

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

Appeal from the Circuit Court of Linn County

Cause No. 10LI-CC00022

The Hon. Gary E. Ravens, Judge Presiding

9th Circuit

APPELLANTS' SUBSTITUTE REPLY BRIEF

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TABLE OF CONTENTS

	Page(s)
I. INTRODUCTION.....	1
II. UNITED'S BRIEF AND APPENDIX VIOLATE THE RULES BY SEEKING TO RAISE NEW CLAIMS AND DOCUMENTS OUTSIDE THE RECORD.....	4
A. This Court Should Refuse to Consider United's New Claim That Scottsdale's Settlement Payment Was "Voluntary"	4
B. This Court Should Reject United's Improper Attempt to Submit an Appendix Consisting of Matter Outside the Appellate Record	5
C. United Cannot Rely On Facts Submitted With Scottsdale's Response, Which United Argues the Trial Court Rightly Refused to Consider	6
D. Even if United Were Permitted to Argue That Scottsdale's Payment Was "Voluntary," The Evidence Shows Otherwise.....	6
III. UNITED FAILS TO DISPUTE THAT EXCESS INSURERS SHOULD BE PERMITTED TO PURSUE PRIMARY INSURERS FOR BFFS.....	8
A. United Fails to Address the Majority Rule That an Excess Insurer May Pursue a Primary Insurer for Equitable Subrogation.....	9
B. United Fails to Acknowledge the Majority Rule that BFFS Claims Are Assignable, Attempting to Rely on Inapposite Federal Cases.....	10

C. United Fails to Acknowledge or Refute the Cases Nationwide
Recognizing an Excess Insurer's Right to Contractual Subrogation..... 13

D. United Fails to Address the Numerous Cases Holding That Primary
Insurers Owe a Direct Duty of Good Faith to Excess Insurers..... 14

IV. SINCE UNITED FAILED TO SUSTAIN ITS INITIAL BURDEN ON
SUMMARY JUDGMENT, ITS MOTION SHOULD HAVE BEEN
DENIED 16

A. United Cannot Dispute That it Failed to Address--Must Less Refute
With Admissible Evidence--Scottsdale's BFFS Claim..... 16

B. United's Claim That There Was No "Failure to Settle" for Its \$1
Million Policy Limits As Required for BFFS Is Disingenuous..... 17

C. As the Court of Appeals Recognized, United's Assertion That An
Excess "Judgment" Is Required for a BFFS Claim Fails..... 18

V. THE TRIAL COURT ERRED IN FINDING IT HAD "NO AUTHORITY"
TO EXTEND THE DEADLINE FOR SCOTTSDALE'S RESPONSE 21

VI. THE TRIAL COURT ERRED IN REFUSING TO GRANT
SCOTTSDALE'S MOTION BASED ON "EXCUSABLE NEGLECT" 23

VII. CONCLUSION..... 25

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>A.W. Huss Co. v. Continental Cas. Co.,</i> 735 F.2d 246 (7th Cir. 1984)	20
<i>American Guarantee and Liability Ins. v. U.S. Fidelity & Guar.,</i> 668 F.3d 991 (C.A.8 2012)	12-13
<i>Amoco Oil Co. v. Reliance Ins. Co.,</i> 1998 WL 187336 (W.D. Mo.)	18
<i>Minden v. USF Ins.,</i> 2012 WL 1866598 (E.D. Mo. 2012)	13
<i>National Sur. Corp. v. Hartford Cas. Ins.,</i> 493 F.3d 752 (C.A.6, 2007)	10
<i>Peter v. Travelers,</i> 375 F.Supp. 1347 (D.C. Cal. 1974)	15
<i>Quick v. National Auto Credit,</i> 65 F.3d 741 (8th Cir. 1995)	12
<i>Ragas v. MGA Ins. Co.,</i> 1997 WL 79357 (E.D. La.)	18
<i>Reliance Ins. Co. in Liquidation v. Chitwood,</i> 433 F.3d 660 (8th Cir.)	14

Romstadt v. Allstate Ins. Co.,
59 F.3d 608 (6th Cir. 1995) 19

Rupp v. Transcontinental Ins. Co.,
627 F.Supp.2d 1304 (D. Utah 2008) 19

State Cases

Agnello v. Walker,
306 S.W.3d 666 (Mo. App. 2010) 24

Bailey v. Bostitch,
890 S.W.2d 648 (Mo. banc 1994)..... 24

Catholic Relief Ins. Co. v. Liquor Liability Joint Underwriting Association,
1997 WL 781448 (Mass.Sup. 1997)..... 20

Commercial Union Ins. v. Medical Protective Co.,
136 Mich.App. 412 (Mich.App. 1984) 14

Continental Casualty v. Reserve Ins.,
307 Minn. 5 (Minn. 1976) 18

Crabtree v. Bugby,
967 S.W.2d 66 (Mo. banc 1998)..... 24

Dupree v. Zenith Goldline Pharmaceuticals,
63 S.W.3d 220 (Mo. 2002) 4

Essex Ins. Co. v. Five Star Dye House,
38 Cal.4th 1252 (Cal. 2006) 11

Federal Ins. Co. v. Travelers Cas. & Surety,
843 So.2d 140 (Ala. 2002)..... 10

Fireman's Fund Ins. Co. v. TIG Ins.,
14 S.W.3d 230 (Mo.App. 2000) 15

Fortman v. Safeco Ins. Co.,
221 Cal.App.3d 1394 (Cal.App. 1990)..... 17

Frazier v. Riggle,
844 S.W.2d 71 (Mo. App. 1992) 73-74..... 15

Ganaway v. Shelter Mut. Ins.,
795 S.W.2d 554 (Mo.App. 1990) 10-11

Grisamore v. State Farm Mut. Auto. Ins.,
306 S.W.3d 570 (Mo.App. 2010) 15

Gulf Ins. Co. v. Noble Broadcast,
936 S.W.2d 810 (Mo. 1997) 19

Hamilton v. Maryland Cas. Co.,
27 Cal.4th (Cal. 2002) 20

Jarvis v. Farmers Ins. Exch.,
948 P.2d 898 (Wy. 1997)..... 20

Johnson v. Allstate Ins.,
262 S.W.3d 655 (Mo. App. 2008) 11

Kelly v. Williams,
411 So.2d 902 (Fl. 1982)..... 20

Lane v. Lensmeyer,
 158 S.W.3d 218 (Mo.App. 2005) 3

Meyer v. Superior Insulating Tape,
 882 S.W.2d 735 (Mo.App.1994) 5

State ex. rel. Mississippi Lime Co. v. Missouri Air Conservation Comm'n,
 159 S.W.3d 376 (Mo.App. 2004) 5

*Missouri Public Entity Risk Management Fund v. American Casualty
 Company of Reading*,
 399 S.W.3d 68 (Mo.App. 2013) 9

Neisler v. Keirsbilck,
 307 S.W.3d 193 (Mo.App. 2010) 5

Northwestern Mut. Ins. v. Farmers' Ins.,
 76 Cal.App.3d 1031 (Cal.App. 1978)..... 15

Rasse v. City of Marshall,
 18 S.W.3d 486 (Mo.App. 2000) 16

Richter v. Union Pacific R.R. Co.,
 265 S.W.3d 294 (Mo. App. E.D. 2008)..... 22

Schmitz v. Great American Assur. Co.,
 337 S.W.3d 700 (Mo., en banc 2011)..... 19

Truck Ins. Exch. v. Prairie Framing,
 162 S.W.3d 64 (Mo.App. 2005) 10, 12

Warren v. Kirwan,

598 S.W.2d 598 (Mo. App. 1980) 14

Miscellaneous

17 Mo. Prac., Civil Rules Practice section 84.04:8 (2013 ed.) 5

24 Mo. Prac., Appellate Practice section 11.11 (2nd ed.)..... 4

Missouri Supreme Court Rule 44.01(b) 3, 21, 22, 23, 24

Missouri Supreme Court Rule 74.04(c)(2)..... 21

Missouri Supreme Court Rule 74.06(b) 3, 21, 22, 23, 24

Missouri Supreme Court Rule 83.08..... 2, 4, 5, 12

I. INTRODUCTION

Although it is an issue of first impression in Missouri, the majority of courts from other jurisdictions hold that an excess insurer like Scottsdale may pursue a primary insurer like United for a bad faith failure to settle ("BFFS"). In so holding, these courts observe that the excess insurer "stands in the shoes" of the insured. Both insureds and excess insurers are harmed when the primary insurer unreasonably fails to settle within its policy limits, which creates the potential for an excess judgment.

As courts across the country have observed, allowing excess insurers as well as insureds to pursue primary insurers for BFFS promotes the important public policies of encouraging settlement, fairly distributing losses among primary and excess insurers, and keeping excess insurance premiums low. These courts have held that an excess insurer may pursue a primary insurer for BFFS under theories of equitable subrogation, assignment, contractual subrogation and/or a direct duty of good faith running from primary to excess insurers.

Appearing to realize that the authorities that so hold are compelling, United does not attempt to address or distinguish them. Instead, it relies on some *dicta* in a few non-binding federal decisions for the proposition that BFFS claims are not assignable. It also relies on a lone Alabama decision applying the minority rule that excess insurers cannot pursue primary insurers for BFFS under an equitable subrogation theory. In addition, United asserts that it was not "unjustly enriched" as required for equitable subrogation. By definition, however, United was unjustly enriched when it caused an *additional* \$1 million in damages due to its BFFS, and Scottsdale was forced to pay these damages to

protect the insured. In fact, this is a paradigm case in which equitable subrogation is appropriate, *i.e.*, a case in which the insurer pays damages caused by a third party's tort, and should be permitted pursue the tortfeasor for recovery.

Significantly, United also attempts to make the "new" argument for the first time in this Court that Scottsdale cannot pursue United for BFFS because Scottsdale's payment was "voluntary." This is improper on a number of levels. First, Rule 83.08 prohibits a party from seeking to make new arguments in its Substitute Brief. Second, in support of its new argument, United attempts to rely on documents outside the record that it attaches to its Appendix, which is likewise not permitted. Moreover, although United also relies on documents in the appellate record, these documents were only submitted with Scottsdale's response papers on summary judgment—which United argues that the trial court rightfully refused to consider. Clearly, United cannot have it both ways by simultaneously arguing that the trial court properly declined to consider the documents while attempting to rely on the documents itself.

Based on these grave procedural flaws, this Court should decline to consider United's new argument that Scottsdale "voluntarily" contributed to the settlement. Even if this Court were to consider the argument, however, the record clearly demonstrates that Scottsdale's payment was far from "voluntary," given that (1) the underlying action could and should have been fully resolved within United's \$1 million limits; (2) After unreasonably rejecting the claimants' multiple settlement demands for \$1 million, United demanded that Scottsdale contribute excess amounts; and (3) United's own retained counsel estimated potential liability in the underlying case could exceed \$3 million,

thereby exposing Scottsdale to potential bad faith liability if it did not settle.

Seeming to recognize that it cannot prevail on the merits, United devotes the majority of its brief to arguing that the trial court correctly granted summary judgment because Scottsdale's response was "untimely." In so doing, United attempts to deflect from the fact that it failed to meet its initial burden on summary judgment. As United cannot dispute, this alone warranted a denial, regardless of whether or when Scottsdale filed a response. As such, United's lengthy argument that Scottsdale's response was "untimely" and should not have been considered is a red herring.

Moreover, even if United had met its initial burden on summary judgment such that Scottsdale was required to respond, the trial court committed clear and reversible error in finding it had "no authority" to enlarge the time for Scottsdale's response. Under Rules 44.01(b) and 74.06(b), the court unquestionably had authority to enlarge the time for a response on summary judgment based on "excusable neglect." Therefore, the trial court's continued insistence that it had "no authority" constituted a clear error of law. Likewise, the trial court's statement that Scottsdale did not request relief based on "excusable neglect" in its reconsideration papers is belied by the record. Therefore, the trial court's grant of summary judgment in United's favor constituted clear error and should be reversed.

II. UNITED'S BRIEF AND APPENDIX VIOLATE THE RULES BY SEEKING TO RAISE NEW CLAIMS AND DOCUMENTS OUTSIDE THE RECORD

A. This Court Should Refuse to Consider United's New Claim That Scottsdale's Settlement Payment Was "Voluntary"

This Court should decline to consider United's Brief and Appendix to the extent they improperly seek to include (1) new issues not briefed below and (2) matters outside the record. Rule 83.08 states that substitute briefs may not seek to raise new issues for the first time in their substitute briefs to the Supreme Court: "The substitute brief. . shall not alter the basis of any claim that was raised in the court of appeals brief. . ." "One may not, however, raise new claims or issues for the first time in the substitute brief. Instead, one is limited, under Rule 83.08(b), to briefing the same issues as were raised in the Court of Appeals. *24 Mo. Prac., Appellate Practice* section 11.11 (2nd ed.). *See Lane v. Lensmeyer*, 158 S.W.3d 218, 230 (Mo.App. 2005) (altering the basis of a claim in a substitute brief constitutes a violation of Rule 83.08(b)); *Dupree v. Zenith Goldline Pharmaceuticals*, 63 S.W.3d 220, 221 (Mo. 2002) (on transfer to the Missouri Supreme Court, an appellant could not add new claims; the new points would not be considered).

Here, United apparently cannot dispute the proposition that an excess insurer should be permitted to pursue a primary insurer for a BFFS. As such, United now contends that in this particular case, Scottsdale should not be permitted to recover because its settlement payment was "voluntary." (RSB, p. 1, 19, 23, 31). However, this argument is entirely new to United's substitute brief. United did not make such an argument in its summary judgment motion, the trial court made no such finding, and

United made no such argument in the Court of Appeals. As such, United is seeking to now alter the basis for its claims for the first time before this Court in violation of Rule 83.08. This Court should decline to consider United's new argument.

B. This Court Should Reject United's Improper Attempt to Submit an Appendix Consisting of Matter Outside the Appellate Record

This Court should also find that United's reliance on an "Appendix" containing facts outside the record is improper: "It is wholly improper to include any exhibit in the appendix that was not part of the record in the trial court, and the appellate court considers such violations in deciding whether to dismiss an appeal." *17 Mo. Prac., Civil Rules Practice* section 84.04:8 (2013 ed.); *Neisler v. Keirsbilck*, 307 S.W.3d 193 (Mo.App. S.D. 2010) (court would not consider records included in the appendix but not included in the legal file in reviewing an order granting summary judgment); *State ex. rel. Mississippi Lime Co. v. Missouri Air Conservation Comm'n*, 159 S.W.3d 376, 380 n. 2 (Mo.App. 2004) ("The mere inclusion of documents in an appendix to a brief does not make it part of the record on appeal."); *Meyer v. Superior Insulating Tape*, 882 S.W.2d 735, 739 (Mo.App.1994) ("Where a document is not part of the record on appeal, we will not include the document in our review").

Here, United includes the entire transcripts of (1) the September 10, 2012 deposition of Lisa Doyle; (2) the August 16, 2012 deposition of Michael French, (3) the August 10, 2012 deposition of Michael Baker and (4) the August 17, 2012 deposition of Douglas Walters. However, the transcript of Lisa Doyle is not included in the appellate record at all. Likewise, the transcript of the August 16, 2012 session of Mr. French's

deposition is not included in the record (although portions of Mr. French's August 21, 2012 deposition session are included). (L.F./752-863.) In addition, only portions of the depositions of Michael Baker and Douglas Walters are included in the appellate record. (L.F./530-636; 1075-1110.) Nevertheless, United attaches the complete deposition transcripts of Messrs. Baker and Walters to its Appendix. To the extent United's Appendix consists of matter not contained in the record, this Court should decline to consider United's assertions based on the Appendix.

C. United Cannot Rely On Facts Submitted With Scottsdale's Response, Which United Argues the Trial Court Rightly Refused to Consider

United should likewise be precluded from seeking for the first time to rely on "facts" taken solely from Scottsdale's response papers on summary judgment. United attempts to base its new argument that Scottsdale's payment was "voluntary" on records submitted with Scottsdale's response. At the same time, United argues that Scottsdale's response papers were "untimely" and thus properly disregarded. Clearly, United should be prohibited from attempting to rely on the very records that claims it should not be considered.

D. Even if United Were Permitted to Argue That Scottsdale's Payment Was "Voluntary," The Evidence Shows Otherwise

Even if United were permitted to make the new claim that Scottsdale's payment was "voluntary," such an argument flies in the face of the evidence. As set forth in the Appellants' Substitute Brief, United had numerous opportunities to resolve the underlying case for its \$1 million limits. (ASB/pp. 7-11.) Further, United's internal records show

that it recognized the claim was worth \$1.5 million at the time. (ASB/p. 9.)

Nevertheless, United repeatedly rejected demands that it settle for its \$1 million limits, and made "lowball" offers. (ASB/pp. 7-13.) It was only after the claimants grew tired of United's repeated rejection of their \$1 million demands and increased their demand to \$3 million that Scottsdale was forced to become involved. (RSB/pp. 13-15.) In fact, United itself demanded that Scottsdale contribute to the defense and settlement of *Childress*. (L.F./1067.) Therefore, it is disingenuous for United to now argue that Scottsdale's contribution was "voluntary." Moreover, United's own retained counsel Michael Baker opined that the *Childress* action could result in a judgment of more than \$3 million: "[T]here is certainly a possibility that a jury verdict in this case could exceed Three Million Dollars (\$3,000,000.00)." (L.F./692.) In turn, this would be in excess of Scottsdale's \$2 million limits and United's \$1 million limits combined, and could expose Scottsdale to a potential bad faith claim if there was no settlement.

Much of the material on which United relies in arguing Scottsdale's contribution was "voluntary" is taken from the deposition of Lisa Doyle, which is in United's Appendix but not the appellate record. Moreover, United mischaracterizes and/or takes Ms. Doyle's testimony out of context. It claims that according to Ms. Doyle, Scottsdale set its reserves at "\$500,000," when in fact Scottsdale set its reserves at \$1.5 million. (RSB/p. 6, 25.) United also asserts that Scottsdale had a "similar" evaluation of the case because United believed the insured was 20% at fault and Scottsdale believed it was 30% at fault. (RSB/pp. 6, 24-25.) In so doing, United fails to mention that Scottsdale valued the case at a much higher number, believing that the potential judgment could be \$5

million. (RA-5:22-25.) United also argues that Ms. Doyle failed to obtain United's evaluation of the case. (RSB/p. 9, 25-26.) In fact, she repeatedly testified that she did receive this evaluation from United's retained defense counsel, Michael Baker. (RA-16, 16:9-21, A19, 75:15-21, 77:4-6.) Therefore, not only does United rely on matter outside the record for its new argument that Scottsdale's payment was "voluntary," but it seeks to mischaracterize that matter. Accordingly, this Court should find that United's new "voluntary" argument fails out-of-hand.

III. UNITED FAILS TO DISPUTE THAT EXCESS INSURERS SHOULD BE PERMITTED TO PURSUE PRIMARY INSURERS FOR BFFS

As United implicitly concedes by failing to address Scottsdale's authorities, the majority of courts nationwide allow excess insurers to pursue primary insurers for BFFS. United seems to realize from the beginning that it is on the losing side of this issue. It inaccurately claims the trial court "never reached the merits" of this issue because it found Scottsdale's response "untimely." (RSB/p. 18.) Contrary to United's argument, however, the Summary Judgment clearly states that "Missouri law does not permit an excess insurer to bring a lawsuit for bad faith failure to settle against a primary insurer." (L.F./1376, 1380, ¶30.) United then asserts that Scottsdale's "central arguments" are actually the procedural arguments addressed under Points II through IV. (RSB/p. 19, 23-24.) Clearly, this is not the case, and United should not be permitted to "muddy the waters" by attempting to argue distinct Points under Point I.

United also attempts to avoid the issue by simply ignoring the numerous cases nationwide holding that an excess insurer may pursue a primary insurer for BFFS. As

explained in the Appellants' Substitute Brief, these authorities make clear that an excess insurer "stands in the shoes" of the insured itself, and is permitted to sue the primary insurer for a BFFS. (ASB/pp. 45-50.) Instead of addressing these authorities, United offers meritless and off-point arguments as to why an excess insurer should not be permitted to pursue a primary insurer for BFFS.

A. United Fails to Address the Majority Rule That an Excess Insurer May Pursue a Primary Insurer for Equitable Subrogation

As United is forced to acknowledge, Missouri law already recognizes the right of an excess insurer to pursue a primary insurer for reimbursement under the theory of equitable subrogation. *Missouri Public Entity Risk Management Fund v. American Casualty Company of Reading*, 399 S.W.3d 68 (Mo.App. 2013) ("*MOPERM*") (RSB/p. 34.) Nevertheless, United asserts that *MOPERM* is distinguishable because the excess insurer paid amounts within the primary insurer's limits. (RSB/21-22). From an equitable standpoint, this is a distinction without a difference. As the Court of Appeals correctly observed, the primary insurer in both situations should be held accountable for the loss it caused: "In both cases, the primary insurer is effectively relieved of the incentive to fulfill a duty it owes to its insured by the excess insurer's performance or presence. In both cases, the primary insurer is effectively insulated from the consequences of breach of a duty owed to the insured to the extent of the excess insurer's performance." (AA-36.) As such, the Court of Appeals correctly recognized that the primary insurer caused the loss, and should bear the consequences.

United's assertion that equitable subrogation is unavailable because it was "not

unjustly enriched" is unavailing. (RSB/p. 36-37.) United was unjustly enriched because Scottsdale, rather than United, was forced to pay the *additional* \$1 million in settlement due to United's stonewalling.

Likewise, United's argument that the insured was not "damaged" is incorrect. (RSB/p. 37.) In so arguing, United ignores the multitude of cases holding that the insured is damaged at the time of the insurer's BFFS, and need not pay anything out-of-pocket to have an actionable claim. *Truck Ins. Exch. v. Prairie Framing, LLC*, 162 S.W.3d 64 (Mo.App. 2005). Instead, United attempts to rely on *Federal Ins. Co. v. Travelers Cas. & Surety Co.*, 843 So.2d 140 (Ala. 2002). (RSB/pp. 37-43.) Notably, *Federal* is from Alabama, one of the only jurisdictions nationwide that has refused to follow the majority rule permitting excess insurers to pursue primary insurers for BFFS. *See, National Sur. Corp. v. Hartford Cas. Ins. Co.*, 493 F.3d 752, 756 -757 (C.A.6 (Ky.), 2007) ("The overwhelming majority of jurisdictions that have considered the issue in this case have adopted such a rule [allowing excess insurers to pursue primary insurers for BFFS under an equitable subrogation theory]. Only Alabama and Idaho adhere to the minority position." Since the Alabama case on which United attempts to rely is contrary to the great weight of authority, this Court should decline to find it persuasive.

B. United Fails to Acknowledge the Majority Rule that BFFS Claims Are Assignable, Attempting to Rely on Inapposite Federal Cases

United's assertion that BFFS claims are non-assignable also flies in the face of prevailing law. In fact, the Missouri courts have recognized that BFFS claims are assignable. *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 560 (Mo.App. 1990).

United argues that *Ganaway* only applies in the bankruptcy context. (RSB/p. 49.) However, *Ganaway* stated that the insured *or* his trustee in bankruptcy may assign a BFFS claim. *Id.* at 565. Further, numerous Missouri courts have at least implicitly recognized that BFFS claims are assignable, since they permitted such claims to go forward in connection with assignments of rights under the policies. (ASB/p. 54-55.)

United claims that in *Johnson v. Allstate Ins. Co.*, 262 S.W.3d 655 (Mo. App. 2008), Justice Smart's concurrence questioned whether BFFS claims are assignable. (RSB/pp. 49-50.) However, Justice Smart did not purport to decide this issue. Rather, he noted that there are a shortage of cases addressing the public policy concerns behind allowing an assignment of BFFS claims. As such, he noted that this issue is ripe for review. *Id.* at 669-675.

Moreover, this Court should find that BFFS claims are assignable under Missouri law. While it is true that "purely personal" claims such as claims for emotional distress are not assignable, claims for financial loss are. Since BFFS claims are, at their essence, claims for financial damages, they are assignable. *Essex Ins. Co. v. Five Star Dye House, Inc.*, 38 Cal.4th 1252 (Cal. 2006). In keeping with this, Scottsdale is seeking damages for a strictly financial loss, *i.e.*, for the \$1 million it contributed to the settlement plus interest.¹

¹ United argues that Scottsdale is also seeking general tort damages, punitive damages and attorney fees. However, United cannot and does not cite to the record for its assertion that Scottsdale is seeking general tort damages. Moreover, Scottsdale and

United's argument that the insured was not "damaged" and thus had nothing to assign to Scottsdale is without merit as set forth above. (RSB/p. 44.) The *Prairie Framing* court renounced the notion that the insured must pay out-of-pocket to have an assignable BFFS claim: "[R]equiring 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." *Truck Ins. Exch. v. Prairie Framing, LLC, supra*, 162 S.W.3d 64, 93. As for United's argument that Scottsdale is attempting to recover its own damages, this ignores the fact that absent Scottsdale's intervention, the insured itself would have been exposed to possibly even a higher excess amount. (RSB/p. 46.)

United's attempt to rely on *dictum* contained in nonbinding federal authorities is unavailing. (RSB/pp. 20-21, 47-48.) In *American Guarantee and Liability Ins. Co. v. U.S. Fidelity & Guar. Co.*, 668 F.3d 991, 1003-04 (C.A.8 2012), the court found that there was no BFFS claim because the insured never made a settlement demand, which is currently a required element of a BFFS claim. *Id.* at 1003-1004.² As such, the *American*

Wells are both corporations, and cannot seek purely personal tort damages like emotional distress damages. Further, United has never before challenged Scottsdale's request for punitive damages and attorney fees, and cannot seek to do so for the first time now. Rule 83.08.

² United argues that a demand to settle should be a required element of an excess insurer's BFFS claim against a primary insurer. (RSB, p. 24.) However, this is a moot

Guarantee court found no occasion to decide whether Missouri law would permit the excess insurer to sue the primary insurer for equitable subrogation. *Id.* at 1004. Here, unlike in *American Guarantee*, it is undisputed the insured and Scottsdale both demanded that United to settle for its \$1 million limits.

The non-binding federal court decision of *Quick v. National Auto Credit*, 65 F.3d 741 (8th Cir. 1995) is similarly unhelpful. In *Quick*, the defendant was not an insurance company but a rental car company. Moreover, 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*. In *Minden v. USF Ins. Co., Inc.*, 2012 WL 1866598 (E.D. Mo. May 22, 2012), the federal district court felt constrained to follow *Quick*. However, it did so with some reluctance, noting "Missouri courts have not since [*Quick*] clarified Missouri law" regarding whether an excess insurer can sue a primary carrier for a bad faith failure to settle. *Id.* at *2. Thus, the non-binding federal decisions on which United relies are of little assistance. Seeming to recognize this, the Court of Appeals failed to so much as reference these decisions in surveying applicable Missouri law regarding the assignability of BFFS claims. (AA-24-25)

C. **United Fails to Acknowledge or Refute the Cases Nationwide**
Recognizing an Excess Insurer's Right to Contractual Subrogation

Scottsdale is likewise permitted to seek reimbursement under a contractual

point, because it is undisputed in this case that there was a settlement demand from both the insured and Scottsdale. (ASB, pp. 9, 11.)

subrogation theory. Scottsdale's policy contains a contractual subrogation provision that effectively assigned the insured's right to pursue third parties to Scottsdale. (L.F./127). Therefore, United's argument that the contractual subrogation clause does not vest Scottsdale with any rights is unavailing. (SRB/p. 50.) As for United's argument that only the insured could prosecute an equitable subrogation claim (RSB/p. 52-53), the courts have recognized that the modern trend is to permit insurers to sue for equitable subrogation. *See Warren v. Kirwan*, 598 S.W.2d 598, 600 (Mo. App. 1980).

D. United Fails to Address the Numerous Cases Holding That Primary Insurers Owe a Direct Duty of Good Faith to Excess Insurers

Contrary to United's assertion, this Court should find that primary insurers owe a duty of good faith and fair dealing to excess insurers, who stand in the same shoes as the insured. If primary insurers were not accountable to excess insurers, this would increase excess premiums. In turn, fewer individuals and businesses would purchase excess insurance. As a result, there would be less insurance money available for those most in need of such money, namely, the victims of catastrophic losses. *Commercial Union Ins. Co. v. Medical Protective Co.*, 136 Mich.App. 412, 418-19 (Mich.App. 1984).

In arguing that this Court should not find a direct duty, United again seeks to rely on *dicta* from a non-binding federal decision. (RSB/p. 54.) In *Reliance Ins. Co. in Liquidation v. Chitwood*, 433 F.3d 660, 664 (8th Cir.), the court stated that whether there was a direct right of action in Missouri or not was a moot point, to the extent there was no evidence of "bad faith" on the part of the insurer. *Id.* at 664.

Moreover, the factors that the Missouri courts weigh in determining whether a

duty exists support a finding of a direct duty running from primary to excess insurers. Among these factors are the foreseeability of the harm and the prevention of future harm. *See, Grisamore v. State Farm Mut. Auto. Inc. Co.*, 306 S.W.3d 570, 575 (Mo.App. 2010). Since the excess insurer stands in the same shoes as the insured, it is clearly foreseeable that the primary insurer's BFFS will harm the excess insurer. Further, allowing both insureds and excess insurers to hold primary insurers accountable for their BFFS will help deter wrongful conduct in the future.

United's assertion that excess insurers are differently situated from insureds in that they have control over the defense is without basis. (RSB/pp. 41-43.) Contrary to United's assertion, the excess insurer generally owes no duty to defend, and no duty to pay until the underlying policy has been exhausted through the payment of a judgment or settlement. *See, e.g., Fireman's Fund Ins. Co. v. TIG Ins. Co.*, 14 S.W.3d 230, 232 (Mo. Ct. App. W.D. 2000). As such, United's assertion that excess insurers should simply settle cases themselves when the primary insurer refuses to do so ignores the crucial distinctions between primary and excess insurance. (RSB/pp. 42-43.) As numerous courts have noted, it is important to ensure the fair distribution of losses among primary and excess insurers according to the risks they got paid to assume. *See, e.g., Northwestern Mut. Ins. Co. v. Farmers' Ins. Group*, 76 Cal.App.3d 1031, 1046 (Cal.App. 1978). If excess insurers were expected to pay amounts within the primary limits, excess premiums would dramatically increase. *See, e.g., Peter v. Travelers*, 375 F.Supp. 1347, 1350-51 (D.C. Cal. 1974). As United fails to acknowledge, this would harm insureds, claimants and society as a whole.

IV. SINCE UNITED FAILED TO SUSTAIN ITS INITIAL BURDEN ON SUMMARY JUDGMENT, ITS MOTION SHOULD HAVE BEEN DENIED

A. United Cannot Dispute That it Failed to Address--Must Less Refute With Admissible Evidence--Scottsdale's BFFS Claim

Since United has not shown and cannot show that it satisfied its threshold burden on summary judgment, the trial court erred in granting its Motion for Summary Judgment for that reason alone. Unless a moving defendant satisfies its initial burden of production on summary judgment, the burden never shifts to the plaintiff. Rather, the court is required to deny the motion even if the plaintiff files no response. *Frazier v. Riggle*, 844 S.W.2d 71 (Mo. App. E.D. 1992) 73-74. The *Rasse v. City of Marshall*, 18 S.W.3d 486 (Mo.App. 2000) case on which United relies is readily distinguishable. (RSB/pp. 58-59.) In *Rasse*, the moving defendant was not *required* to address the merits of the Petition in its summary judgment motion because it was relying on a procedural statute of limitations defense. *Id.* at 494. Here, United was required to, but did not, submit viable evidence controverting Scottsdale's *substantive* claim of a BFFS.

Significantly, United appears to recognize that the trial court's substantive ruling was in error. It attempts to distance itself from the ruling, claiming that the trial court did not make any rulings on the merits. (RSB/pp. 15, 60.) However, United is well aware that the final Summary Judgment purported to make rulings on the merits, since its attorneys drafted the Judgment that the trial court later "rubber-stamped." (L.F./1364, 1367, 1378-1381.) One of these rulings was that United's facts (drawn from Scottsdale's own FAP) were deemed "admitted," and failed to support Scottsdale's BFFS claim as a

matter of law. (L.F./1386, 1387, ¶6, 22; 1389-91)

Contrary to the trial court's finding, United did not submit any evidence addressing, much less controverting, Scottsdale's BFFS claim. Again, United relied on only a few select allegations from Scottsdale's own FAP. (L.F./10-28; LF 267-269.) None of these purported "facts" addressed Scottsdale's core bad faith claim that United recognized the likelihood of a judgment in excess of \$1 million limit but repeatedly refused to resolve the action for \$1 million when it had the chance. Since United did not address Scottsdale's BFFS claim, much less controvert it, United failed to meet its threshold burden on summary judgment. Therefore, it was incumbent on the trial court to deny United's Motion regardless of when, or whether, Scottsdale responded to the Motion. Notably, the Court of Appeals recognized this in its Opinion. (AA-52, fn. 19, AA-56.)

B. United's Claim That There Was No "Failure to Settle" for Its \$1 Million Policy Limits As Required for BFFS Is Disingenuous

United's assertion that the facts drawn from Scottsdale's own FAP were deemed "admitted" and negated the elements of Scottsdale's BFFS claim is without merit. (RSB/pp. 65-67.) According to United, a BFFS claim requires, *inter alia*, a failure to settle and an excess judgment. Moreover, United claims, Scottsdale's facts demonstrate that there was no failure to settle because United ultimately contributed its \$1 million limits towards the settlement. (RSB/pp. 23-24, 61-62.) As United fails to mention, it had numerous opportunities to settle the case for \$1 million, and its records showed it valued the case at \$1.5 million. (L.F./752, 762:19-763:4, 864, 907-908.) Moreover, United's

unreasonable failure to settle for \$1 million ultimately led the claimants to increase their demand to \$3 million. In turn, this forced Scottsdale to get involved and contribute \$1 million to a \$2 million settlement. Therefore, there was a failure to resolve the case for \$1 million despite ample opportunity to do so.

Moreover, the Court of Appeals correctly recognized that United's belated payment of its \$1 million limits--after the demand increased to \$3 million--met 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." (AA-54-55.)

C. **As the Court of Appeals Recognized, United's Assertion That An Excess "Judgment" Is Required for a BFFS Claim Fails**

As for United's contention that there was no excess "judgment," which it claims is a required element of a BFFS claim, this is similarly without merit. (RSB/pp. 26-34.) United mischaracterizes *Amoco Oil Co. v. Reliance Ins. Co.*, 1998 WL 187336, *3-5 (U.S.D.C., W.D. Mo.), arguing that it states an excess "judgment" is required. (RSB/p. 28.) In fact, *Amoco* states that "actual damage in the form of an excess judgment or settlement" triggers a BFFS claim. *Id.* at *5.

Moreover, other courts have observed that requiring an excess judgment, as opposed to settlement, would discourage settlement. *Continental Casualty v. Reserve Ins. Co.*, 307 Minn. 5, 13-14 (Minn. 1976); *Fortman v. Safeco Ins. Co. of America*, 221 Cal.App.3d 1394, 1399-1400, 1402 (Cal.App. 1990). Thus, United's argument that an

excess judgment should be required undermines the key public policy goal of encouraging settlement. (RSB/pp. 31-33.)

The authorities on which United relies for the proposition that an excess judgment is required do not so hold. United cites to several cases stating that section 537.065 settlements must be "reasonable." These authorities make clear that this rule "only applies to 537.065 settlements." *Schmitz v. Great American Assur. Co.*, 337 S.W.3d 700, 709 (Mo., en banc 2011). The cases also state that the non-participating insurer bears the burden of proving the settlement was unreasonable. *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810, 816 (Mo. 1997). Clearly, United cannot meet this burden when its own representatives at the mediation confirmed the \$2 million settlement was reasonable. (L.F./12, 26 (¶75), 530, 616:23-617:9, 752, 775:3-10, 860:14-22, 867-868, 1075, 1088:20-1091:11.).

United's reliance on *Rupp v. Transcontinental Ins. Co.*, 627 F.Supp.2d 1304 (D. Utah 2008) is similarly misguided. (RSB/p. 32.) In fact, *Rupp* confirms that an excess insurer who settles a case due to the primary insurer's BFFS is not a "volunteer," and may pursue the primary insurer for equitable subrogation. *Id.* at 1326. Although the *Rupp* court held there was a fact issue as to whether the settlement was collusive, this finding was adverse to the non-settling *primary insurer*, who contended the settlement was collusive based on the undisputed facts. *Id.* at 1325.

In *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 612 (6th Cir. 1995) and *Ragas v. MGA Ins. Co.*, 1997 WL 79357, *2 (E.D. La.), the insured entered into a stipulated judgment with the claimant without the insurer's permission although the insurer was

defending. In the *Romstadt, Ragas* and many other jurisdictions, a stipulated judgment when the insurer is defending is non-binding because the insurer did not "cause" the consent judgment. An arm's length judgment or settlement is required. *See, Hamilton v. Maryland Cas. Co.*, 27 Cal.4th at 718, 731 (Cal. 2002). Here, however, the settlement was at arm's length. Again, United's representatives confirmed their belief that \$2 million was a reasonable settlement amount.

In *A.W. Huss Co. v. Continental Cas. Co.*, 735 F.2d 246, 249 (7th Cir. 1984), *Catholic Relief Ins. Co. v. Liquor Liability Joint Underwriting Association*, 1997 WL 781448, *1, *23 (Mass.Sup. 1997) and *Kelly v. Williams*, 411 So.2d 902 (Fl. 1982) 411 So.2d 902, there was no excess amount in question because the insurer agreed to resolve the claim within its policy limits. In *Jarvis v. Farmers Ins. Exch.*, 948 P.2d 898, 901 (Wy. 1997), there was not excess amount at issue because there was a defense verdict in favor of the insureds. Therefore, United's authorities do not support its position that an excess "judgment" as opposed to an excess settlement is required for a BFFS claim.

Moreover, the Court of Appeals in this case correctly held that an excess settlement, like an excess judgment, is sufficient to support a BFFS claim because both cause financial harm: "An insured's financial interests are equally impacted by an excess settlement, whether or not reduced to a judgment." (AA-49)

Seeming to realize that it failed to meet its threshold burden on summary judgment, United attempts to distract from the issue. It argues at length that the trial court granted its motion on the sole ground that Scottsdale's response was "untimely." (RSB/p. 60.) As explained above, however, United knows this is not the case, since its

attorneys drafted the Summary Judgment purporting to make numerous Conclusions of Law. (L.F./1378-1381.) Further, the argument does not belong under Point II, since the trial court was obligated to deny United's Motion on the ground that United failed to meet its initial burden *irrespective* of whether Scottsdale's response was filed timely or at all.

V. THE TRIAL COURT ERRED IN FINDING IT HAD "NO AUTHORITY" TO EXTEND THE DEADLINE FOR SCOTTSDALE'S RESPONSE

As United does not and cannot dispute, the trial court committed a clear error of law in finding it had "no authority" to extend the deadline for a summary judgment response. Rule 44.01(b) provides that the trial court has authority to enlarge the time for a response, either pursuant to a request before the deadline or a motion for relief based on "excusable neglect" after the deadline. While there are exceptions to Rule 44.01(b), responses on summary judgment are not among these exceptions. Further, Rule 74.06(b), which concerns summary judgment motions, provides that a court may grant relief from a summary judgment order based on a party's "excusable neglect." As such, even United is forced to acknowledge that the trial court had authority to enlarge the time for Scottsdale's response: "Rule 74.04(c)(2) gives the trial court discretion to order the 30 day period [for a response on summary judgment] to be enlarged. [Citation omitted.]" (RSB/62-63.)

Despite this, the trial court insisted that it "did not have the authority" to enlarge the deadlines on summary judgment such that it was required to grant United's motion based on Scottsdale's "untimely" response. (L.F./1376, 1379.) Since even United recognized this was error, Scottsdale promptly filed a Motion for Reconsideration of the

finding. It argued that under Rules 44.01(b) and 74.06(b), the trial court should reconsider its erroneous holding that it had "no authority" to enlarge Scottsdale's time for a response. (L.F./1252.) Scottsdale further argued that to the extent the trial court had authority to enlarge the time for the response, it should exercise such authority. In so arguing, Scottsdale asked the trial court to consider Scottsdale's "excusable neglect" in relying in good faith on the parties' stipulated extensions of time. (L.F./1364.)

Nevertheless, the trial court was insistent that it did not have authority, entering a Summary Judgment that stated: "the Court declines to enlargement [sic] of the time period for Plaintiffs' Response because it does not have the authority to do so. . . ." (L.F./1380.) To the extent the trial court held that it simply had no power to enlarge the deadlines on summary judgment, it erred under Rules 44.01(b) and 74.06(b). Since this was an error in interpreting court rules, United's contention that an "abuse of discretion" standard applies is without merit. (RSB/p. 69.) Rather, the trial court's legal error is subject to *de novo* review. *Richter v. Union Pacific R.R. Co.*, 265 S.W.3d 294, 297 (Mo. App. E.D. 2008).

In hopes of blurring the issue, United now argues that the trial court lacked discretion because Scottsdale did not request relief under Rules 44.01(b) and 74.06(b). (RSB/p. 70.) As United acknowledges, Scottsdale's reply brief in support of its reconsideration motion stated the trial court should find that "any 'neglect' on plaintiffs' part was excusable." (L.F./1372-73.) Likewise, United's assertion that Scottsdale's counsel "admitted" Scottsdale never moved for relief at the hearing of Scottsdale's reconsideration motion is belied by the record. (RSB/pp. 12-13, 16, 17.) Counsel

expressly advised the trial court that Scottsdale had requested relief based on "excusable neglect" in its moving papers submitted in November of 2012. (Tr./6:6-9.) United also ignores the fact that, as a practical matter, Scottsdale could not request that the court exercise its authority to grant relief based on "excusable neglect" until it first convinced the trial court that it had such authority. Moreover, based on the Summary Judgment, Scottsdale was not able to disabuse the trial court of the belief that it "lacked authority" to grant the requested relief.

**VI. THE TRIAL COURT ERRED IN REFUSING TO GRANT
SCOTTSDALE'S MOTION BASED ON "EXCUSABLE NEGLIGENCE"**

United's argument that the trial court properly denied Scottsdale's motion for reconsideration based on Scottsdale's "excusable neglect" fails. (RSB/pp. 74-77.) Again, Rules 44.01(b) and 74.06(b) provide the court with authority to grant relief for a failure to act based on "excusable neglect." Moreover, Scottsdale's failure to file its response to the summary judgment motion on October 1, 2012 was clearly the result of such "excusable neglect." As the undisputed facts show, United filed its own summary judgment motion late. (L.F./264, 265 (¶7); (L.F./271).) Thereafter, Scottsdale requested, and United stipulated to, two short extensions of time for Scottsdale to file its response. (L.F./1266, 1268 (¶6), 1275-1277, L.F. 1283.) Scottsdale filed notices regarding the extensions with the trial court. (L.F./287-288, 289, 1266, 1268 (¶5, ¶7).) Not long thereafter, the trial court issued a Summary Judgment Order granting United's motion for summary judgment on the ground that Scottsdale's response was "untimely" and United's facts were deemed "admitted." In its Summary Judgment Order, the trial court stated that it lacked authority

to enlarge the deadline for Scottsdale's response because the deadlines on summary judgment are mandatory. (L.F./1250-1251.)

As stated above, Scottsdale immediately moved for reconsideration of this order.³ (L.F./1252-1349.) Its first order of business was to convince the trial court that it *had* "authority" to grant relief under Rules 44.01(b) and 74.06(b). Nevertheless, Scottsdale also argued that the trial court should exercise such authority to grant relief based on Scottsdale's excusable neglect. (L.F./1364, 1372-73; RSB/p. 72.) As such, the trial court was required to treat Scottsdale's reconsideration motion as a motion for relief based on excusable neglect under Rules 44.01(b) and 74.06(b).

Further, the trial court should have found that any neglect on Scottsdale's part in relying on the stipulated extensions was in good faith and "excusable." *See Crabtree v. Bugby* 967 S.W.2d 66, 72 (Mo. banc 1998) (the trial court properly enlarged the filing period for a response on summary judgment under Rule 44.01(b) based on "excusable neglect"; plaintiff made no showing the late filing was *not* due to excusable neglect). Here, as in *Crabtree*, United does not attempt to argue that Scottsdale's reliance on the extensions of time that United provided was not "excusable." In fact, United's "counsel had no objection to Scottsdale's request for extensions." (RSB/p. 11.) As such, the trial

³ Notwithstanding United's argument to the contrary, a number of Missouri cases have recognized motions for reconsideration. *Bailey v. Bostitch*, 890 S.W.2d 648, 649-650 (Mo. banc 1994); *Agnello v. Walker*, 306 S.W.3d 666, 674-75 (Mo. App. W.D. 2010); (RSB 74-75.)

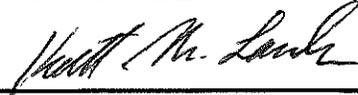
court should have deemed Scottsdale's reliance on the extensions "excusable" and permitted the filing of Scottsdale's response. Instead, the trial court failed altogether to address whether Scottsdale's conduct was "excusable." In so doing, it continued to maintain that it had "no authority" to enlarge the time for Scottsdale's response. In addition, the trial court stated--against the evidence--that Scottsdale had not requested relief based on its excusable neglect until the December 4, 2012 hearing. (L.F./1376, 1378-79.) To the extent both of these findings constituted clear error, the trial court's summary judgment in favor of United should be reversed.

VII. CONCLUSION

Missouri should join the overwhelming majority of courts that recognize that an excess insurer may pursue a primary insurer for a BFFS under theories of equitable subrogation, assignment, contractual subrogation and/or a "direct duty." Insureds are permitted to hold primary insurers accountable for their BFFS, and excess insurers "stand in the shoes" of the insured. Therefore, a rule permitting excess insurers to likewise pursue primary insurers for BFFS logically follows. In addition, such a rule advances important public policy goals like encouraging quick and just settlements within the primary limits. To the extent the trial court here held that Missouri law does not permit excess insurers to pursue primary insurers for BFFS, it erred. Therefore, Scottsdale respectfully requests that this Court reverse and remand for further proceedings consistent with its Opinion.

Respectfully submitted,

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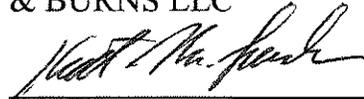


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CERTIFICATE OF COMPLIANCE

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 7,731 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' Substitute Reply Brief has been filed and placed electronically with the Supreme Court of Missouri and placed for delivery through the Missouri e-Filing System on this 28th day of April, 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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