In the
Missouri Court of Appeals
Western District

SCOTTSDALE INSURANCE COMPANY AND WELLS TRUCKING, INC.,	)	**WD75963**
Appellants,	)	**OPINION FILED: October 1, 2013**
v.	)	
ADDISON INSURANCE COMPANY, ET AL.,	)	
Respondents.	)	

Appeal from the Circuit Court of Linn County, Missouri
The Honorable Gary E. Ravens, Judge

Before Division Three: Lisa White Hardwick, Presiding Judge, Mark D. Pfeiffer and Cynthia L. Martin, Judge

This is a case of first impression involving an excess insurer's attempt to recover from a primary insurer the amount contributed from an excess policy to resolve a claim where the primary insurer has allegedly failed to settle the claim within its policy limits in bad faith. The trial court entered summary judgment in favor of the primary insurer Addison Insurance Company and United Fire & Casualty Company (collectively "United

Fire"[1]), and against the excess insurer Scottsdale Insurance Company ("Scottsdale") and the insured Wells Trucking, Inc. ("Wells Trucking") (collectively "Appellants"), on seven alternatively pled causes of action, each of which sought to recover the amount Scottsdale contributed toward the settlement of a lawsuit against Wells Trucking.

Because we conclude that an excess insurer can recover on a theory of equitable subrogation amounts contributed from an excess policy as a result of the primary insurer's bad faith failure to settle a claim within policy limits, and because the uncontroverted facts do not negate any of the essential elements of that cause of action, we affirm in part and reverse in part, necessitating a remand for further proceedings consistent with this Opinion.

Factual and Procedural Background[2]

In August 2007, a Wells Trucking employee driving one of the company's trucks pulling a flatbed trailer was involved in an automobile accident. The driver of the other vehicle sustained severe bodily injuries from which he died.

At the time of the accident, Wells Trucking had a primary liability insurance policy with United Fire and an excess liability insurance policy with Scottsdale. The United Fire policy contained liability limits of $1 million. The Scottsdale policy contained liability limits of $2 million and specified that it would not apply unless and until the underlying United Fire policy was exhausted.

[1]Addison Insurance Company is a wholly owned subsidiary of United Fire & Casualty Company, so for clarity, we refer to these parties collectively throughout the Opinion.

[2]"We view the record and reasonable inferences therefrom in the light most favorable to the non-movant in [a] summary judgment proceeding." *Thiemann v. Columbia Pub. Sch. Dist*., 338 S.W.3d 835, 837 (Mo. App. W.D. 2011).

In April 2008, the decedent's family made demand that United Fire settle for its $1 million policy limits. At the time, the decedent's family was unaware of the excess policy. After United Fire rejected the demand, the decedent's family filed a wrongful death lawsuit against Wells Trucking and its employee. The decedent's family again demanded that United Fire settle for its $1 million policy limits. United Fire again rejected the demand. United Fire extended a $250,000 counteroffer which was rejected.

Scottsdale learned of the pending lawsuit in September 2008. The decedent's family learned about the excess policy around the same time. Though aware of the excess policy, the decedent's family renewed their demand on United Fire to settle for its $1 million policy limits. Wells Trucking and Scottsdale also demanded that United Fire settle with the decedent's family for its $1 million policy limits. United Fire refused.

In August 2009, the decedent's family increased their settlement demand to $3 million. United Fire and Scottsdale participated in pre-trial mediation with the decedent's family in October 2009. The decedent's family agreed to accept a total settlement of $2 million. United Fire contributed its $1 million policy limits toward the settlement. Scottsdale contributed $1 million from the excess policy toward the settlement. Scottsdale expressly reserved its right to pursue United Fire for bad faith failure to settle, and secured a written assignment from Wells Trucking of its bad faith failure to settle claim.

Scottsdale filed suit against United Fire in its name and in the name of Wells Trucking for the benefit of Scottsdale.[3] In a first amended petition, Scottsdale sought to recover the $1 million it paid to settle the lawsuit on one of seven alternative theories:

●Count 1: the written assignment from Wells Trucking;

●Count 2: equitable subrogation;

●Count 3: contractual subrogation;

●Count 4: as a third party beneficiary of the insurance policy between United Fire and Wells Trucking;

●Count 5: because United Fire owed Scottsdale the legal duty to exercise good faith to settle within its policy limits;

●Count 6: prima facie tort; and

●Count 7: declaratory judgment.

United Fire filed a motion for summary judgment on August 30, 2012, seeking judgment in its favor on all seven counts. The motion for summary judgment argued that Scottsdale has no right under Missouri law to bring a bad faith failure to settle claim, and that Scottsdale could not recover through the rights of Wells Trucking because Wells Trucking could not establish all of the elements of a bad faith failure to settle claim.

Scottsdale twice secured United Fire's consent to extend the deadline for filing a response to the motion for summary judgment. Each time, Scottsdale filed a pleading entitled "Extension to File Response to Defendants' Motion for Summary Judgment." In

[3]Though both Scottsdale and Wells Trucking are separately named as plaintiffs in the first amended petition as certain of Scottsdale's claims are asserted derivatively through the rights of Wells Trucking, for ease of reference we collectively refer to them as "Scottsdale" when referring to claims made in the first amended petition, in other pleadings filed in this case, or on appeal.

each pleading, Scottsdale granted itself an additional four days and an additional seven days, respectively, to file a response to United Fire's summary judgment motion. Neither pleading sought leave of court, or an order from the court, granting an extension of time to respond. Scottsdale filed its response to United Fire's motion for summary judgment on October 11, 2012, approximately ten days after the initial thirty-day limit imposed by Rule 74.04(c)(2).[4]

On November 1, 2012, the trial court entered an interlocutory order finding that Scottsdale's response to United Fire's motion for summary judgment was untimely. The trial court deemed all allegations in the motion for summary judgment admitted pursuant to Rule 74.04(c)(2). As directed by the interlocutory order, United Fire prepared and submitted a proposed form of judgment.

Scottsdale filed a motion for reconsideration and objections to the proposed form of judgment. Scottsdale argued that the trial court should have exercised its discretion under Rule 44.01(b) to enlarge Scottsdale's time for filing a response to the motion for summary judgment. Scottsdale argued that the motion for summary judgment should have been denied in any event because United Fire did not meet its burden to produce legally cognizable evidence, and instead relied solely on allegations drawn from the first amended petition. Finally, Scottsdale registered a variety of objections to the proposed form of judgment submitted by United Fire.

[4]The official docket sheet in the legal file indicates that on October 18, 2012, Scottsdale filed a "superseding" response to United Fire's motion for summary judgment, and that it did so pursuant to United Fire's consent permitting it to "substitute" the pleading for the response filed on October 11, 2012. The "superseding" response to the motion for summary judgment is neither referenced in Scottsdale's appellate brief, nor included in the record on appeal.

After a hearing, the trial court entered a judgment on December 4, 2012, sustaining the motion for summary judgment and entering judgment in favor of United Fire on all seven counts asserted in the first amended petition ("Judgment"). The Judgment again concluded that Scottsdale's response to the motion for summary judgment was untimely pursuant to Rule 74.04(c)(2), and deemed the factual allegations in the motion for summary judgment admitted.

The Judgment alternatively found that "[t]o the extent this court would have considered [Scottsdale's] untimely filed Response, [the response] did not comply with Rule 74.04(c)(2) in that [the] response to paragraphs 1, 4, 10, and 11 of [United Fire's statement of uncontroverted facts] was 'objection' and failed to admit or deny those paragraphs as required by Rule 74.04."

The Judgment also alternatively concluded that "[t]o the extent this court would have considered [Scottsdale's] untimely filed Response, [its] Statement of Additional Material Facts consisted of facts that were either immaterial or did not create a genuine issue of material fact."[5]

The Judgment then reached the following legal conclusions pertaining to the claims asserted in the first amended petition:

(1) That "based on the findings of fact above," Wells Trucking would have been unable to establish two essential elements of the tort of bad faith failure to settle as a matter of law because "United Fire did not refuse, in bad faith or otherwise, to settle the

[5]We assume, but cannot confirm from the record on appeal, that the trial court was referring to the response to the motion for summary judgment filed by Scottsdale on October 18, 2012, as that response is referenced on the official docket sheet as "superseding" and "substituting" for the response filed by Scottsdale on October 11, 2012. The October 18, 2012 response is not included in the record on appeal.

claim within the liability limits of the policy," and because "Wells Trucking was not subjected to a judgment in excess of the policy limits."

(2) That "Missouri law does not permit the assignment of a bad faith failure to settle claim."

(3) That "[t]here is no duty of good faith between primary and secondary insurers."

(4) That "Missouri law does not permit an excess insurer to bring a lawsuit for bad faith failure to settle against a primary insurer."

(5) That "Scottsdale is not a third-party beneficiary of the insurance policy between United Fire and Wells Trucking."

(6) That Scottsdale "failed to state a claim for *prima facie* tort."

The first of these legal conclusions depended upon the uncontroverted facts. The remaining legal conclusions involved pure questions of law, the resolution of which did not depend on the uncontroverted facts.

Scottsdale filed this timely appeal.

Summary of Issues on Appeal

Scottsdale raises four points on appeal. It argues in its first point that it was error to grant summary judgment because United Fire's uncontroverted facts were exclusively supported by reference to select allegations in the first amended petition. It argues in its second point that the trial court erroneously refused to consider the untimely response to the motion for summary judgment because it should have exercised its authority to enlarge the time to respond due to excusable neglect. It argues in its third point that the

trial court should have treated the motion for reconsideration as a motion for relief from judgment due to excusable neglect. It argues in its fourth point that the trial court erred in rejecting its causes of action as a matter of law because Missouri should recognize an excess insurer's right to pursue a primary insurer for bad faith failure to settle pursuant to one of several suggested legal theories.

We address the points out of turn, dealing first with the questions of law framed by Scottsdale's fourth point on appeal, which we find to be dispositive of all of the issues raised on appeal.

Point Four

Scottsdale argues that the trial court erred in entering summary judgment because Missouri should permit an excess insurer to pursue a primary insurer for bad faith failure to settle within its policy limits under one of several suggested legal theories. This is a question of first impression.

Standard of Review

We review the trial court's entry of summary judgment *de novo*. *Renaissance Leasing, LLC v. Vermeer Mfg. Co.*, 322 S.W.3d 112, 119 (Mo. banc 2010) (citing *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993)). "Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 119-20. The moving party carries the burden to establish the absence of a genuine issue of material fact and the legal right to judgment. *Wallingsford v. City of Maplewood*, 287 S.W.3d 682, 685 (Mo. banc 2009) (citing *ITT Commercial*, 854 S.W.2d at 376-81).

The trial court entered summary judgment in favor of United Fire as a matter of law because it found that no theory permits an excess insurer to recover from a primary insurer for bad faith failure to settle within its policy limits. We review the trial court's legal determination *de novo*.

Analysis

Scottsdale acknowledges that Missouri has yet to address whether an excess insurer may sue a primary insurer for bad faith failure to settle within the primary policy limits. Scottsdale asserts that policy considerations--including our desire to encourage settlements between parties--should persuade us to permit it to recover the $1 million it contributed toward settlement from United Fire on one or more of the following theories: (i) pursuant to the written assignment it received from Wells Trucking; (ii) pursuant to the theory of equitable subrogation; (iii) pursuant to the theory of contractual subrogation; or (iv) because United Fire owed Scottsdale a legal duty to act in good faith in settling within its policy limits. These theories were asserted as Counts 1, 2, 3, and 5 in the first amended petition and were each rejected by the Judgment as not permitted or recognized under Missouri law.[6]

Before determining whether Missouri permits an excess insurer to recover from a primary insurer for bad faith failure to settle under one or more of these theories, we must understand the origin of an insured's right to recover for a primary insurer's bad faith failure to settle a claim within policy limits.

[6]Scottsdale has *not* challenged the trial court's entry of summary judgment in favor of United Fire on Counts 4, 6, and 7 of the first amended petition. Those counts asserted claims of third-party beneficiary status, *prima facie* tort, and a request for declaratory judgment. Those claims are deemed abandoned.

A. The existing tort of bad faith failure to settle

The Missouri Supreme Court first recognized a cause of action in tort for bad faith failure to settle in *Zumwalt v. Utilities Insurance Co.*, 228 S.W.2d 750 (Mo. 1950). It did so with little fanfare, after observing that the question had been previously ruled in *McCombs v. Fidelity & Casualty Co.*, 89 S.W.2d 114 (Mo App. 1936). *Id.* at 753. "After an extensive review of the cases from other states and from the federal courts," the court in *McCombs* observed "'[t]he courts are not in agreement in holding the insurer liable for negligence in refusing to settle, but there is no disagreement with respect to the insurer's liability where bad faith appears.'" *Id.* (quoting *McCombs*, 89 S.W.2d at 121).

The Supreme Court then held that:

> [T]he weight of authority is that where the insurer in a liability policy reserves the exclusive right to contest or settle any claim brought against the assured, and prohibits him from voluntarily assuming any liability or settling any claims without the insurer's consent, except at his own costs, and the provisions of the policy provide that the insurer may compromise or settle such a claim within the policy limits, no action will lie against the insurer for the amount of the judgment recovered against the insured in excess of the policy limits, unless the insurer is guilty of fraud or bad faith in refusing to settle a claim within the limits of the policy.

Id. In addressing the concept of bad faith, the court held that an insurer is not permitted to "take a gamble on getting a favorable verdict rather than to make a settlement within the limits of the policy." *Id.* at 754. It further held that bad faith must be determined based on the particular facts of each case. *Id.* Finally, the court concluded that as applied to the facts before it, "bad faith on the part of the insurer would be the intentional disregard of the financial interest of the insured in the hope of escaping the full responsibility imposed upon it by its policy." *Id.*

Craig v. Iowa Kemper Mutual Insurance Co., 565 S.W.2d 716, 722 (Mo. App. 1978), *overruled on other grounds by Thomas v. American Casualty Insurance Co.*, 871 S.W.2d 460 (Mo. App. W.D. 1993), emphasized the continued vitality of *Zumwalt*, and in reliance on Couch on Insurance 2d, section 23:8 (Supp. p.8), noted that "[t]he general jurisprudence recognizes that a policy of insurance imports the utmost good faith by the insurer to perform according to its terms. This principle extends to imply a covenant of good faith and fair dealing from every contract of insurance." *Craig* then concluded that "the covenant imposes on an insurer which assumes control over the proceedings against the insured the duty of good faith to settle the claim within the policy limits and allows recovery in tort to the insured for breach of that duty." *Id.* at 723.

Against this backdrop, we turn our attention to Scottsdale's claim that it should be permitted to recover the $1 million it paid from its excess policy limits from United Fire premised on United Fire's bad faith failure to settle within its policy limits. Scottsdale argues it is entitled to this recovery pursuant to one or more of the following theories: (i) the written assignment from Wells Trucking; (ii) contractual subrogation; (iii) breach of a legal duty owed directly by United Fire to Scottsdale; and (iv) equitable subrogation. We address the theories in turn.

B. Scottsdale's claim that it is entitled to recover amounts it contributed toward settlement through the written assignment from Wells Trucking

The trial court concluded in its Judgment that "Missouri law does not permit the assignment of a bad faith failure to settle claim." The trial court's conclusion erroneously presumed that this is a settled question in Missouri. It is not. *See, e.g., Johnson v.*

Allstate Ins. Co., 262 S.W.3d 655, 674 (Mo. App. W.D. 2008) (Smart, J., concurring) ("[B]ecause neither the Court of Appeals nor the Missouri Supreme Court have addressed the matter of public policy differences between assignment of [bad faith failure to settle] claims and assignment of other personal tort claims . . . the answer to the issue of the assignability of [bad faith failure to settle] claims seems to me to be less than certain."). *But see Quick v. Nat'l Auto Credit*, 65 F.3d 741, 746 (8th Cir. 1995) (holding that Missouri law does not permit the assignment of a bad faith failure to settle claim). It is *generally* accepted in Missouri that a tort action based on wrongful or negligent acts resulting in personal injuries is not assignable, where tort actions claiming damage to property, real or personal, are assignable. *See, e.g., Forsthove v. Hardware Dealers Mut. Fire Ins. Co.*, 416 S.W.2d 208, 213 (Mo. App. 1967); *Freeman v. Berberich*, 60 S.W.2d 393, 401 (Mo. 1933); *Remmers v. Remmers*, 117 S.W. 1117, 1122 (Mo. 1909). It is also said that "[p]ractically 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." *State ex rel. Park Nat'l Bank v. Globe Indemnity Co.*, 61 S.W.2d 733, 736 (Mo. 1933). Thus, Missouri prohibits the assignment of a "right of action for fraud or deceit, [as] the wrong is regarded as one to the person rather than an injury affecting the estate or property or as arising out of contract." *Id.* (citing *Houston v. Wilhite*, 27 S.W.2d 772 (Mo. App. 1930)). Where unliquidated bad faith failure to settle

claims fall within the patchwork of rules addressing the assignability of choses in action is undetermined.[7]

We need not resolve this open question. The damages Scottsdale seeks to recover cannot be recovered through the Wells Trucking assignment regardless its lawfulness.

An assignment delivers to an assignee the rights of an assignor. *Holt v. Myers*, 494 S.W.2d 430, 437 (Mo. App. 1973). "When there is an assignment of an entire claim there is a complete divestment of all rights from the assignor and ***a vesting of those same rights in the assignee***." *Id.* (emphasis added). Thus, when a claim is assigned, the assignee becomes the real party in interest entitled to assert the assignor's claim *and to recover the assignor's damages*. *See, e.g.*, *DeBaliviere Place Ass'n v. Veal*, 337 S.W.3d 670, 677-78 (Mo. banc 2011) (holding that assignment allowed assignee to "collect prior assessments owed to" the assignor); *Renaissance Leasing*, 322 S.W.3d at 128 ("The only rights or interests an assignee acquires are those the assignor had at the time the assignment was made. Because an assignee merely steps into the shoes of the assignor,

[7]We distinguish section 537.065 agreements where an insured tortfeasor and the claimant contract to resolve an unliquidated personal injury claim with an agreement that the claimant will only seek to collect a judgment entered against the insured tortfeasor *from the insured's available insurance coverage*, and thus not for amounts in excess of coverage on a theory of bad faith failure to settle. *See, e.g*., *Schmitz v. Great Am. Assurance Co*., 337 S.W.3d 700 (Mo. banc 2011) (injured third party sought recovery of judgment amount within excess insurer's policy limits based on section 537.065 contract). We note, however, that in *Johnson*, the insured tortfeasor and the injured claimant used a section 537.065 contract to authorize the claimant to share the insured's recovery for bad faith failure to settle, and thus to permit recovery of a judgment from amounts *in excess of* available insurance coverage. 262 S.W.3d 658. The majority opinion concluded that the insurer's claim that the agreement violated section 537.065 and was void against public policy was an affirmative defense that had not been preserved, and that could not be determined. *Id.* at 666-67. Judge Smart questioned in his concurring opinion whether a section 537.065 contract could be used to permit a claimant to recover not just from available insurance proceeds, but also from the insured's unliquidated tort claim for damages *in excess* of available insurance coverage in light of the insurer's bad faith failure to settle. *Id.* at 669-75. That question remains unresolved.

We also exclude from this discussion an insured's assignment of a judgment it has received against an insured for bad faith failure to settle. In such a case, the insured is clearly and permissibly assigning a property right. *See id.* at 674 ("And, of course, a judgment for [bad faith failure to settle], once obtained, is absolutely assignable as property . . . ."); *Marshall v. N. Assurance Co. of Am*., 854 S.W.2d 608, 610 (Mo. App. W.D. 1993) (holding that policy consideration prohibiting assignment of a personal injury claim do not apply where the claim has been reduced to a judgment).

an *assignee* must allege facts showing that the *assignor* would be entitled to relief." (internal quotation marks omitted)).

Here, Scottsdale is not seeking to recover damages incurred by Wells Trucking. Scottsdale is seeking to recover the damages it incurred--the $1 million it paid from the excess policy limits. Because the damages Scottsdale seeks to recover were not incurred by Wells Trucking, the assignment lends nothing to Scottsdale's efforts to recover its damages. *See id.* at 128-29 (holding that where assignee sought to recover its own damages, and did not plead or attempt to prove any injury to its assignor, summary judgment in favor of the defendant on assigned breach of warranty claim was proper).

The trial court did not rely on the nature of the damages Scottsdale sought to recover to enter summary judgment in favor of United Fire on the claim seeking to enforce the Wells Trucking assignment. However, "[a]n order of summary judgment may be affirmed under any theory that is supported by the record." *Id.* at 120. Thus, the trial court did not err in entering judgment in favor of United Fire on Count 1 of the first amended petition, Scottsdale's claim seeking to recover its own damages in reliance on a written assignment from Wells Trucking.

C. Scottsdale's claim that it is entitled to recover amounts it contributed toward settlement based on the theory of contractual subrogation

The trial court concluded in its Judgment that "Missouri law does not permit an excess insurer to bring a lawsuit for bad faith failure to settle against a primary insurer. This includes claims based on . . . contractual subrogation."

Scottsdale's excess policy provided that "[i]f [Wells Trucking] has rights to recover all or part of any payment we have made under this Coverage . . . , those rights are transferred to us. . . . At our request, the insured will bring 'suit' or transfer those rights to us and help us enforce them." Scottsdale claims that this policy provision creates a cause of action in its favor against United Fire for the amounts Scottsdale paid on Wells Trucking's behalf.

The policy provision does not create a cause of action. It merely requires Wells Trucking to permit Scottsdale to assert Wells Trucking's rights to recover the payment made on its behalf. If we assume, *arguendo*, that the scope of the provision includes claims Wells Trucking ***would have had*** to recover from United Fire but for Scottsdale's payment, the provision merely affords Scottsdale the contractual right to invoke the doctrine of subrogation as between it and Wells Trucking. *See Messner v. Am. Union Ins. Co.*, 119 S.W.3d 642, 649 (Mo. App. S.D. 2003) ("'[T]he right to invoke the doctrine of subrogation may be contractual.'" (quoting *Anison v. Rice*, 282 S.W.2d 497, 503 (Mo. 1955))). However, the contractual right to be subrogated to the rights of Wells Trucking does not operate to create a right of recovery as between Scottsdale and United Fire that is not permitted as a matter of state law. *Id.* at 649 n.8 (noting regardless a contractual subrogation provision, a "serious question exists whether an insurer could *ever* be subrogated to a personal injury claim in the underinsurance realm"); *McKenzie v. Mo. Stables, Inc.*, 34 S.W.2d 136, 141 (Mo. App. 1930) (contractual subrogation rights "must be such as the law would have vouchsafed . . . in the absence of the contract"). Thus, though Scottsdale's right to seek subrogation may be expressed in the insurance policy,

"the exercise of the right will nevertheless have its basis in general principles of equity, rather than in the contract which will be treated as being merely a declaration of principles of law already existing." *McKenzie*, 34 S.W.2d at 141 (citing *Loewenstein v. Queen Ins. Co.*, 127 S.W.72 (Mo. 1910)). Simply stated, any right Scottsdale has to seek subrogation from United Fire exists, if at all, as a function of equity, and is thus subsumed in Scottsdale's equitable subrogation claim.[8]

Because the contractual subrogation provision is either an assignment or a mere declaration of Scottsdale's right to assert a common law claim for equitable subrogation if such a claim exists, the trial court did not err in entering judgment in favor of United Fire on Count 3 of the first amended petition, Scottsdale's claim seeking to recover the $1 million it paid on Wells Trucking's behalf on a theory of contractual subrogation. *Renaissance Leasing*, 322 S.W.3d at 120 ("An order of summary judgment may be affirmed under any theory that is supported by the record.").

D. Scottsdale's claim that it is entitled to recover amounts it contributed toward settlement because United Fire owed it a direct and independent duty to act in good faith to settle within the primary policy limits

The trial court concluded in its Judgment that "[t]here is no duty of good faith between primary and secondary insurers." Federal courts have, in fact, concluded that Missouri would not recognize a direct duty owed by a primary insurer to an excess

[8]Though the contractual subrogation provision does not create a right to seek subrogation from United Fire independent of equitable rights Scottsdale may or may not otherwise possess, common law subrogation rights can be waived by contract. *See, e.g.*, *Messner v. American Union Ins. Co.*, 119 S.W.3d 642, 649 (Mo. App. S.D. 2003) ("Subrogation based upon the common law, i.e., legal subrogation, is not an option 'where it would be inconsistent with the terms of the contract.'") (quoting *Anison v. Rice*, 282 S.W.2d 497, 503-04 (Mo. 1955)). Though the contractual subrogation provision in the Scottsdale policy does not create a cause of action that can be separated from the right of equitable subrogation, the policy is nonetheless relevant to establish that Scottsdale has not waived its common law right to seek equitable subrogation. *Id.*

insurer to negotiate in good faith to settle within policy limits. *See Am. Guarantee & Liability Ins. Co. v. U.S. Fid. & Guar. Co.*, 693 F. Supp. 2d 1038, 1048 (E.D. Mo. 2010) ("'Missouri courts . . . have not recognized a direct duty of good faith between primary and secondary insurers.'" (quoting *Reliance Ins. Co. in Liquidation v. Chitwood*, 433 F.3d 660, 664 (8th Cir. 2006)). But no Missouri court has rendered a decision on the issue.

A few jurisdictions have recognized the existence of a direct duty owed by a primary insurer to an excess insurer to negotiate in good faith to settle within policy limits. *See, e.g., U.S. Fid. & Guar. Co. v. Tri-State Ins. Co*., 285 F.2d 579, 581 (10th Cir. 1960) ("An insurance carrier has the duty to use the utmost good faith in its disposition of claims made against its insured. And this duty is not lessened by the existence of excess insurance but is extended to include the excess carrier within the shelter of the obligation." (citations omitted)). Other jurisdictions refuse, however, to recognize a direct duty of good faith owed by a primary insurer to an excess insurer. *See, e.g., Royal Ins. Co. of Am. v. Caliber One Indem. Co.*, 465 F.3d 614, 618 (5th Cir. 2006).

We can conceive of no basis to impose a duty on a primary insurer to act in good faith for the benefit of an excess carrier. The primary insurer's duty to negotiate in good faith for its insured is attendant to the contractual relationship between the insured and the insurer, and is in part a function of that which the insured is entitled to expect upon payment of a premium. *Truck Ins. Exch. v. Prairie Framing, LLC*, 162 S.W.3d 64, 93 (Mo. App. W.D. 2005) (holding that in remitting insurance premiums, the insured pays for the insurer to act in good faith with respect to the settlement of potential claims). In the ordinary course, no such relationship exists between an excess insurer and a primary

insurer. There is thus no contractual framework within which to superimpose an implied duty to act in good faith. *Cf. Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 563 (Mo. App. S.D. 1990) (holding that insurer's duty to settle in good faith "flows from or arises out of the contractual relationship" (internal quotation marks omitted)); *Craig*, 565 S.W.2d at 723 (holding that implied "covenant imposes on an insurer which assumes control over the proceedings against the insured the duty of good faith to settle the claim within the policy limits"). Although *both* the primary insurer and the excess insurer are "'bound, under [their] contract[s] of indemnity, and in good faith, *to sacrifice* [*their*] *interests in favor of those of the* [*insured*],'" we conclude that neither insurer is directly bound to sacrifice its interests in favor of the interests of the other. *Zumwalt*, 228 S.W.2d at 756 (quoting *Tyger River Pine Co. v. Maryland Cas. Co*., 170 S.E. 346, 348 (S.C. 1933)).

The trial court did not err in granting summary judgment in favor of United Fire on Count 5 of the first amended petition, Scottsdale's claim that United Fire owed it a duty of good faith to attempt to negotiate a settlement of the claim against Wells Trucking within its policy limits.

E. Scottsdale's claim that it is entitled to recover amounts contributed toward settlement based on the theory of equitable subrogation

The trial court concluded in its Judgment that "Missouri law does not permit an excess insurer to bring a lawsuit for bad faith failure to settle against a primary insurer. This includes claims based on equitable . . . subrogation." Scottsdale argues this was error because but for the excess policy, Wells Trucking would have had a claim against

United Fire for bad faith failure to settle for the amount paid to resolve the wrongful death lawsuit over and above United Fire's policy limits. Scottsdale thus argues that it should be equitably subrogated to Wells Trucking's rights, permitting it to recover from United Fire the $1 million it contributed toward settlement. Though Missouri courts recognize the theory of equitable subrogation, they have yet to determine whether the theory can be employed to permit an excess insurer to recover for a primary insurer's bad faith failure to settle.

The theory of subrogation is generally described in *Kroeker v. State Farm Mutual Automobile Insurance Co.*, 466 S.W.2d 105, 109-10 (Mo. App. 1971):

> Subrogation originated as a creature of the common law. Basically, it is classified as either legal or conventional. Legal subrogation arises out of a condition or relationship by operation of law, whereas conventional subrogation arises by act or agreement of the parties. Subrogation is founded on principles of justice and its operation is governed by principles of equity. It rests on the principle that substantial justice should be attained regardless of form, that is, its basis is the doing of complete, essential and perfect justice between all parties without regard to form. As a general rule, any 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. An important distinction between subrogation and assignment is that subrogation presupposes an actual payment and satisfaction of the debt or claim to which the party is subrogated, although the remedy is kept alive in equity for the benefit of the one who made the payment under circumstances entitling him to contribution or indemnity, while assignment necessarily contemplates the continued existence of the debt or claim assigned. As simply stated by the Supreme Court of South Carolina, 'subrogation is the machinery by which the equity of one man is worked out through the legal rights of another.'

(Internal citations and quotations omitted.)

"Equitable subrogation" is a form of subrogation that is not founded in contract, but is a creature of equity. As with all forms of subrogation, equitable subrogation is intended to prevent unjust enrichment. *Am. Nursing Res., Inc. v. Forrest T. Jones & Co.*, 812 S.W.2d 790, 798 (Mo. App. W.D. 1991); *see also Keisker v. Farmer*, 90 S.W.3d 71, 75 (Mo. banc 2002) ("Subrogation exists to prevent unjust enrichment."). Equitable subrogation has been explained as follows:

> This equitable doctrine, which is a particular application of the broad principle of subrogation, is enforced whenever the person making the payment stands in such relations to the premises or to the other parties that his interests, recognized either by law or by equity, can only be fully protected and maintained by regarding the transaction as an assignment to him, . . . either wholly or in part, for his security and benefit.

Anison, 282 S.W.2d at 503. "There is no general rule regarding when the doctrine of equitable subrogation applies." *Ethridge v. TierOne Bank*, 226 S.W.3d 127, 134 (Mo. banc 2007). "Its application depends on the facts of the case." *Id.*

Though the facts of the case did not involve an assertion of bad faith failure to settle, Missouri has recognized an excess insurer's right to assert a claim of equitable subrogation to recover from a primary insurer. In *Missouri Public Entity Risk Management Fund v. American Casualty Co.*, 399 S.W.3d 68 (Mo. App. W.D. 2013), we found factual issues prevented the entry of summary judgment where MOPERM, the excess insurer, claimed that it had a right of equitable subrogation to recover from American Casualty, the primary insurer, amounts paid to settle a case on behalf of a joint insured. The amount MOPERM sought to recover was *not* an amount paid by it in *excess* of American Casualty's policy limits. Rather, MOPERM sought to recover an amount it

paid *within* American Casualty's policy limits following a dispute between the carriers over how a settlement should be allocated. *Id.* at 71-73. Thus, MOPERM did not allege bad faith failure to settle, but instead alleged that "because [American Casualty] failed to either pay an amount ***which was within [American Casualty's] coverage*** or to tender its insured an unqualified defense," it breached its ***contractual duty*** to the insured. *Id.* at 73 (emphasis added).

In the *MOPERM* context, an equitable subrogation claim asserted by one insurer against another is routine. "'When insurance companies are unable to agree which is primary, the insured should not be left to litigate the issue. The preferable solution is for one of the insurers to pay the claim and then pursue a subrogation action.'" *Id.* at 74 (quoting 4 New Appleman section 41.04). The recovery sought in such cases is in the nature of reimbursement as one insurer's payment has discharged the *contractual obligation* of another. *See, e.g., Royal Ins. Co. of Am. v. Caliber One Indem. Co.*, 465 F.3d 614, 619 (5th Cir. 2006) ("Under the doctrine of equitable subrogation, an excess insurer, paying a loss under a policy, 'stands in the shoes' of its insured with regard to any cause of action its insured may have against a primary insurer responsible for the loss." (internal quotation marks omitted)); *Great Plains Mut. Ins. Co. v. Nw. Nat'l Cas. Co.*, 914 F. Supp. 459, 463 (D. Kan. 1996) ("Where there are primary and excess carriers and the primary fails to defend its insured in a liability suit and the excess insurer defends and pays a resulting judgment, the excess carrier is subrogated to the rights of the insured to seek reimbursement from the primary insurer."); *Ins. Co. of N. Am. v. Travelers Ins. Co.*, 692 N.E.2d 1028, 1036 (Ohio Ct. App. 1997) (holding that excess insurer has right of

recovery from primary insurer when it undertakes defense following primary insurer's refusal to defend); 44 AM. JUR. 2D *Insurance* section 1396 (2013) ("[I]f a primary liability insurer fails to assume the defense, for any reason, the excess insurer which has a duty to defend should provide the defense and, to do justice, should be entitled to recoup its costs from the primary insurer.").

Extending equitable subrogation to permit an excess insurer to recover for a primary insurer's bad faith failure to settle appears, at first blush, indistinguishable from the factual scenario in *MOPERM*. In reality, applied to a bad faith failure to settle scenario, the theory presents unique concerns.

When bad faith failure to settle is alleged, the excess insurer is seeking to recover amounts it paid within its own policy limits, and thus ***within*** the risk it undertook in exchange for the insured's premium. In contrast, where equitable subrogation is employed as in *MOPERM*, the excess insurer is seeking to recover amounts paid within the primary insurer's policy limits, and thus ***outside*** the risk the excess insurer undertook in exchange for the insured's premium. When bad faith failure to settle is alleged, the duty breached by the primary insurer is an implied duty to act in good faith to protect the insured's financial interests, the breach of which gives rise to an action in tort. The excess insurer is thus seeking to recover tort damages that would have belonged to the insured but for the excess insurer's intervention. In contrast, where equitable subrogation is employed as in *MOPERM*, the primary insurer has breached a contractual duty to defend and/or to afford coverage, giving rise to a cause of action in contract. The excess insurer is thus seeking to recover contract damages that would have belonged to the

insured but for the excess insurer's intervention. The difference between the insured's underlying right in tort versus contract theoretically implicates the unresolved question about whether an insured can lawfully assign an unliquidated claim for bad faith failure to settle.

Although there are conceptual differences, there are also important similarities between an excess insurer's equitable subrogation claim to recover amounts paid within the primary insurer's policy limits, and to recover amounts paid in excess of the primary insurer's policy limits. In both scenarios, damages the insured would have been able to recover from the primary insurer have been mitigated in whole or in part by the excess insurer's performance. 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.

These conceptual contrasts and similarities frame the tension between jurisdictions that recognize an excess insurer's right to recover for a primary insurer's bad faith failure to settle on a theory of equitable subrogation, and those jurisdictions that do not.[9] Although not all jurisdictions agree, the vast majority of jurisdictions have recognized an

[9]For a discussion of the issues raised by the general topic of an excess insurer's ability to recover for a primary insurer's bad faith failure to settle, see Sutterfield, *Relationships Between Excess and Primary Insurers: The Excess Judgment Problem*, 52 INS. COUNSEL J. 638 (1985); Lanzone & Ringel, *Duties of a Primary Insurer to an Excess Insurer*, 61 NEB. L. REV. 259 (1981); Annotation, *Excess Carrier's Right to Maintain Action Against Primary Liability Insurer for Wrongful Failure to Settle Claim Against Insured*, 10 A.L.R. 4TH 879 (1981).

excess insurer's right to recover for a primary insurer's bad faith failure to settle on a theory of equitable subrogation.[10]

We believe Missouri aligns with the majority of jurisdictions to recognize an excess insurer's ability to recover from a primary insurer for bad faith failure to settle on a theory of equitable subrogation. In such a case, the excess insurer is not enforcing a duty owed directly to it by the primary insurer, but is merely seeking to recover the amounts the primary insurer would have been obligated to pay its insured but for the excess insurer's performance. In this essential respect, equitable subrogation to recover for bad faith failure to settle is no different in its effect than equitable subrogation employed in the factual scenario involved in *MOPERM*. In both cases, we are encouraging that the risk of the primary carrier's non-performance be borne by that insurer, and not by the insured, or another carrier. *MOPERM*, 399 S.W.3d at 74.

If we reject the theory of equitable subrogation where bad faith failure to settle is alleged, a primary insurer would be permitted to benefit from the fortuity of the insured's excess coverage by eliminating the primary insurer's incentive to negotiate in good faith

[10]Jurisdictions recognizing an excess insurer's right to recover for bad faith failure to settle from a primary insurer on a theory of equitable subrogation include: *New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co*., 352 F.3d 599 (2d Cir. 2003); *Greater New York Mut. Ins. Co. v. N. River Ins. Co*., 85 F.3d 1088, 1094 (3d Cir. 1996); *Certain Underwriters of Lloyd's v. Gen. Accident Ins. Co.*, 909 F.2d 228 (7th Cir. 1990); *Flintkote Co. v. Gen. Accident Assurance Co.*, 480 F. Supp. 2d 1167, 1181 (N.D. Cal. 2007)); *Westport Ins. v. St. Paul Fire & Marine Ins. Co*., 375 F. Supp. 2d 4, 8 (D. Conn. 2005); *Elec. Ins. Co. v. Nationwide Mut. Ins. Co.*, 384 F. Supp. 2d 1190, 1193 (W.D. Tenn. 2005); *Progressive Am. Ins. Co. v. Nationwide Ins. Co.*., 949 So. 2d 293, 294 (Fla. Dist. Ct. App. 2007); *Reliance Ins. Co. v. Doctors Co*., 299 F. Supp. 2d 1131, 1151 (D. Haw. 2003); *Galen Health Care, Inc. v. Am. Cas. Co.*, 913 F. Supp. 1525, 1531 (M.D. Fla. 1996); *Peter v. Travelers Ins. Co.*, 375 F. Supp. 1347, 1349-50 (C.D. Cal. 1974); *RLI Ins. Co. v. CNA Cas. of Cal.*, 45 Cal. Rptr. 3d 667 (Cal. Ct. App. 2006); *Home Ins. Co. v. Cincinnati Ins. Co.*, 821 N.E.2d 269, 280 (Ill. 2004); *Home Ins. Co. v. Royal Indem. Co.*, 327 N.Y.S.2d 745 (N.Y. Sup. Ct. 1972).

Jurisdictions refusing to recognize an excess insurer's right to recover for bad faith failure to settle from a primary insurer on a theory of equitable subrogation include: *Nat'l Surety Corp. v. Hartford Cas. Ins. Co*., 445 F. Supp. 2d 779 (W.D. Ky. 2006), *aff'd in part and rev'd in part*, 793 F.3d 752 (6th Cir. 2007); *Travelers Indem. Co. v. W. Am. Specialized Transp. Co.*, 317 F. Supp. 2d 693, 696-97 (W.D. La. 2004), *aff'd*, 409 F.3d 256 (5th Cir. 2005).

to settle a claim within policy limits. Rejection of the theory would result in an insured receiving less than it has paid for, as the premium paid to a primary insurer includes the right to insist on the primary insurer's performance of its duty to negotiate in good faith to settle within policy limits. *Truck Ins. Exch.*, 162 S.W.3d at 93 ("When the insurer refuses to settle, the insured loses the benefit of an important obligation owed by the insurer."). Rejection of the theory would relieve a primary insurer of any consequence for its breach of the duty to protect the insured's financial interests.[11] *Shobe v. Kelly*, 279 S.W.3d 203, 210-11 (Mo. App. W.D. 2009). Conversely, permitting an excess insurer to be equitably subrogated to recover for the primary insurer's bad faith failure to settle will not increase the scope or nature of the duty owed by the primary insurer to its insured, and will discourage a primary insurer from gambling for its own benefit. *Zumwalt*, 228 S.W.2d at 754 (holding it inappropriate for insurer to "prefer to take a gamble on getting a favorable verdict rather than to make a settlement within the limits of the policy"). Our holding will also foster the policy of encouraging settlements. *Lowe v. Norfolk & W. Ry. Co.*, 753 S.W.2d 891, 894-95 (Mo. banc 1988) ("The policy of the law is to encourage settlements."). In addition, permitting the claim is wholly consistent with the intended import of excess coverage--the exhaustion of primary coverage before excess coverage is exposed. *Planet Ins. Co. v. Ertz*, 920 S.W.2d 591, 593-94 (Mo. App. W.D. 1996) ("A separate class of policies is expressly written to provide excess coverage. . . . A true

[11]This is so because an insured retains a financial interest in a case despite the existence of excess coverage, either for defense or other costs it might directly incur, due to the potential of a judgment or settlement exceeding the limits of both primary and excess coverage, due to the risk of uncollectibility of the excess coverage, or by virtue of other foreseeable financial impact resulting from prolonged, unresolved litigation.

excess policy provides coverage above a primary policy for specific risks." (emphasis omitted)).

We are not concerned that equitable subrogation permits Scottsdale to assert a claim of bad faith failure to settle where Wells Trucking cannot, at least to the extent of Scottsdale's payment.[12] That incongruity is the natural function of subrogation, where the subrogee is placed in the shoes of the subrogor as of the instant immediately preceding the subrogee's performance. *Kroeker*, 466 S.W.2d at 110 ("[S]ubrogation presupposes an actual payment and satisfaction of the debt or claim to which the party is subrogated, although the remedy is kept alive in equity for the benefit of the one who made the payment . . . .").

Our holding is not inconsistent with the constraints placed on the theory of equitable subrogation by our Missouri Supreme Court in *Ethridge v. TierOne Bank*. In *Ethridge*, our Supreme Court noted the following with respect to the theory of equitable subrogation:

> As the doctrine of equitable subrogation developed in Missouri, it became known as a "fairly drastic remedy . . . usually allowed only in extreme cases 'bordering on if not reaching the level of fraud.'"

226 S.W.3d at 134 (quoting *Thompson v. Chase Manhattan Mortg. Corp*, 90 S.W.3d 194, 206 (Mo. App. S.D. 2002)). As we noted in *MOPERM*, however, the *Ethridge* constraints are plainly limited in application to:

[12]We assume, but need not address, that but for the written assignment to Scottsdale, Wells Trucking would have retained the right to assert a claim against United Fire for damages (if any) proximately caused by United Fire's alleged bad faith failure to settle, independent of the amount paid by Scottsdale on its behalf. *See Shobe*, 279 S.W.3d at 212.

> [C]ases involving liens against property . . . because of section 442.390, which provides that all purchasers of real property are deemed to purchase with notice of the contents public records thereof and all subsequent purchasers and mortgagors are deemed to purchase with notice "in law and in equity."

399 S.W.3d at 77 (quoting *Ethridge*, 226 S.W.3d at 134 and citing *Landmark Bank v. Ciaravino*, 752 S.W.2d 923, 928 (Mo. App. E.D. 1988) ("For courts to allow equitable subrogation where no extreme circumstances are present would be nothing less than a judicial repeal of section 442.390 . . . .").

Finally, we do not believe that an excess insurer's claim of equitable subrogation for a primary insurer's bad faith failure to settle collides with the unresolved question regarding assignability of an insured's unliquidated bad faith failure to settle claim. The claims are readily distinguishable. An equitable subrogation claim is not an assignment of the insured's bad faith failure to settle claim, and is instead a means to avoid unjust enrichment of a primary insurer who has benefitted from the excess insurer's performance. *Kroeker,* 466 S.W.2d at 110 ("[A]n important distinction between subrogation and assignment is that subrogation presupposes an actual payment and satisfaction of the debt or claim to which the party is subrogated, although the remedy is kept alive in equity for the benefit of the one who made the payment . . . while assignment necessarily contemplates the continued existence of the debt or claim assigned."). Equitable subrogation permits the excess insurer to recover *its own* damages in reliance on principles of equity. In contrast, assignment (if otherwise lawful) permits recovery of damages incurred by the insured. The policy concerns that underlie the prohibition against assignment of certain choses in action are tied either to the abuses

attendant to permitting a third party to recover unliquidated personal injury damages incurred by another, or to the desire to prohibit one who has benefitted from a breach of duty from profiting from assignment of a claim for damages arising from the breach. *See, e.g., Freeman v. Basso*, 128 S.W.3d 138, 142 (Mo. App. S.D. 2004) (prohibiting assignment of legal malpractice claim on policy grounds, including concern that the "very parties who benefitted from [the] malpractice" were now asserting the claim based on an assignment); *White v. Auto Club Inter-Ins. Exch.*, 984 S.W.2d 156, 160 n.9 (Mo. App. W.D. 1998) (holding the "undesirable risk of tempering an attorney's zeal with concern that a present adversary may become the holder of the client's alleged legal malpractice claim" underscores the policy prohibiting assignment of such claims); *Forsthove*, 416 S.W.2d at 217 (noting that at "common law, a chose in action for personal injuries could not be assigned . . . because [most] felt that unscrupulous people would purchase causes of action and thereby traffic in lawsuits for pain and suffering (citation omitted)); *Beechwood v. Joplin-Pittsburg Ry. Co.*, 158 S.W. 868, 870 (Mo. App. 1913) ("There is every reason for holding that a cause of action for personal injuries, where the gist of the damages recovered is physical pain and mental anguish, should not be the subject of barter of trade, or a matter of profit to the creditors of the injured party."). These policy concerns are not implicated when an excess insurer is equitably subrogated to the insured to recover the excess insurer's own damages, having spared the insured from incurring those damages.

We recognize that if an excess insurer recovers amounts it has paid within its policy limits from the primary insurer, it is recovering in equity for a risk it contractually

agreed to undertake and for which it accepted a premium. However, this is generally true as to every insurance subrogation claim. In the context of bad faith failure to settle, any resulting inequity is outweighed by the inequity of permitting a primary insurer from effectively escaping the consequences of non-performance of its implied duty of good faith to negotiate in the financial interests of its insured--a duty factored into the primary insurer's calculation of the insured's premium. "Subrogation should be applied where justice, based on the dictates of equity and good conscience, demands its application, and where the rights of the one asking subrogation are more equitable in nature than those who oppose the subrogation." *Jos. A. Bank Clothiers, Inc. v. Brodsky*, 950 S.W.2d 297, 302 (Mo. App. E.D. 1997) (citing *In re Jamison's Estate*, 202 S.W.2d 879, 883-84 (Mo. 1947)).

In light of the foregoing, the trial court erred as a matter of law in entering judgment in favor of United Fire on count 2 of the first amended petition because Missouri does permit an excess insurer to recover for a primary insurer's bad faith failure to settle on the theory of equitable subrogation. Before we can determine whether the trial court's legal error necessitates reversal, we must determine whether the trial court's legal conclusion that the uncontroverted facts negated Scottsdale's ability to establish two "essential elements" of the claim of bad faith failure to settle is erroneous.

F. Whether the uncontroverted facts negated the ability to establish essential elements of the claim of bad faith failure to settle

The trial court concluded that based on the uncontroverted facts, two essential elements of the tort of bad faith failure to settle could not be established as a matter of

law because "United Fire did not refuse, in bad faith or otherwise, to settle the claim within the liability limits of the policy," and because "Wells Trucking was not subjected to a judgment in excess of the policy limits." To determine whether this conclusion is erroneous, we must identify the essential elements of a claim of bad faith failure to settle when asserted by an excess insurer. That undertaking requires us to first examine the elements of the claim when asserted by an insured.

(i) The essential elements of an insured's claim of bad faith failure to settle

Neither *McCombs*, *Zumwalt*, *Landie*, nor *Craig* clearly identified the "essential elements" of an insured's claim of bad faith failure to settle. The first attempt to do so appears in *obiter dicta*[13] in *Dyer v. General American Life Insurance Co.*, 541 S.W.2d 702 (Mo. App. 1976). That case involved an unsuccessful attempt to extend the tort of bad faith failure to settle to first-party insurance claims. *Id.* at 705. Though not relevant to its rejection of the requested expansion of the claim, the court in *Dyer* purported to identify the essential elements of an insured's bad faith failure to settle third party claims as follows:

> The elements of the tort ***appear to be*** that: (1) the liability insurer has assumed control over negotiation, settlement, and legal proceedings brought against the insured; (2) the insured has demanded that the 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.

[13]"*Obiter dicta*, by definition, is a gratuitous opinion. Statements are *obiter dicta* if they are not essential to the court's decision of the issue before it." *Richardson v. QuikTrip Corp*., 81 S.W.3d 54, 59 (Mo. App. W.D. 2002) (citations omitted).

Id. at 704 (emphasis added). *Dyer* cited no authority for its declaration of the "apparent" elements of a bad faith failure to settle claim. Notably, of the four elements identified, the first had already been rejected as an "essential element." *Landie v. Century Indem. Co.*, 390 S.W.2d 558, 564 (Mo. App. 1965) (holding that the tort of bad faith failure to settle should extend to circumstances in which the insured has refused to assume the insured's defense). And no Missouri case to that point had ever referenced as "essential" that an insured make formal demand upon an insurer to perform a duty it undertook upon issuance of the policy and acceptance of the insured's premium. Only the third and fourth "essential elements" identified in *Dyer* are arguably tied to the Supreme Court's discussion of the claim in *Zumwalt*.

Despite the absence of any reasoned basis for its pronouncement, *Dyer* has since been cited as authoritatively describing the essential elements of the tort of bad faith failure to settle, often to support the entry of judgment in favor of an insurer because an "essential element" was lacking. *See, e.g., Bonner v. Auto. Club Inter-Ins. Exch.*, 899 S.W.2d 925, 928 (Mo. App. E.D. 1995) (affirming grant of summary judgment in favor of insurer because insured never made demand that insurer settle within policy limits despite evidence that injured third party made demand to settle for policy limits); *State Farm Fire & Cas. Co. v. Metcalf*, 861 S.W.2d 751, 756 (Mo. App. S.D. 1993); *Purscell v. TICO Ins. Co.*, ___ F. Supp. 2d ____, 2013 WL 2450825, at *4 (W.D. Mo. May 24, 2013) (granting summary judgment in favor of insurer because insured never made a sufficiently definite demand for settlement within policy limits).

Other decisions have softened rigid application of the "elements" announced in *Dyer*, calling their efficacy into question. *See, e.g.*, *Am. Guarantee & Liability Ins. Co.*, 693 F. Supp. 2d at 1051 ("A demand is not required if the insurer has failed to notify the insured of an offer of settlement because if the insured were not advised of the offers of settlement, he could not have demanded that the offer be accepted. Similarly, when an insurer refuses to provide a defense to the insured it cannot avoid liability because the insured fails to make a futile demand." (citations and internal quotation marks omitted)); *Quick*, 65 F.3d at 745 (noting that "some Missouri decisions have suggested a demand is not required if the insurer has failed to notify the insured of an offer of settlement"); *Ganaway*, 795 S.W.2d at 564 ("[I]f the insured were not advised of the offers of settlement, he could not have demanded that the offer be accepted."). One federal decision has gone so far as to predict "that when the precise question is presented to a Missouri court, it will be held that the making of a demand by the insured and a rejection of the demand by the insurer is not an essential element of a . . . claim of the defendant's bad faith failure to settle [sic]." *H & S Motor Freight, Inc. v. Truck Ins. Exch*. 540 F. Supp. 766, 769 (W.D. Mo. 1982). The court in *H & S* reasoned that the only essential element of a bad faith failure to settle claim is that the insurer has the power and ability to control whether a claim is settled within the policy limits, and that other "facts," such as whether a demand has been made or refused, are mere factors to be considered in assessing the insurer's opportunity to settle within the policy limits and/or the insurer's bad faith. *Id.* at 767-68.

The "essential elements" announced in *Dyer* were questioned by this court in *Shobe v. Kelly*, 279 S.W.3d 203 (Mo. App. W.D. 2009). In *Shobe*, we pointed out that *Dyer's* identification of the elements of the claim of bad faith failure to settle was *dicta*, and was offered without citation to any authority. 279 S.W.3d at 210. We then held that it would be inappropriate to require an insured to establish that an insurer has assumed control over the proceedings, and/or that an insured has made a demand to settle within policy limits, particularly where an insurer has failed to provide a defense or coverage, because to hold otherwise would insulate an insurer from a bad faith failure to settle claim. *Id.*[14] We affirmed the trial court's decision to submit a bad faith failure to settle claim with a verdict director that "premised [the insurer's] liability on a finding that the [insurer]: (1) had the opportunity to settle within the policy limits, (2) acted in bad faith through its refusal to do so, and (3) such failure caused damage to [the insured]." *Id.* at 209-10. In short, *Shobe* authorized a verdict director consistent with the prediction in *H & S*.

The verdict director authorized in *Shobe* is consistent with *Zumwalt*. The tort of bad faith failure to settle originates in the insurer's duty to act in a manner that protects its insured's financial interests. *Zumwalt*, 228 S.W.2d at 754-56. As observed in *Landie*, the tort reflects that an insurer "may be liable over and above its policy limits if it acts in bad faith . . . in refusing to settle [a] claim against its insured within its policy limits ***when it***

[14]Specifically, the court in *Shobe* held that "[i]f an insurer wrongly denies coverage, denies even a defense under a reservation of rights, and then completely refuses to engage in settlement negotiations, it cannot avoid liability by its wrongful refusal to assume control of the proceedings. Similarly, if an insurer wrongly denies any responsibility for a claim, it cannot avoid liability because the insured fails to make a futile demand that the insurer provide funds for a settlement offer of which it is already aware." 279 S.W.3d at 211.

has a chance to do so." 390 S.W.2d at 563 (emphasis added). Missouri courts have observed that the insured *pays* for the insurer to act in good faith with respect to the settlement of potential claims in remitting insurance premiums. *Truck Ins. Exch.*, 162 S.W.3d at 93. To condition the insurer's obligation to perform its duty on formal demands, refusals, or on express assumption of control over the proceedings, is to impose hyper-technical avenues for escape that are unrelated to the duty's existence.

We thus take this opportunity to formally dispel the *dicta* in *Dyer*. 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)[15] the policy limits;
>
> (2) that the insurer has the opportunity to settle a claim against its insured within (or by payment of) the policy limits;[16]
>
> (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.[17]

[15]Though not before us, one can envision a case where a primary insurer refuses to contribute its policy limits to a settlement proposal that is in excess of the policy limits, but where the insured and/or the excess insurer has agreed to pay all sums in the settlement proposal above the primary insurer's policy limits; then, as a result of the failure to achieve settlement, the insured or the excess insurer is subjected to a later judgment or settlement in a higher amount. The parenthetical "or by payment of" anticipates this scenario.

[16]In this case, the decedent's family made an explicit $1 million demand on United Fire and both Wells Trucking and Scottsdale requested that United Fire accept this demand and pay its policy limits. Moreover, United Fire explicitly rejected those demands and instead made a $250,000 counteroffer. Therefore, in this case, it is relatively clear that United Fire had an "opportunity to settle" within the meaning of element 2, and "failed to settle" within the meaning of element 3. Other situations may arise in which the insurer's "opportunity to settle" or "fail[ure]" to do so may be less clear (for example, where no settlement negotiations occur, no explicit monetary settlement demand is made, or where a settlement demand exceeds the insurer's coverage but further negotiations are not pursued). We take no position on whether sufficient evidence could be marshaled to establish a bad faith failure to settle claim in these or other similar situations, since they are not presented here, and note only that the essential elements herein described would not foreclose assertion of the claim in such situations as a matter of law.

These essential elements properly relegate evidence heretofore inappropriately characterized as an "essential element" to merely relevant in assessing whether the essential elements have been established.[18]

The essential elements of the tort of bad faith failure herein described recognize an element omitted by the discussion in *Dyer*, but rudimentary to a tort claim--the essential element of proximately caused damages. *Shobe* found that an insured's damages for bad faith failure to settle are not limited to the excess liability to which the insured is exposed by virtue of the insurer's bad faith failure to settle. Instead, as with every tort, an insured's damages for bad faith failure to settle are those "damages proximately caused by [the insurer's] bad faith." *Shobe*, 279 S.W.3d at 212. Those damages *may* include that part of a judgment entered against an insured in excess of the primary policy limits. *See Landie*, 390 S.W.2d at 566 (insurer who fails to settle within policy limits in bad faith is liable for the insured's damages, "which ***may include*** that part of the judgment which the

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[17]These elements assume, as is always the case when bad faith failure to settle is asserted by an insured, that the insurer has not contested coverage, or is found to have the contractual obligation to afford coverage, for the claim in question. The obligation to afford coverage is a contract issue, not a tort issue. Thus, if coverage is in dispute, that contract issue will first need to be resolved within the traditional rubric employed to interpret insurance contracts, before the tort of bad faith failure to settle is determined. *See Landie*, 390 S.W.2d at 563 (finding first a breach of the contract duty to afford coverage and to defend before addressing whether the tort duty to negotiate a settlement within policy limits was breached).

[18]For example, in weighing the establishment of these elements, and with no intent to limit the universe of relevant evidence, a jury would be permitted to consider: (i) whether the insurer has the exclusive right under its policy to control settlement negotiations and the decision to settle, and if it does not, whether the insured has afforded its consent to settle within the policy limits; (ii) evidence that other insurers (either primary or excess) had the right to control the defense or settlement of a claim (iii) whether the injured third party has indicated a willingness to settle its claims within the policy limits; (iv) whether the insured has made demand that the insurer settle within its policy limits; (v) whether the insurer failed to inform an insured of settlement demands; (vi) whether the insurer has attempted to settle a claim within its policy limits even in the absence of settlement demands from a claimant; (vii) the nature and extent of the investigation conducted by the insurer into the claim both as to liability and the range of potential recovery; (viii) the claim materials presented to the insurer by the injured party; and (ix) evidence offered by the insurer to demonstrate that it acted in good faith, or merely negligently, in failing to resolve a claim within its policy limits.

insured has paid over and above the limits of the policy" (emphasis added)). And as noted in *Shobe*, the "financial interests" of the insured extend beyond mere compensation for the excess portion of a judgment or settlement to include all other damages proximately caused by the insurer's bad faith. *Shobe*, 279 S.W.3d at 212.

Simply stated, the insurer's duty, as described in *Zumwalt*, is to protect the insured's "financial interests." 228 S.W.2d at 754 ("[B]ad faith on the part of the [insurer] would be the intentional disregard of the financial interest of the [insured] in the hope of escaping the full responsibility imposed upon it by its policy."). An insured's financial interests are equally impacted by an excess settlement, whether or not reduced to a judgment. *See, e.g., Amoco Oil Co. v. Reliance Oil Co.*, 1998 WL 187336, at *4 (April 14, 1998 W.D. Mo.) (discussing that bad faith failure to settle cases require a "judgment entered ***or a settlement*** reached" in excess of the policy limits (emphasis added)).

In summary, though the Missouri Supreme Court has not expressly delineated the essential elements of a claim of bad faith failure to settle, it need not have done so for this court to reach the conclusion that the elements are as herein announced. *Zumwalt* defined the duty owed by an insurer, and the manner in which that duty can be breached. 228 S.W.2d at 753-54 (addressing duty to resolve claims against insured within policy limits and breach of that duty in bad faith). Torts routinely possess as their essential elements a description of the duty owed, the requirement of a breach of the duty, and the requirement of proximately caused damage. *See, e.g., Dibrill v. Normandy Assocs., Inc.*, 383 S.W.3d 77, 86 (Mo. App. E.D. 2012) ("To prevail on a breach of fiduciary duty

claim, a plaintiff must establish that: (1) a fiduciary duty existed between the parties; (2) the defendant breached the duty; and (3) the breach caused the plaintiff to suffer harm."); *Bickerton, Inc. v. Am. States Ins. Co.*, 898 S.W.2d 595, 600 (Mo. App. W.D. 1995) ("The elements of a negligence action are a legal duty to conform to a certain standard of conduct to protect others against unreasonable risks, breach of the duty, proximate cause and actual damages."). The essential elements of the claim of bad faith failure to settle within policy limits herein described are consistent with this template, and are neither earth shattering nor bold.

(ii) The essential elements of an excess insurer's claim of equitable subrogation to recover for a primary insurer's bad faith failure to settle

An excess insurer's ability to recover from a primary insurer for bad faith failure to settle on a theory of equitable subrogation derives from rights the insured would have had but for the excess insurer's payment. Thus, the essential elements of the insured's claim are necessarily incorporated into the essential elements of the claim if asserted by the excess insurer. In addition, because equitable subrogation is intended to prevent unjust enrichment, an excess insurer must be able to establish that it "acted to make the payment [from the limits of its excess policy] under the compulsion of a legal liability or to protect some other interest . . . [and not] as a volunteer." *Am. Nursing*, 812 S.W.2d at 794.

We therefore conclude that an excess insurer's claim of equitable subrogation premised on bad faith failure to settle requires the excess insurer to establish these essential elements:

> (1) that the primary insurer had the authority to settle a claim against its insured within (or by payment of) the primary policy limits;

(2) that the primary insurer had the opportunity to settle a claim against its insured within (or by payment of) the primary policy limits;

(3) that the primary insurer failed to do so in bad faith;

(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

(5) that but for the excess insurer's payment, the insured would have incurred damages in the amount of the payment as a proximate result of the primary insurer's conduct.

(iii) The trial court's conclusions addressing the essential elements of the claim of bad faith failure to settle

As noted, the trial court concluded that based on the uncontroverted facts, two essential elements of the tort of bad faith failure to settle could not be established as a matter of law. We disagree.

United Fire's motion for summary judgment asserted the following uncontroverted facts, each supported by reference to allegations set forth in Scottsdale's first amended petition:

1. The underlying case from which this action stems was a wrongful death lawsuit filed as a result of a two-vehicle accident which occurred in Knox County, Missouri.

2. United Fire issued a commercial auto coverage primary policy to Wells Trucking with liability limits [of] $1 million per occurrence.

3. Scottsdale issued a commercial liability umbrella policy to Wells Trucking in excess of the $1 million primary policy issued by United Fire which provided liability limits of up to $2 million per occurrence.

4. After the underlying accident occurred, United Fire entered into negotiations to resolve the underlying case by settlement.

5. After suit was filed, United Fire retained defense counsel in Missouri to represent the interests of Wells Trucking and their driver, Eric Probst.

6. In October 2009, mediation was held in the underlying lawsuit, with an attorney retained by United Fire to represent the interests of Wells Trucking.

7. United Fire tendered the $1 million policy limits of the primary insurance policy.

8. At mediation, Scottsdale paid $1 million pursuant to its commercial liability umbrella policy that provided coverage in excess of the primary insurance policy.

9. The case settled for $2 million at mediation.

10. Scottsdale received an assignment from Wells Trucking of its rights against United Fire to file a civil lawsuit for Bad Faith Failure to Settle.

11. As a result of assignment, Wells Trucking no longer has any exposure.

12. At no time was an excess judgment entered by any court against Wells Trucking as the underlying case was settled by United Fire and Scottsdale prior to trial.

As explained, *supra*, the trial court deemed each of United Fire's uncontroverted facts admitted.[19] The trial court then relied on the "admitted" facts to draw the legal conclusion that "based on the findings of fact above," two essential elements of the tort of bad faith failure to settle could not be established as a matter of law because "United Fire did not refuse, in bad faith or otherwise, to settle the claim within the liability limits of

[19]Of course, Scottsdale contests that United Fire's uncontroverted facts should be deemed admitted for reasons raised in its first, second, and third points relied on. However, we need not reach the merits of those points if we otherwise conclude that the "admitted facts" did not support the entry of judgment in United Fire's favor. That is because a non-moving party's failure to respond does not require that summary judgment be entered against it, as the moving party continues to carry the burden to establish that it is entitled to judgment as a matter of law. *Ming v. Norfolk & W. Ry. Co.*, 947 S.W.2d 480, 483 (Mo. App. E.D. 1997).

the policy," and because "Wells Trucking was not subjected to a judgment in excess of the policy limits." This was error.

First, the trial court erred by concluding that a judgment in excess of policy limits is an "essential element" of a bad faith failure to settle claim. This is so whether the "essential elements" are viewed through the lens of *Dyer*, or as announced in this Opinion. The essential elements about which the court speculated in *Dyer* did not even address damages. *Dyer*, 541 S.W.2d at 704. The essential elements herein announced incorporate the element of damages in the form universally applicable to tort claims--the presence of damages proximately caused by breach of an applicable duty. *See Shobe*, 279 S.W.3d at 212. Though many bad faith failure to settle cases are filed after an excess judgment is entered, no authority holds that the entry of an excess judgment is the only means by which proximately caused damage can occur. *See Amoco Oil Co.*, 1998 WL 187336, at *4 (addressing ability to claim bad faith failure to settle in the event of an excess settlement or judgment). The facts before us present a case in point. It cannot reasonably be suggested that Wells Trucking would have been unable to assert a claim for bad faith failure to settle if, in the absence of excess coverage, it had paid the $1 million required to settle in excess of its United Fire policy limits, in lieu of the prospect of a higher judgment being entered had the case proceeded to trial.

Thus, though it is true (and Scottsdale's response to the motion for summary judgment does not contest) that no excess judgment was entered against Wells Trucking, that "fact" is legally immaterial to whether Wells Trucking could have established a claim

for bad faith failure to settle, and is thus legally immaterial to whether Scottsdale can establish a right to equitable subrogation.

The trial court also erred by concluding that regardless its "good or bad" faith, United Fire did not fail to settle within its policy limits.[20] It is true that failing to settle within policy limits is an essential element of the tort of bad faith failure to settle, whether the "essential elements" are viewed through the lens of *Dyer*, or as announced in this Opinion. However, the trial court's conclusion erroneously attached legal significance to United Fire's payment of its policy limits. A primary insurer's mere payment of its policy limits does not negate the essential element of "failing to settle within policy limits." Rather, unless the payment of policy limits alone yields a resolution of the claim, it is axiomatic that the primary insurer has failed to settle the claim *within its policy limits*. *See Landie*, 390 S.W.2d at 563 ("[Insurer] may be liable over and above its policy limits if it acts in bad faith . . . in refusing to settle the claim against its insured within its policy limits ***when it has the chance to do so***.") (emphasis added). 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

[20]We do not read the trial court's conclusion as finding that United Fire acted in either good faith or bad faith. In fact, a summary reading of the uncontroverted facts that were deemed admitted plainly reveals that none related to the characteristic of good or bad faith. Thus, *if* the trial court meant its conclusion as a "legal conclusion" that United Fire did not act in bad faith, its conclusion would be legally erroneous. Moreover, the determination of bad faith is inherently factual, rendering the ability to determine its existence as a matter of law elusive. *See Truck Ins. Exch.*, 162 S.W.3d at 95 ("We can envision a fact situation where we could decide as a matter of law that an insurer was guilty of acting in bad faith regarding its refusal to settle. But this is not such a case."); *Zumwalt*, 228 S.W.2d at 754 ("Bad faith is, of course, a state of mind, indicated by acts and circumstances . . . . Each case must stand and be determined upon its particular state of facts."). As indicated, however, we believe the trial court merely concluded (albeit erroneously) that regardless its good or bad faith, United Fire's payment of its policy limits negated the essential element of "failing to settle within policy limits."

limits, but failed in bad faith to do so. *Truck Ins. Exch.*, 162 S.W.3d at 93. The circumstances before us explain why that is the case. If, as is alleged here, United Fire could have settled the claim against Wells Trucking for its $1 million policy limits, but failed to do so in bad faith, it is legally irrelevant that at a later point, United Fire contributed its $1 million policy limits toward settlement in an amount in excess of the United Fire policy limits. That "fact" does not negate the essential element of failing to settle within policy limits.

We conclude that although United Fire paid its policy limits to settle the lawsuit filed against Wells Trucking (and Scottsdale's response to the motion for summary judgment does not contest this point), that "fact" does not support the legal conclusion that United Fire failed to settle the claim against Wells Trucking within its policy limits. United Fire's payment of its policy limits toward settlement is legally immaterial to whether Wells Trucking could have established a claim for bad faith failure to settle, and is thus legally immaterial to whether Scottsdale can establish a right to equitable subrogation.

Conclusion with Respect to Point Four

The trial court committed legal error when it determined that Missouri does not recognize an excess insurer's ability to recover from a primary insurer for bad faith failure to settle on a theory of equitable subrogation. The trial court committed legal error when it concluded that two essential elements of the claim of bad faith failure to settle could not be established based on the uncontroverted facts. Point Four is thus granted with respect to Scottsdale's claim of equitable subrogation, and denied in all other respects.

The trial court's Judgment in favor of United Fire and against Scottsdale on count 2 of the first amended petition is reversed. The trial court's Judgment in favor of United Fire and against Scottsdale on counts 1, 3, 4, 5, 6, and 7 of the first amended petition is affirmed.

Points One, Two and Three

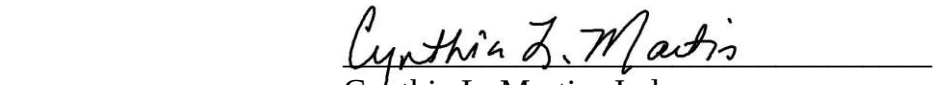
Scottsdale's remaining points relied on challenge the trial court's grant of summary judgment because the uncontroverted facts were supported by reference to select allegations in the first amended petition and/or because the deemed admission of those facts in light of Scottsdale's untimely filed response was erroneous because the trial court had the authority and discretion to consider the response.

We have concluded that the uncontroverted facts, whether or not deemed admitted, do not support the entry of judgment in favor of United Fire on Scottsdale's equitable subrogation claim. We have also concluded that the remaining theories for recovery asserted in Scottsdale's first amended petition have either been abandoned by Scottsdale on appeal or were properly rejected by the trial court as a matter of law for reasons that are not influenced by whether the alleged uncontroverted facts were in dispute. Scottsdale's points one, two, and three have been rendered moot, and need not be addressed.

Conclusion

We affirm the trial court's grant of summary judgment in favor of United Fire on counts 1, 3, 4, 5, 6, and 7 of Scottsdale's first amended petition. We reverse the trial court's grant of summary judgment in favor of United Fire on count 2 of Scottsdale's first amended petition because an excess insurer can assert a claim for equitable subrogation

premised on a primary insurer's bad faith failure to settle within its policy limits, and because the uncontroverted facts do not establish United Fire's right to judgment on this claim as a matter of law. We remand this cause for further proceedings consistent with this Opinion.



Cynthia L. Martin, Judge

All concur