is held to its obligations due to its

bad faith refusal to settle imposes the very burden on the insured that the requirement of good faith seeks to avoid." *Id.* at 93.

Thus, the *Prairie Framing* decision held that the insured need not personally make a payment to have a viable cause of action for BFFS.<sup>16</sup>

**vii. Courts Nationwide Agree that the Insured Need Not Pay In Order to Have an Assignable Claim**

Courts across the country are in accord with Missouri that an insured need not incur out-of-pocket costs to have an assignable cause of action against a third party. *See*

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<sup>16</sup> The Court of Appeals erroneously stated in its Opinion that Wells was not "damaged" because it did not contribute to the excess settlement, and Wells thus had nothing to assign. (A27) This holding contravenes the law of Missouri and innumerable other jurisdictions, as discussed herein. In addition, the authorities on which the Court of Appeals relied do not support its conclusion. *Renaissance Leasing, LLC v. Vermeer Manufacturing Co.*, 322 S.W.2d 112, 128-29 (Mo. En Banc 2010) is not an insurance case, and there was no evidence the assignor was injured at all. Here, Wells was injured when United exposed it to an excess judgment due to United's BFFS. *DeBaliviere Place Association*, 337 S.W.3d 670 (*En Banc* 2011) is not an insurance case and simply states that an assignee obtains the right of the assignor. Here, Wells had a right to pursue United for BFFS that was not extinguished by Scottsdale's payment of the excess settlement under governing law.

*Gray v. Nationwide*, 422 Pa. 500, 502-503, 505-06 (Pa. 1966) (under the weight of authority, it is not necessary for the insured to allege that he has paid or will pay a judgment in excess of the policy limits to sustain an action against the insurer for BFFS; insured could assign his claims notwithstanding the lack of an out-of-pocket payment); *Allstate Insurance Company v. Reserve Insurance Company, supra*, 116 N.H. at 808 (rejecting the argument that an assignment was ineffective because the assignee's payment prevented any financial loss to the insured: "[A] cause of action for negligent failure to settle is not dependent upon the insured's prior payment or the certainty of his future payment of the judgment against him"); *Dumas v. State Farm*, 111 N.H. 43, 45 (NH 1971) ("The modern trend is to allow the action [for negligent failure to settle within the policy limits] to be maintained by an insured who has not paid the excess judgment"); *Zander v. Casualty Ins. Co. of Cal.*, 259 Cal.App.2d 793, 803 (Cal.App. 1968) (insured's settlement with a covenant not to execute does not bar a subsequent suit against the insurer; the insured should not be penalized for attempting to minimize its damages).

*See also Fortman v. Safeco, supra*, 221 Cal.App.3d at 1400 (Cal.App. 1990) (the subrogor need not suffer actual loss, it is required only that he would have suffered loss had the subrogee not discharged the liability or paid the loss); *Pinto v. Allstate Ins. Co.* (2nd Cir. 2000), 221 F.3d 394, 403 (claimant's release of liability in exchange for an assignment of the insured's BFFS claim did not extinguish assignable right; this is a standard mechanism for pursuing a claim against the insurer); *Vigilant v. Continental Cas. Co.*, 33 So.3d 734, 739 (Fl. App. 2010) (an excess carrier's right to pursue a bad faith claim against the primary carrier is not lost simply because the injured party

released the insured); *Nunn v. Mid-Century* (Co En Banc 2010), 244 P.3d 116, 121-22 (the insured is not required to pay an excess amount to have a viable bad faith claim; the claimant may provide a covenant not to execute in exchange for an assignment without destroying such a claim); *Sell v. American Family Mut. Ins.*, 2011 WL 1042688, \*11-12 (U.S.D.C. Mont. 2011) (the courts have rejected the argument that an insured's assignment in exchange for a covenant not to execute leaves the third-party/assignee with no cause of action; such a rule would undermine the strong public policy in favor of settlement).

As such, numerous courts across the country have rejected the argument that the insured had no viable claim against its insurer because it did not personally contribute to the judgment or settlement. In keeping with the weight of authority, this Court should find that Wells had a valid, assignable claim against United even though Wells did not personally contribute to the excess settlement.

**viii. The Insured Sustains Actionable Injury at the Time  
the BFFS Occurs, Without Having Made any  
Payment**

That the insured need not pay anything to have an actionable BFFS claim is also clear from cases holding that a BFFS claim accrues at the time of the bad-faith failure to settle. In *Critz v. Farmers Ins. Group*, 230 Cal.App.2d 788, 795 (Cal.App. 1964), the insured was involved in an auto accident that seriously injured the claimant. After the insurer refused a pre-litigation demand within its policy limits, the insured assigned its rights against the insurer to the claimant. *Id.* at 792. Ultimately, the claimant sued and

there was an excess judgment against the insured. *Id.* at 792-93. The issue before the court was whether the assignment was valid, insofar as there was no judgment against the insured at the time. *Id.* at 793. The insurer argued that the insured had nothing to assign to the claimant because there was no excess judgment at the time of the assignment. The court noted that California and other states have rejected the view that an insured has no cause of action until he suffers and pays an excess judgment. *Id.* at 794. Rather, the actionable claim accrues when the insurer wrongfully rejects a policy limits demand: "Assuming bad faith, the breach of the insurer's obligation occurs at the time when it indulges in the unwarranted rejection of a reasonable compromise offer within the policy limits. [Citations omitted.]" *Id.* at 797. Therefore, *Critz* held that the actionable breach occurs at the time of the BFFS, before there has been any excess judgment, settlement, or payment of the same.

In *Farmers Group v. Trimble*, 691 P.2d 1138 (Co. 1984), the insurer allegedly refused in bad faith to settle an underlying claim against the insured. The insured brought suit against the insurer for BFFS. In the interim, the underlying suit against the insured settled for an amount within the policy limits. The Colorado Supreme Court rejected the insurers' argument that the insured had no viable BFFS claim absent exposure to an excess judgment:

"We are not persuaded by the assertion of petitioners [insurers] and *Amici* that, absent actual exposure of an insured to a judgment in excess of policy limits, there can be no breach of the duty of good faith by the insurer. The Eleventh

Circuit Court of Appeals, in interpreting Alabama law, has addressed the issue and stated, "[i]f the action accrues at the point when payment is refused, the elements of the tort are satisfied on such refusal, and the continuing condition of nonpayment cannot be a predicate to a bad faith cause of action." [Citations omitted.] We agree that it is the affirmative act of the insurer in unreasonably refusing to pay a claim and failing to act in good faith, and not the condition of nonpayment, that forms the basis for liability in tort. An actual judgment in excess of the policy limits is therefore not a necessary prerequisite to a claim of bad faith breach of an insurance contract." *Id.* at 1142.

As such, the *Trimble* Court held that a cause of action for BFFS accrues upon the unreasonable failure to settle within policy limits, and that no excess judgment is required to sustain such a claim.

In *Permanent General Assurance Corp. v. Moore*, 2005 WL 2038378 (4<sup>th</sup> Cir. 2005), the court similarly observed that the claim against the insurer for a BFFS incepted at the time the insurer wrongfully failed to settle within the policy limits:

"An insurer must estimate the probability of an excess judgment at the time it decides whether to settle the claim within the policy limits. The insurer commits bad faith at this point, if at all, by unreasonably refusing to settle even though

the facts before it raise a substantial probability that a jury will return a verdict for an excess judgment against the insured. [Citation omitted.] Although a later excess judgment certainly is evidence that the insurer has acted in bad faith, it is not a necessary predicate for the accrual of a bad faith cause of action. [Citation omitted.] Liability for bad faith is determined based upon the information available to the insurer and the reasonableness of the insurer's refusal to settle. The insured's cause of action accrues at the time the insurer unreasonably refuses to settle the case within the policy limits." (Emphasis added.) *Id.* at 16.

Therefore, the *Permanent General* court held that an excess judgment is not necessary for a BFFS claim to accrue. Rather, the claim accrues at the time the BFFS is committed. Likewise, here, this Court should find that Wells' claim against United for BFFS accrued when Wells unreasonably refused to settle within its policy limits beginning in 2008. There was no requirement that Wells suffer an excess judgment or settlement (much less that it make an out-of-pocket payment) for it to have a valid and assignable BFFS claim against United.

**e. Scottsdale Was Entitled to Sue United Fire for Contractual Subrogation**

Like other jurisdictions, this Court should find Scottsdale was entitled to sue United for contractual subrogation. The Missouri courts have already recognized the

doctrine of contractual subrogation. In *Kroeker v. State Farm Mut. Auto. Ins. Co.* 466 S.W.2d 105, 110 (Mo.App.1971), the court explained that contractual subrogation arises by act or agreement of the parties. Like equitable subrogation, contractual subrogation is designed to effect ultimate justice by ensuring the wrongdoer is held responsible for the loss:

"[A]ny person who, pursuant to a legal obligation to do so, has paid even indirectly, for a loss or injury resulting from the wrong or default of another will be subrogated to the rights of the creditor or injured person against the wrongdoer or defaulter, persons who stand in the shoes of the wrongdoer, or others who, as the payor, are primarily responsible for the wrong or default." *Id.* at 110.

Therefore, Missouri law expressly recognizes a right of contractual subrogation.

Moreover, other courts have held that an excess insurer who is forced to contribute to an excess judgment or settlement due to the primary insurer's BFFS is entitled to pursue the primary insurer under the doctrine of contractual subrogation. In *Great Southwest Fire Ins. Co. v. CNA*, 547 So.2d 1339 (La.App. 1989), the insured had a primary and excess policy. The insured was involved in an accident, and the claimant sued. *Id.* at 1340. The primary insurer assumed the insured's defense. There was a settlement demand within the primary limits, and the excess insurer demanded the primary insurer settle, on its own behalf and on behalf of the insured. The primary insurer refused, and there was an excess judgment. The excess insurer paid the excess

portion of the judgment and sued the primary insurer. *Id.* at 1341. The excess insurer alleged, *inter alia*, that it was entitled to proceed against the primary insurer under the doctrine of contractual subrogation. The *Great Southwest* court agreed. It noted that contractual subrogation clauses simply recognize that when the insurer pays someone on the insured's behalf, it is subrogated to the insured's rights:

"Contractual subrogation arises by way of provisions within the policy itself, or, as is frequently the case, by way of the proof of loss form. These contractual provisions simply recognize that where payment is made by an insurer to the insured or to someone on the insured's behalf, the insurer becomes subrogated to all rights of the insured. On the other hand, many policies do not contain subrogation provisions and in those situations the right to subrogation has been held to rest upon common law principles of equity." *Id.* at 1343.

Therefore, the *Great Southwest* court observed that a contractual subrogation provision recognizes the insurer's right to accede to the rights of the insured when it makes a payment on the insured's behalf. Moreover, the court held that the excess insurer was entitled to pursue the primary insurer for its BFFS under a contractual subrogation theory. *Id.* at 1349.

In so finding, the *Great Southwest* court rejected the primary insurer's argument that since the excess insurer paid the excess portion of the underlying judgment, the insured was not damaged and had no actionable claim:

"Defendants' [primary insurers] contention that the insured has not been damaged, because the plaintiff paid the amount of the *Youngblood* [underlying action] judgment in excess of defendants' primary policy limits and therefore has no cause of action to subrogate, is without merit because of the collateral source rule. Under the 'collateral source' rule our courts permit recovery of damages incurred by a plaintiff which he will never have to pay since they have been paid from another source.' [Citations omitted.] A plaintiff in a personal injury action has never been required to pay or show that he is able to pay expenses incurred in order to recover them. [Citations omitted.]<sup>17</sup>

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[In addition], [d]efendants without excess coverage, who were cast for an excess judgment, have assigned their rights for a bad faith claim for damages against their primary insurer to their judgment creditors, in settlement of the excess

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<sup>17</sup> Missouri likewise follows the "collateral source rule," which should support a finding that Scottsdale's payment of the excess portion of the settlement did not destroy Wells' cause of action against United for a BFFS. *See Washington by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 619 (Mo. 1995) (*En Banc*).

judgment, and the judgment creditors, as the assignees, have been permitted to assert the claims.

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Since the insured would have been able to recover from the primary insurer for a judgment in excess of the policy limits caused by the primary insurer's wrongful refusal to settle, the excess insurer, who discharged the insured's liability as a result of this tort, stands in the shoes of the insured and should be permitted to assert all claims against the primary insurer which the insured himself could have asserted.

[Citations omitted.]" *Id.* at 1348-49.

Therefore, the *Great Southwest* court found that the law and public policy considerations supported the excess insurer's right to pursue the primary insurers under a contractual subrogation theory.

In *Allstate Insurance Company v. Reserve Insurance Company* 116 N.H. 806 (N.H. 1997), an excess insurer sued a primary insurer for failing to settle within its policy limits when it had an opportunity to do so. According to the excess insurer, the primary insurer's negligent failure to settle forced the excess carrier to become involved and to contribute to the settlement. *Id.* at 807-808. The primary insurer moved to dismiss on the ground the excess insurer had no valid claim against it. *Id.* at 807.

The New Hampshire Supreme Court disagreed. It held that, as a matter of first impression, the excess insurer had a right to pursue the primary carrier for contractual

subrogation. In so doing, the *Allstate* court reasoned the standard subrogation clause contained in the excess insurer's policy constituted an assignment of the insured's rights against the primary insurer:

"Allstate [excess carrier] is entitled to bring an action against Reserve [primary carrier] on the basis of [the assignment clause in the Allstate excess policy]. Other courts have sustained the right of excess insurers to maintain an action against the primary carrier under a theory of equitable subrogation. [Citations omitted.] We find it unnecessary to utilize a subrogation analysis in view of our rule that tort claims of this sort are assignable as choses in action.

[Citations omitted.] *Id.* at 808.

Thus, *Allstate* held that that excess insurer was entitled to pursue the primary carrier as an "assignee" of the insured, pursuant to the contractual subrogation clause.

Like the *Great Southwest* Court, the *Allstate* Court rejected the primary carrier's argument that the excess carrier had no valid claim because the insured suffered no financial loss (due to the excess carrier's involvement). The *Allstate* Court reasoned that an insured need not suffer financial loss to maintain a claim for negligent failure to settle. *Id.* at 808.<sup>18</sup> Furthermore, the *Allstate* Court rejected the primary carrier's argument that

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<sup>18</sup> Other courts have held that contractual subrogation is not barred simply because the insured does not pay anything out of pocket: "Contractual subrogation is not barred

the excess carrier had no viable claim because it received a premium. In so doing, the Court noted that insurance carriers who have received premiums routinely sue third party tortfeasors for subrogation. Moreover, the Court saw no reason to apply a different rule to an excess carrier pursuing a primary carrier for subrogation. *Id.* at 809. Finally, the Court disagreed with the primary carrier's assertion that the excess carrier had no valid claim because the excess carrier was sophisticated and had the wherewithal to buy its own peace with the claimant. In so doing, the Court reasoned that the argument failed to take into account the very reason behind failure-to-settle claims, which is that the primary carrier's contract vests it with absolute control over settlements. *Id.* at 809.

Like the above courts, this Court should find as a matter of first impression in Missouri that Scottsdale was entitled to pursue United for contractual subrogation. As in the above cases, Scottsdale's policy contained an express contractual subrogation clause. This clause stated Scottsdale was entitled to pursue responsible third parties for amounts paid on the insured's behalf: "If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. . . .At

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simply because an insured has been fully indemnified. [Citations omitted.] In other words, that the shoes of the insured are purportedly "empty" of rights against the primary carrier does not necessarily bar an excess insurer from recovering under a theory of subrogation from the primary carrier who should have paid its share or indemnity or defense costs." *Continental Cas. Co. v. North American Capacity Ins.*, 683 F.3d 79 (5<sup>th</sup> Cir. 2012).

our request, *the insured will bring 'suit' or transfer those rights to us and help us enforce them.*" (L.F. 127, No. 9.) As such, Scottsdale's policy expressly provides that the insured's right to pursue a third party is transferred to Scottsdale upon Scottsdale's payment of a loss. Moreover, the trial court here expressly held in denying United's earlier MTD that Scottsdale had a viable claim for *at least* assignment and contractual subrogation. (L.F., 237 (¶2).) Despite this, the trial court "rubber stamped" statements to the contrary in the Judgment United's attorneys drafted. (L.F. 1376-1381.) To the extent the trial court held that, as a matter of law, excess insurers cannot pursue primary insurers for contractual subrogation, the trial court's finding was in error and should be reversed.<sup>19</sup>

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<sup>19</sup> The Court of Appeals declined to find that Scottsdale had an independent right to pursue United under its contractual subrogation clause. In so holding, the Court of Appeals reasoned that the contractual subrogation clause did not create a cause of action. Rather, the contractual subrogation clause simply embodied rights Scottsdale would have otherwise had under governing law as an assignee or under the doctrine of equitable subrogation. (A27-A28) Respectfully, this holding was in error under the above authorities, which hold that an insurer may obtain a subrogation right by means of a provision in the insurance contract.

**f. This Court Should Also Find that Primary Carriers Owe a Direct Duty of Good Faith to Excess Insurers**

**i. A Number of Jurisdictions Hold Primary Insurers Owe a Direct Duty to Excess Insurers**

As numerous courts have held, primary insurers owe excess insurers a direct duty to settle in good faith, since the excess insurer stands in the same position as the insured. In *Hartford Accident & Indem. Co. v. Michigan Mut. Ins. Co.*, 93 A.D.2d 337 (NY 1983), *aff'd*, 61 N.Y.2d 569 (N.Y.2d 1984), the New York court held that a primary carrier owes an excess carrier the same fiduciary duty that it owes the insured:

"[I]t has been recognized in this and other States, as well as in the Federal courts, that the primary carrier owes to the excess insurer the same fiduciary obligations which the primary insurer owes to its insured, namely, a duty to proceed in good faith and in the exercise of honest discretion, the violation of which exposes the primary carrier to liability beyond its policy limits. [Citations omitted.]" *Id.* at 341.

Therefore, the *Hartford Accident* court held that primary insurers owe the same duty of good faith to excess insurers that they owe their insured. *See also Estate of Penn v. Amalgamated Gen. Agencies*, 148 N.J. Super. 419, 424 (1977), *aff'd*, 61 N.Y.2d 569 (N.Y. 1984) (the primary insurer owes the excess insurer the same "positive duty" to take the initiative and attempt a settlement within the policy limit that it owes the insured; such a rule encourages settlement and keeps excess premiums low). In *Western World Ins.*

*Co. v. Allstate Ins. Co.*, 150 N.J.Super. 481, 486 (N.J. Super. 1977), the New Jersey court likewise held that primary insurers owe a direct duty of good faith to excess insurers. In *Attorneys Liability Protection Society v. Reliance Ins. Co.*, 117 F.Supp.2d 1114, 1124 (U.S.D.C. Kansas), the court applied Kansas law to find that a primary insurer owes the same duty of good faith and fair dealing that it owes its insured to the excess insurer.

As other courts have recognized, holding primary insurers directly accountable to excess insurers promotes important public policies. In *National Union v. Liberty Mut. Ins. Co.*, 696 F.Supp. 1099 (U.S.D.C. E.D. La.), the Louisiana District Court noted that permitting excess insurers to enforce primary insurers' duty of good faith and fair dealing prevents misconduct and encourages stability of the insurance industry:

"This rule of law [imposing a direct duty on excess insurers to act in good faith toward primary insurers] discourages 'misconduct, disregard, and misfeasance' and 'promotes stability and positive economics.' [Citation omitted.] Under this rule, the excess insurer 'stands in the same position as the insured.' 'The insurer is bound to a competent defense of the insured, and is liable to the insured for any damages sustained as a result of the breach of that obligation.' [Citation omitted.] The duty owed by a primary insurer under Louisiana law has been defined as 'impos[ing] liability for an excess judgment against a primary insurer if that insurer failed to accept an actual offer to settle within its policy limits

and such failure was negligent, arbitrary and/or in bad faith."

[Citation omitted.]" *Id.* at 1101-02.

Therefore, the *National Union* court observed that imposing a direct duty on excess insurers is appropriate, since excess insurers are in the same position as the insured.

Moreover, in cases in which the insured does not pay anything out-of-pocket because the excess insurer contributes to the judgment or settlement, only the excess insurer has an incentive to hold the primary insurer accountable for its BFFS:

"If the primary insurer may not be held accountable for a breach of good faith in conducting an insured's defense or negotiating settlement, excess insurance premiums may escalate. Since the insured will not bring an action if he has not suffered any loss, the primary insurer will suffer no consequences from breaching its duty. As a result, excess insurers would likely respond to this possible additional liability by raising insurance premiums. This in turn would discourage the purchase of excess insurance, thereby exposing an insured to more liability and reducing an injured party's chances of recovery of large settlements or judgments which the insured may not be able to pay without excess coverage." *Commercial Union Ins. Co. v. Medical Protective Co.*, 136 Mich.App. 412, 418-19 (Mich.App. 1984).

As such, *Commercial Union* held that precluding excess insurers from maintaining a direct action would, ultimately, prevent claimants with large claims from recovering.

Therefore, a number of courts hold that a primary insurer owes a direct duty of good faith and fair dealing to the excess insurer. In so holding, the courts have reasoned that such a rule promotes sound public policy. It encourages settlement, keeps excess premiums low, and helps ensure that claimants with large claims are able to obtain compensation. To the extent that these same policy concerns exist in Missouri, this Court should hold that excess insurers have a direct right of action against primary insurers for BFFS.

**ii. Missouri Law Supports a Finding that Primary Insurers Owe Excess Insurers a Direct Duty**

Existing Missouri law also requires a finding that primary insurers owe excess insurers a direct duty to act in good faith, since excess insurers are in essentially the same position as the insured. In *Grisamore v. State Farm Mut. Auto. Inc. Co.*, 306 S.W.3d 570, 575 (Mo.App.2010) the court set forth several factors to be weighed in determining whether a party owes a legal duty. Among these factors are the plaintiff's relationship to the transaction and the foreseeability of harm:

"The determination of whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the

foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to defendant's conduct, and [6] the policy of preventing future harm. Each and every one of the above elements are not absolutely necessary to authorize an action to be maintained." *Id.* at 575.

Therefore, *Grisamore* held that in determining the existence of a legal duty, the Missouri courts will consider the effect on the plaintiff, the certainty of injury, the foreseeability of harm, the nexus between the defendant's conduct and the injury, any moral blame and the prevention of future harm.

Here, all of these factors weigh in favor of imposing a duty on primary carriers to act in good faith toward excess carriers. First, settlement negotiations in cases involving a potential excess verdict have a direct financial impact on excess carriers. As courts nationwide have recognized, the excess insurer is, in effect, the same position as the insured with respect to such negotiations. Second, it is a virtual certainty that if the primary carrier fails to settle in bad faith, this will financially harm the excess carrier, just as it would harm the insured.

Third, it is eminently foreseeable that a failure to reasonably settle for the primary limits will cause financial injury to the excess carrier. Fourth, there is a direct causal nexus between a wrongful failure to settle for the primary limits and the ensuing harm to the excess insurer. Fifth, a primary carrier's unreasonable failure to settle for its policy

limits is morally blameworthy, since the primary insurer engages in such conduct to protect its own financial interests at the expense of the insured and excess insurer. Sixth, as numerous other courts have observed, permitting excess carriers to pursue primary carriers for a BFFS furthers the important public policy goals of encouraging settlement and minimizing excess insurance premiums. As such, this Court should find that each and every factor referenced in *Grisamore* weigh in favor of imposing a duty on primary insurers to act in good faith toward excess insurers.<sup>20</sup>

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<sup>20</sup> The Court of Appeals declined to find any direct duty of good faith and fair dealing running from primary insurers to excess insurers. In so doing, the Court of Appeals held that the primary insurer's duty to act in good faith toward the insured arises from the insurance contract. Moreover, there is no such contract between the primary and excess insurer. (A30-A31) In so finding, however, the Court of Appeal failed to take into account the important factors that have compelled a number of other courts to find such a duty. As a number of courts have held, the excess insurer is in the identical position to the insured *vis-à-vis* the primary insurer. That is, the primary insurer's failure to settle in bad faith foreseeably and directly impacts the excess insurer, just as it would the insured. As such, the primary insurer should bear a direct duty to the excess insurer to negotiate and settle in good faith, irrespective of whether there is a contract between the primary and excess insurer.

**g. The Trial Court Erred in Finding an Excess Judgment (as Opposed to Settlement) is Required for a BFFS Claim**

As courts applying Missouri law have recognized, an excess judgment *or settlement* is sufficient to support a claim for BFFS. *Amoco Oil Co. v. Reliance Ins. Co.*, 1998 WL 187336, \*3-5 (U.S.D.C., W.D. Mo.).<sup>21</sup> Other jurisdictions are in accord. In *Continental Casualty v. Reserve Ins. Co.*, *supra*, 307 Minn. 5, 13-14, the Minnesota Supreme Court held that an excess settlement (as well as an excess judgment) supports an excess insurer's claim against a primary insurer for equitable subrogation:

"[A]n excess insurer is in the same position as its subrogor, the insured. In such a case the insured should certainly be able to protect itself by settling a claim against it within primary policy limits, and then recovering from its primary insurer who refused to settle in bad faith. In that lawsuit the primary insurer could claim that the insured was not liable or liable for less than its policy limits and those questions could be tried by the jury along with the general issue of bad faith.

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<sup>21</sup> In finding that Scottsdale had a right to pursue United for equitable subrogation, the Court of Appeals correctly rejected the notion that there must be an excess "judgment" as opposed to an excess settlement. Whether there is an excess judgment or settlement, the insured is exposed to financial harm: "An insured's financial interests are equally impacted by an excess settlement, whether or not reduced to a judgment." (A49)

Since bad faith failure to settle occurs prior to trial, and the relevant standard involves evaluation of the insurer's decision at the time it is made and not from hindsight, we see no reason to allow the primary insurer to force a trial of the principal action. [Citation omitted.]" *Id.* at 13-14.

Thus, the Minnesota Supreme Court observed that an excess settlement is sufficient to support an excess insurer's equitable subrogation claim against the primary insurer.

Likewise, in *Fortman v. Safeco Ins. Co. of America*, 221 Cal.App.3d 1394 (Cal.App. 1990), the California court held that an excess settlement was sufficient to support a claim for BFFS through the doctrine of equitable subrogation. In *Fortman*, the primary insurer rejected several settlement demands within its policy limits. Thereafter, there was a pre-trial settlement to which the excess insurer was forced to contribute, and no judgment against the insured. *Id.* at 1397-98. The primary insurer was sued for equitable subrogation. The primary insurer argued that no viable claim for equitable subrogation existed because there was no "judgment" against the insured. *Id.* at 1398. The *Fortman* court disagreed. It observed that regardless of whether there is a settlement or judgment, an excess insurer may pursue a primary insurer for amounts the excess insurer is forced to pay due to the primary insurer's BFFS:

"[W]e entertain no doubt that an excess insurer which has settled and discharged the insured's liability may recover from the primary insurer an amount in excess of the primary insurer's policy limits if the excess insurer can prove the

primary insurer's unreasonable refusal to settle within its policy limits resulted in a loss to the excess insurer in an amount in excess of the policy limits of the primary insurer it would not have otherwise have had.' [Citation omitted]." *Id.* at 1399-1400.

Thus, the *Fortman* court noted that there was "no doubt" an excess insurer had a right to pursue a primary carrier for BFFS notwithstanding the lack of any excess judgment.

In so holding, the *Fortman* court noted that if an excess judgment were required, this would turn the public policy in favor of settlement on its head:

"On this record, Safeco [primary insurer] repeatedly, and allegedly in bad faith, refused settlement offers below its policy limits. Had the case been settled for any of those amounts, U.S. Fire [excess insurer] would have paid nothing. Instead, U.S. Fire actually paid \$1,125,000 toward the eventual settlement. If we adopted Safeco's position, U.S. Fire would suffer that loss without a remedy. On the other hand, an excess insurer who proceeded to trial and was required to pay any portion of a resulting judgment would be able to prosecute a similar action. Doing so might expose the excess insurer to a bad faith claim by the insured. Such a rule would encourage trials in cases which otherwise might settle." *Id.* at 1402.

Therefore, the *Fortman* court stated that requiring an excess judgment rather than an excess settlement could subject the excess insurer to bad faith liability and discourage settlement.<sup>22</sup>

C. **POINT TWO - THE TRIAL COURT ERRED IN GRANTING UNITED'S MOTION FOR SUMMARY JUDGMENT, BECAUSE UNITED DID NOT MEET ITS THRESHOLD BURDEN ON SUMMARY JUDGMENT UNDER RULE 74.04(C)(1), IN THAT THE UNITED WAS REQUIRED TO BUT DID NOT ATTACH TO THE MOTION LEGALLY COGNIZABLE EVIDENCE CONTROVERTING SCOTTSDALE'S CLAIM OF BAD FAITH BUT INSTEAD RELIED SOLELY ON SELECT ALLEGATIONS FROM SCOTTSDALE'S OWN FIRST AMENDED PETITION WHICH WERE MISCHARACTERIZED AND TAKEN OUT-OF-CONTEXT.**

Rule 74.04

*ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. 1993)

*Landmark North County Bank & Trust Co. v. National Cable Training Centers, Inc.*,

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<sup>22</sup> See also *North American Van Lines, Inc. v. Lexington Ins. Co.*, 678 So.2d 1325, 1333 (Fla.App. 1996) ("No excess judgment is required, because the insured has paid an obligation for which the insurers should have been liable, had they not breached the contract.")

738 S.W.2d 886, 890. (Mo. App. E.D. 1987)

*Frazier v. Riggle*, 844 S.W.2d 71 (Mo. App. E.D.)

**D. Standard of Review**

This is an appeal of a summary judgment entered in a suit over obligations between two insurers. It is well-settled that the propriety of summary judgment is an issue of law that is to be reviewed *de novo*. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Therefore, the appellate court will review the entire record anew, using the same standards the trial court should have used. *Stormer v. Richfield Hosp. Servs., Inc.*, 60 S.W.3d 10, 12 (Mo.App. 2001). In so doing, the appellate court will independently determine whether there exists any genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *Dial v. Lathrop R-II Sch. Dist.*, 871 S.W.2d 444, 446 (Mo. banc 1994). In addition, the court will consider the record in the light most favorable to the party against whom summary judgment was entered. It will give the non-moving party the benefit of all reasonable inferences. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, *supra*, 854 S.W.2d at 376.

**E. United Failed to Present Any Viable Evidence with its Motion, Much Less Any Evidence Controverting the "Bad Faith" Claim**

Under governing law, the trial court erred in granting summary judgment for United when United failed to meet its initial burden under Rule 74.04. Summary judgment is an extreme remedy that must be exercised with the greatest of caution. *Bell v. Garcia*, 639 S.W.2d 185, 190 (Mo.Ct.App. 1982). It is only appropriate when there is

no genuine issue as to any material fact *and* the moving party is entitled to judgment as a matter of law. Rule 74.04(c)(3). When the defendant is the moving party, as here, it may establish the right to summary judgment by (1) negating an element of the plaintiff's cause of action; (2) showing that plaintiff cannot produce evidence sufficient to support its claims; or (3) showing evidence supporting each element of an affirmative defense. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, *supra*, 854 S.W.2d at 381. Therefore, a defendant cannot prevail on summary judgment unless it produces evidence controverting the claims of the plaintiff. This evidence must consist of admissible evidence including pleadings, depositions, admissions, answers to interrogatories and affidavits. Rule 74.04.

If the defendant fails to produce sufficient evidence to refute the plaintiff's claims, the claims are deemed admitted. *Pine Lawn Bank and Trust Co. v. Schnebelen*, 579 S.W.2d 640, 642 (Mo. App. E.D. 1979). The burden never shifts to the opposing party, and the motion must be denied. *See Landmark North County Bank & Trust Co. v. National Cable Training Centers, Inc.*, 738 S.W.2d 886, 890. (Mo. App. E.D. 1987). This is the case even if the opposing party files no response to the motion at all. *Frazier v. Riggle*, 844 S.W.2d 71 (Mo. App. E.D. 1992) 73-74.

Here, United maintains that it met its burden on summary judgment by "negating" two elements of Scottsdale's claim through "admitted" facts, namely, that there was no "failure to settle" within policy limits, and no excess "judgment." (L.F. 276-77.) However, United's purported "facts" consisted solely of select allegations drawn from Scottsdale's own FAP and then misstated. Aside from mischaracterizing a few of

Scottsdale's own allegations in the FAP, United provided no "evidence" in support of its MSJ.

In fact, United failed to acknowledge, much less to controvert, Scottsdale's core allegations that United acted in "bad faith." As the Missouri Supreme Court has held, an unreasonable failure to settle that exposes the insured to a potential excess verdict constitutes bad faith. *Overcast v. Billings Mutual Ins. Co.* 11 S.W.3d 62, 67-68 (Mo. 2000). The elements of a claim for BFFS are (1) the liability insurer has assumed control over the proceedings against the insured; (2) the insured has demanded that the insurer settle the claim; (3) the insurer refuses to settle within its limits; and (4) in refusing to settle, the insurer acts in bad faith, rather than negligently. *Shobe v. Kelly, supra*, 279 S.W.3d 203, 210. The rationale behind imposing BFFS liability is that the insurer should not be permitted to place its own interests above those of the insured. *Johnson v. Allstate Ins. Co., supra*, 262 S.W.3d 655, 662. Moreover, this is precisely what an insurer does when it "gambles" with the insured's money by failing to resolve a case within its policy limits when an excess verdict is likely. *Ibid.* In determining whether the insurer acted in bad faith, the courts will consider several factors, including whether the insurer fully evaluated the third party claim and whether an excess verdict was likely, and the insurer's refusal to meaningfully consider settlement demands. *Id.* at 662.

In the instant case, Scottsdale alleged all of the elements of a BFFS in its FAP. It alleged that United was aware of the potential for a verdict well in excess of its \$1 million primary limits. Moreover, Scottsdale alleged that United had numerous opportunities to resolve the case for an amount within its primary limits. Nevertheless,

Scottsdale alleged, United refused to settle the case for \$1 million. Instead, United made "lowball" counteroffers, failed to respond to certain demands and rejected others months before they expired.<sup>23</sup> In so doing, United acted in bad faith, with the intention of protecting its own financial interests at the expense of Wells and Scottsdale. Further, United's bad faith conduct ultimately caused the claimants to withdraw their \$1 million demand and make a demand for \$3 million. This harmed Scottsdale by forcing it to become involved as the excess carrier and to contribute \$1 million to a \$2 million settlement (when the case should have been resolved for \$1 million). (L.F. 12, 19-26 (¶¶40-74).)

Significantly, instead of submitting any evidence controverting Scottsdale's claims of bad faith, United acted as if such claims did not exist. United seized upon the allegation that it ultimately contributed its \$1 million limits to the \$2 million settlement. It then argued that based on this allegation, there was no "failure to settle" within its \$1 million limits. (L.F. 267, 268, 272, 276- 277.) Clearly, however, United did not settle "within" its \$1 million policy limits when the total settlement was for \$2 million (\$1 million over United's policy limits). Moreover, nowhere in United's purported "facts" was there any reference to Scottsdale's allegation that it acted in bad faith by rejecting

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<sup>23</sup> In its Opinion, the Court of Appeals stated that it was "relatively clear" that based on this evidence, at least two of the elements of an excess insurer's cause of action against a primary insurer for BFFS (as articulated by the Court of Appeals) were satisfied, namely, the opportunity to settle and the failure to settle within policy limits. (A47)

multiple \$1 million demands when it recognized the likelihood of an excess verdict.

(L.F. 267, 268-269.)<sup>24</sup>

In addition, United's contention that an excess "judgment" is required to sustain a BFFS claim is patently without merit. Rather, it is enough if the insured is faced with an excess *settlement* due to the primary insurer's BFFS. In both cases, the insured is exposed to financial harm due to the insurer's bad-faith conduct. *See Truck Ins. Exch. v. Prairie Framing, LLC, supra*, 162 S.W.3d 64, 93 ("requiring a business or individual to pay the judgment before the insurer is held to its obligations due to its bad faith refusal to settle imposes the very burden on the insured that the requirement of good faith seeks to avoid.")<sup>25</sup>

Since United failed to acknowledge Scottsdale's allegations of "bad faith," much

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<sup>24</sup> The Court of Appeals correctly recognized that United's belated payment of \$1 million when it was no longer possible to resolve the case for that amount did not negate the "failure to settle" element of a BFFS claim: "Simply put, the insurer does not satisfy its duty to protect the 'financial interests' of an insured merely by remitting payment of its policy limits if the evidence indicates that the insurer had the opportunity to fully settle a claim within the policy limits, but failed in bad faith to do so. [Citation omitted]." (A54-A55)

<sup>25</sup> As indicated *supra*, the Court of Appeals correctly recognized in its Opinion that an excess settlement as well as an excess judgment is sufficient to support a BFFS claim. Both expose the insured to financial harm. (A49)

less controvert them with admissible pleadings, depositions, admissions or affidavits, United failed to meet its initial burden. The burden never shifted to Scottsdale, and the trial court was to deny the motion irrespective of whether Scottsdale filed a response at all. *Frazier v. Riggle*, 844 S.W.2d 71 (Mo. App. E.D.). 73-74. In granting the motion despite United's clear failure to meet its initial burden, the trial court committed reversible error.<sup>26</sup>

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<sup>26</sup> The Court of Appeals concluded that the trial court committed reversible error in finding that, as a matter of law, United negated two essential elements of a BFFS claim, namely, a failure to settle and an excess "judgment." First, the Court of Appeals reasoned that an excess settlement, like an excess "judgment," is sufficient because both expose the insured to financial harm. (A53-A54) Second, it held that United did fail to settle the entire underlying case within its \$1 million limits when it was presented with the opportunity to do. (A54-A55)

F. POINT THREE - THE TRIAL COURT ERRED IN GRANTING UNITED'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THE COURT HAD "NO AUTHORITY" TO CONSIDER SCOTTSDALE'S "UNTIMELY" RESPONSE TO THE MOTION, BECAUSE UNDER RULES 44.01(B) AND 74.06(B), THE COURT HAS AUTHORITY TO ENLARGE THE TIME WITHIN A RESPONSE ON SUMMARY JUDGMENT MAY BE FILED UPON A SHOWING OF "EXCUSABLE NEGLIGENCE," AND HERE SCOTTSDALE PRESENTED UNDISPUTED FACTS SHOWING ANY NEGLIGENCE ON ITS PART WAS "EXCUSABLE" BECAUSE IT RELIED IN GOOD FAITH ON THE PARTIES' STIPULATED EXTENSION OF TIME TO FILE THE RESPONSE.

Rule 44.01(b)

Rule 74.06(b)

*Crabtree v. Bugby*, 967 S.W.2d 66, 72 (Mo. banc 1998).

G. Standard of Review

The standard for review of the trial court's interpretation of a court rule is a legal question and subject to *de novo* review. *Richter v. Union Pacific R.R. Co.*, 265 S.W.3d 294, 297 (Mo. App. E.D. 2008). Accordingly, the appellate court will review the trial court's judgment independently, without deference to the trial court's conclusions. *ITT Commercial Finance Corp. v. Mid Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

**H. As United Recognizes, the Trial Court Unquestionably Had "Discretion" to Consider Scottsdale's Response on Summary Judgment under Rule 44.01(b)**

As United has itself recognized, the trial court erred in finding that it had "no authority" to enlarge the time for Scottsdale's response.<sup>27</sup> Under Rule 44.01(b), the Court has discretion to enlarge the time for responding to a motion:

**"b. Enlargement.** When by these rules, or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon notice and motion

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<sup>27</sup> The Court of Appeals deemed the issue of whether the trial court had authority to extend the time within which Scottsdale could respond to United's summary judgment motion to be moot. (A56) As set forth above, the Court of Appeals held that United failed, as a matter of law, to negate any of the essential elements of an excess insurer's BFFS claim against a primary insurer (as articulated by the Court of Appeals). (A53-A54) Consequently, United failed to sustain its initial burden on summary judgment. Accordingly, it was incumbent upon the trial court to deny United's motion whether Scottsdale responded in an untimely fashion or at all. (A52, fn18).

made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 52.13, 72.01, 73.01, 75.01, 78.04, 81.04 and 81.07."

Accordingly, Rule 44.01 states that the court has discretion to enlarge the time allowed for taking a specific action.

Moreover, although Rule 44.01 lists various Rules to which it does not apply, the Summary Judgment Rule (Rule 74.04) is not among such Rules. Accordingly, Rule 44.01 on its face allows the court "discretion" to enlarge the time for the filing of a response based on "excusable neglect." Similarly, Rule 74.06(b) itself authorizes courts to grant relief from the summary judgment order based on "excusable neglect": "[T]he court may relieve a party or his legal representative from a final judgment or order for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect."

Rules 44.01(b) and 74.06(b) do not define "excusable neglect." However, several cases have relied on the definition set forth in Black's Law Dictionary. See *Burleson v. Fleming*, 58 S.W.3d 599, 605 (Mo.App. W.D. 2001). In turn, Black's Law Dictionary defines excusable neglect as, *inter alia*, a misstep due to reliance on another party's promise:

"A failure—which the law will excuse—to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) not because of the party's own carelessness, inattention, or

willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care and vigilance of the party's counsel or on a promise made by the adverse party." Black's Law Dictionary, 608, 1061 (8<sup>th</sup> ed.2004).

Thus, "excusable neglect" occurs when a party fails to perform an act due to its reliance on the representations of the opposing party.

In *Crabtree v. Bugby* 967 S.W.2d 66 (Mo. banc 1998), the Missouri Supreme Court considered whether the trial court abused its discretion by allowing the defendant to file its response on summary judgment late. *Id.* at 72. The plaintiff in *Crabtree* did not claim that the late filing caused her any prejudice or surprise. Instead, she simply argued the deadlines under Rule 74.04 are "mandatory," and did not contemplate any extension.

The *Crabtree* Court disagreed. It found that the trial court had discretion to enlarge the Rule 74.04 filing period under Rule 44.01(b) based on "excusable neglect." Moreover, the trial court had the right to do so even after the filing deadline expired: "Rule 44.01 states that even after the expiration of a filing period, the court 'may at any time in its discretion' enlarge the filing period when the failure to respond was the result of excusable neglect." Further, the Court noted, the plaintiff did not claim that the late response was *not* due to excusable neglect, and nothing in the record supported such a claim. Therefore, the Court found that the trial court did not abuse its discretion in allowing the late response. *Id.*

Here, Scottsdale obtained United's consent for the two extensions of time to file its response and filed memoranda with the Court on October 2 and 5, 2012. (L.F. 287-288, 289, 1266, 1268 (¶¶5, 7), 1283, 1266, 1268 (¶6).) After the trial court granted United's motion on the ground Scottsdale's response was "untimely," Scottsdale filed a reconsideration motion, which could not be heard until December 4, 2012, the Court's only remaining motion date after November 6. It argued that any neglect on its part was "excusable" under 44.01(b) and 74.06(b). (L.F. 1252-1349.)

In this regard, Scottsdale asserted that it relied in good faith on the parties' agreed-upon extensions. First, United agreed to extend the deadline for a response to October 5, 2012. Thereafter, it agreed to a second extension until October 12, 2012. Moreover, Scottsdale filed notices of both of these agreed-upon extensions with the trial court. (L.F. 287-288, 1266, 1268 (¶5-7), 1283.)

Further, after the trial court held Scottsdale's response was "untimely," Scottsdale immediately moved for reconsideration based on, *inter alia*, its "excusable neglect." (L.F. 1252, 1253-1254, 1364.) Since Scottsdale relied in good faith on the agreed-upon extensions and promptly moved for relief, the trial court erred in refusing to find its conduct "excusable" under Rule 44.01(b) and 74.06(b). At a minimum, the trial court committed an error of law in finding that it "lacked authority" to enlarge the time for Scottsdale's response on summary judgment under these Rules.

The authorities that the trial court cited in support of its finding that it lacked "authority" are inapposite. (Tr. 3:16-4:9.) In *Butler v. Tippee, supra*, 943 S.W.2d at 324, the plaintiffs requested and obtained a 15 day extension to file their response. Unlike

here, however the plaintiffs failed did not file their response until 40 days after the new deadline. *Id.* at 324. In *Siemens Building Technologies v. St. John's Regional Medical Center, supra*, 124 S.W.3d at 10, the court *reversed* the grant of summary judgment in the defendants' favor because, like United, they failed to attach evidence to their motion and mischaracterized the contents of the court file. In *Chopin v. American Automobile, supra*, 969 S.W.2d at 250, the court found a summary judgment response failed to admit or deny the moving party's facts. There was no issue as to whether the response was late or whether the court had the time to enlarge the response under Rule 44.01(b). In *Estate of Clifton, supra*, 69 S.W.3d at 502-503, the plaintiff claimed that it received an extension of time from opposing counsel to file its response. However, unlike here, the file did not contain any such extension. In *Bilyeu v. Vaill, supra*, 349 S.W.3d 479, the court reversed a grant of summary judgment because the moving party relied solely on allegations in the Petition, without attaching any evidence. Likewise, here, the grant of summary judgment should be reversed because United attempted to rely solely on the Petition without submitting any actual evidence. As such, the authorities on which the trial court relied are either inapposite or support Scottsdale's argument of error.

As an alternative, Scottsdale argued that if the trial court believed it lacked discretion to enlarge the times on summary judgment, it should have denied United's motion as late. (L.F. 271.) The court's own scheduling order stated that summary judgment motions were to be argued and submitted by October 1, 2012. (L.F. 264, 265 (¶7).) Moreover, Rule 74.04(c)(6) states that a motion is to be decided after the court has considered the opposition, reply and any sur-reply. Furthermore, this entire briefing

process takes at least 60 days. The opposition is due 30 days after the motion is filed, the reply is due 15 days later, and the sur-reply is due 15 days after that. Accordingly, United was required under the Scheduling Order and Rule 74.04 to file its motion 60 days prior to October 1, 2012, or by August 2, 2012. Despite this, United did not file its motion until August 2, 2012. (L.F. 271.) This was only 32 days before the October 1, 2012 deadline and 28 days late. Since United's motion for summary judgment was thus itself untimely, Scottsdale argued, it was unfair for the trial court to grant the motion while refusing to consider Scottsdale's response as "untimely." (L.F. 1252, 1258-1261.) Rather, if the trial court believed it had no discretion under Rule 74.04, it should have denied United's motion as untimely.

I. POINT FOUR-- THE TRIAL COURT ERRED IN DENYING SCOTTSDALE'S MOTION FOR RECONSIDERATION OF THE TRIAL COURT'S ORDER GRANTING UNITED'S MOTION FOR SUMMARY JUDGMENT, BECAUSE UNDER RULES 44.01(B) AND 74.06(B) A PARTY MAY MOVE FOR RELIEF FROM A SUMMARY JUDGMENT ORDER BASED ON "EXCUSABLE NEGLECT," AND UNDER THESE RULES THE TRIAL COURT WAS REQUIRED TO TREAT SCOTTSDALE'S MOTION FOR RECONSIDERATION AS A MOTION FOR RELIEF BASED ON "EXCUSABLE NEGLECT" AND TO FIND THAT BASED ON THE UNDISPUTED FACTS, ANY NEGLIGENCE ON SCOTTSDALE'S PART IN FILING AN UNTIMELY RESPONSE TO UNITED'S MSJ WAS "EXCUSABLE" DUE TO SCOTTSDALE'S GOOD-FAITH RELIANCE ON THE PARTIES' STIPULATED EXTENSION OF TIME FOR FILING THE RESPONSE.

Rule 44.01(b)

Rule 74.06(b)

*Crabtree v. Bugby*, 967 S.W.2d 66, 72 (Mo. banc 1998).

J. Standard of Review

The standard of review when considering a trial court's denial of a motion for reconsideration is an abuse of discretion. *In Re Carol Coe*, 903 S.W.2d 916, 918 f.n. 1 (Mo. 1995). "An abuse of discretion occurs when the trial court's ruling is clearly against

the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Lowdermilk v. Vescovo Building and Realty Co., Inc.*, 91 S.W.3d 617, 625 (Mo. 2002).

**K. Under Governing Law, the Trial Court Should Have Granted  
Scottsdale's Motion for Reconsideration Based on "Excusable Neglect"  
Under Rules 44.01(b)(2) and 74.06(b)**

As set forth above, Scottsdale was entitled to bring a motion for relief from the trial court's Order granting United's MSJ based on Scottsdale's excusable neglect" under Rules 44.01(b)(2) and 74.06(b). In keeping with this, Scottsdale filed a Motion for Reconsideration based on "excusable neglect." (L.F. 1252-1349, 1360, 1368-1370.) For the reasons set forth in Section VI above, the trial court was required to treat the Motion for Reconsideration as one for relief based on "excusable neglect" under Rules 44.01(b)(2) and 74.06(b). Moreover, in denying the relief sought in the Motion for Reconsideration, the trial court abused its discretion. The Motion for Reconsideration set forth undisputed facts showing Scottsdale relied in good faith on the parties' stipulated extensions of time to file its response to United's MSJ. (L.F. 1252-1253, 1254, 1266-1270, 1280, 1285, 1364.) Accordingly, the trial court's denial of relief was so arbitrary and unreasonable as to shock the sense of justice. *Lowdermilk v. Vescovo Building and Realty Co., Inc.*, *supra*, 91 S.W.3d 617, 625.

**VI. CONCLUSION**

For all of the foregoing reasons, plaintiffs and appellants Wells and Scottsdale respectfully request the following relief:

(1) That this Court find the trial court erred in holding that Missouri law bars an excess carrier from suing a primary carrier for a BFFS, and hold as a matter of first impression that Missouri, like the majority of jurisdictions nationwide, recognizes such a right under the theories of equitable subrogation, assignment, contractual subrogation and/or a direct duty of good faith running from primary to excess insurers;

(2) That this Court find the trial court committed reversible error in granting United's motion for summary judgment when United failed to meet its initial burden of producing sufficient admissible evidence to controvert Scottsdale's "bad faith" claims;

(3) That this Court find the trial court committed reversible error in finding that it had no "authority" to enlarge the time for Scottsdale's response to the summary judgment motion notwithstanding provisions to the contrary in Rules 44.01(b) and 74.04(b) and evidence that any neglect was "excusable" based on agreed-upon extensions of time; and

(4) That this Court find the trial court committed reversible error in declining to treat Scottsdale's Motion for Reconsideration as a motion for relief based on "excusable negligent" and finding that based on the undisputed facts, any neglect on Scottsdale's part in filing an untimely response to United's Motion for Summary Judgment was "excusable" due to Scottsdale's good-faith reliance on the parties' stipulated extension of time for filing the response.

Respectfully submitted,

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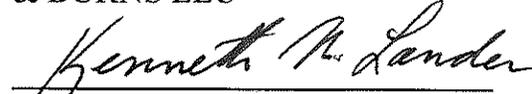
COMPANY AND WELLS

TRUCKING, INC.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Missouri Supreme Court Rule 84.06(c), Counsel for Appellants states that this Brief is in compliance with the limitations of Missouri Supreme Court Rule 84.06(b), is in Microsoft Word format using Times New Roman 13 point font and contains 29,323 words, exclusive of the brief cover, the certificate of service, the certificate required by Rule 84.06(c), the signature block and the appendix.

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**CERTIFICATE OF SERVICE**

I hereby certify that the Appellants' Brief and Appendix has been filed and placed electronically with the Supreme Court of Missouri and placed for delivery through the Missouri e-Filing System on this 14<sup>th</sup> day of March, 2014, to the following: Mr. John G. Schultz and Ms. Jill Frost Smith and Ms. Suzanne Bruss, Franke, Schultz & Mullen, P.C., 8900 Ward Parkway, Kansas City, Missouri 64114, Attorneys for Defendants-Respondents and Mr. John W. Grimm and Mr. John C. Steffens, The Limbaugh Firm, 407 N. Kingshighway, Suite 400, P.O. Box 1150, Cape Girardeau, Missouri 63701, Co-counsel for Respondents.

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