

**Summary of SC93792, *Scottsdale Insurance Company and Wells Trucking Inc. v. Addison Insurance Company and United Fire & Casualty Company***

Appeal from the Linn County circuit court, Judge Gary E. Ravens

Argued and submitted May 7, 2014; opinion issued December 9, 2014

**Attorneys:** Scottsdale and Wells trucking were represented by Kenneth M. Lander of Kortenhof McGlynn & Burns LLC in St. Louis, (314) 621-5757, and Alan B. Yuter of Selman Breitman LLP in Los Angeles. Addison Insurance and United Fire were represented by John G. Schultz, Jill Smith and Suzanne R. Bruss of Franke Schultz & Mullen PC in Kansas City, (816) 421-7100, and John W. Grimm and John C. Steffans of The Limbaugh Firm in Cape Girardeau, (573) 335-3316.

The Missouri Association of Trial Attorneys, which filed a brief as a friend of the Court, was represented by Tim Dollar and Tom Hershewe of Dollar, Burns & Becker LC in Kansas City, (816) 876-2600, and Kirk R. Presley and Sean Brown of Presley and Presley LLC in Kansas City, (816) 931-4611.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A trucking company and its excess insurer appeal the circuit court's judgment granted in favor of the company's primary insurer in a case in which they alleged the primary insurer engaged in bad faith refusal to settle an underlying wrongful death claim against the company. In a unanimous decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri reverses the judgment and remands (sends back) the case. The primary insurer is not entitled to judgment as a matter of law because the uncontroverted facts in its motion for summary judgment (judgment on the court filings, without a trial) do not show the trucking company would be unable to prove the essential elements of a claim for bad faith refusal to settle. A judgment exceeding policy limits is not an essential element of such a claim, and an insurer's ultimate payment of its policy limits does not negate an earlier bad faith refusal to settle. Additionally, the excess insurer can pursue the trucking company's bad faith refusal to settle claim against the primary insurer under the theories of assignment, contractual subrogation or equitable subrogation.

**Facts:** A Wells Trucking Inc. employee was involved in an August 2007 automobile accident that resulted in the death of another motorist. An accident reconstruction report identified multiple factors contributing to the accident, including the employee's speed and failure to drive in the proper lane. At the time of the accident, Wells Trucking had a primary insurance policy with United Fire & Casualty Company with a liability limit of \$1 million and an excess insurance policy with Scottsdale Insurance Company with a liability limit of \$2 million. The Scottsdale policy specified that it would not apply unless and until the underlying United Fire policy was exhausted. The Scottsdale policy also provided that if Wells Trucking had any rights to recover any payment Scottsdale made under the policy, those rights would transfer to Scottsdale. The decedent's family entered into negotiations with United Fire to settle any claims the family might have against Wells Trucking and the employee but, in July 2008, filed a

wrongful death lawsuit against Wells Trucking and the employee. Settlement negotiations continued. In October 2009, the family, United Fire and Scottsdale participated in mediation, which resulted in United Fire and Scottsdale each tendering \$1 million to settle the case for a total of \$2 million. Wells Trucking and Scottsdale subsequently sued United Fire for bad faith refusal to settle, alleging that, during settlement negotiations, United Fire made very low and unreasonable offers at a fraction of its \$1 million policy limits, causing the family to sue; that United Fire continued to refuse to settle for the \$1 million policy limits, despite Wells Trucking's exposure to a probable judgment far higher than \$1 million; that the family ultimately raised its settlement offer from \$1 million to \$3 million; and that Scottsdale persuaded the family to accept a total settlement of \$2 million, with United Fire paying \$1 million and Scottsdale paying the additional \$1 million. In August 2012, United Fire filed a motion for summary judgment. After receiving extensions of time from United Fire but not the circuit court, Wells Trucking and Scottsdale ultimately filed their response in October 2012, 10 days after it was due. The circuit court ultimately granted summary judgment to United Fire, finding Wells Trucking and Scottsdale could not meet the elements of a bad faith refusal to settle claim because United Fire did not refuse to settle the claim within its liability limits and because Wells Trucking was not subjected to a judgment in excess of the policy limits. Wells Trucking and Scottsdale appeal.

#### **REVERSED AND REMANDED.**

**Court en banc holds:** (1) The circuit court misstated the law when it found it had no authority to enlarge the period for Wells Trucking and Scottsdale to respond to United Fire's motion for summary judgment. Although Rule 74.04(c)(2) requires the non-moving party to respond to a summary judgment motion within 30 days, Rule 44.01(b) gives the court authority to grant an extension of that time for excusable neglect after the time period expires. Once the original time period expires, however, the non-moving party must file a motion on which the court can act. Wells Fargo and Scottsdale did not file such a motion, and the court did not abuse its discretion in not treating their motion for reconsideration as a motion requesting an extension of time.

(2) United Fire was not entitled to judgment as a matter of law. An excess judgment is not required to maintain an action against an insurer for bad faith refusal to settle. The insurer's duty is to protect the insured's financial interests, which are impacted by an insurer's breach of duty whether the breach results in an excess judgment or an excess settlement. Additionally, an insured's premiums pay, in part, for the insurer's obligation to act in good faith when settling a third-party claim. Further, United Fire's ultimate settlement for its policy limits is not fatal to a bad faith refusal to settle action. An 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. The crux of Wells Trucking and Scottsdale's claim is that United Fire had numerous opportunities to settle fully the wrongful death claim against Wells Trucking for United Fire's \$1 million policy limits, that United Fire wrongfully refused to do so until after the family no longer was willing to accept a \$1 million settlement, and that United Fire's payment up to the policy limits does not make Wells Trucking whole or put Wells Trucking in the same position as if United Fire had performed its obligations in good faith. The uncontroverted facts in United Fire's summary judgment motion fail to negate essential elements of bad faith refusal to settle the underlying action, and summary judgment may not be granted.

(3) Scottsdale properly can pursue Wells Trucking's bad faith refusal to settle claim under the theories of assignment, contractual subrogation or equitable subrogation. An action for bad faith refusal to settle falls among the category of claims that can be assigned to an insurer, and – as discussed in Paragraph 2 – Wells Trucking can maintain a cause of action for bad faith refusal to settle against United Fire. Subrogation is the substitution of another in the place of a creditor and can be either equitable – when the right to subrogation is imposed by law – or conventional – in which the right to subrogation arises from a contract. Scottsdale's policy with Wells Trucking contains a provision granting Scottsdale a right to subrogate any recovery by Wells trucking of payment Scottsdale made under the policy. Because Scottsdale paid \$1 million toward the settlement of the wrongful death claim under the policy, it has the right to invoke the doctrine of conventional subrogation. Additionally, as the party that actually paid the loss caused by United Fire's alleged bad faith, Scottsdale should be equitably subrogated to the rights of Wells Trucking and be able to bring a bad faith refusal to settle action in the name of Wells Trucking. A right to equitable subrogation belongs to one, not a volunteer, who pays another's debt, to recover the amount paid, which in good conscious should be paid by the one primarily responsible for the loss. Regardless of the existence of an excess insurer, a primary insurer should be held liable when it acts in bad faith in refusing to settle within its policy limits. Equitable subrogation also prevents and unfair distribution of losses between the primary and excess insurers. Allowing an excess insurer to bring an action under equitable subrogation does not create a new duty or impose new obligations on the primary insurer; it merely substitutes the excess insurer for the insured.