

**Indemnity Insurance Company of North America v  
Transcontinental Insurance Company**

2005 NY Slip Op 30201(U)

March 17, 2005

Supreme Court, New York County

Docket Number: 0603492/2002

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: WALTER B. TOLUB  
*Justice*

PART 15

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

INDEX NO. 603492/2002

Plaintiff,

- v -

MOTION DATE 11/19/ 2004

TRANSCONTINENTAL INSURANCE COMPANY and  
CONTINENTAL CASUALTY COMPANY a/k/a CNA,

MOTION SEQ. NO. 002

Defendants.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers this motion is decided in accordance with the accompanying memorandum decision.

**FILED**  
MAR 21 2005  
NEW YORK  
COUNTY CLERKS OFFICE

Dated: 3/17/05

WALTER B. TOLUB, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
INDEMNITY INSURANCE COMPANY OF NORTH  
AMERICA,

Plaintiff,

Index No. 603492/02  
Mtn Seq.

-against-

TRANSCONTINENTAL INSURANCE COMPANY and  
CONTINENTAL CASUALTY COMPANY a/k/a  
CNA,

Defendants.

-----x  
**WALTER B. TOLUB, J.:**

By this motion, defendants move for summary judgment dismissing the complaint. Plaintiff cross-moves for summary judgment.

Plaintiff, an excess insurance carrier, brought this action against defendant Transcontinental Insurance Company of North America and/or Continental Casualty Company a/k/a CNA (together, Transcontinental), a primary insurance carrier. Plaintiff alleges that Transcontinental, acted in bad faith, by failing to settle a tort case within its \$1 million dollar limits, subjecting plaintiff to liability under its excess policy in the amount of \$500,000.

The underlying tort case arose out of a 1999 vehicular accident in which an automobile driven by plaintiff Kiplin McGann (McGann) rear-ended a flatbed truck being driven by Timothy Rice (Rice), an employee of Three Star Masonry Supplies, Inc., (Three Star). Three Star was the insured of Transcontinental under a

primary insurance policy with a limit of \$1 million. Plaintiff was the excess insurer of Three Star, with a limit of \$25 million. Transcontinental defended Rice and Three Star, appointing staff counsel James Kehoe of Tromello, McDonnell, & Kehoe.

Defendants move for summary judgment dismissing the complaint on the ground that the conduct of Transcontinental's litigants did not amount to bad faith. Defendants contend that during the pre-trial phase of this litigation, Kehoe conducted extensive discovery. Depositions of both sides were conducted, McGann's medical records were obtained, and McGann was given four IMEs by specialists designated by Kehoe. In addition, expert vocational and accident reconstruction witnesses were retained by Kehoe, and surveillance of McGann was conducted by an investigator retained by Transcontinental.

Prior to trial, Kehoe wrote several reports. The last one, dated July 31, 2001, entitled "Final Report Prior to Trial", analyzed the liability and damage issues. Kehoe arrived at liability and damage (verdict value) assessments by analyzing the facts developed in discovery, and surveying jury verdicts in cases with similar injuries. On liability, Kehoe noted that McGann testified at his EBT inconsistently, inasmuch as he said he drove side by side with Rice, yet the collision was caused undisputedly by McGann hitting the rear of Rice's truck. Rice was at fault because he admitted he was making a left-handed turn at the

intersection from the right lane. Kehoe concluded that a reasonable jury should find McGann 50% at fault and Rice 50% at fault. On damages, Kehoe concluded that a reasonable jury should award damages of \$1.5 million at full value. Combining his liability and damage assessments Kehoe concluded that the reasonable verdict value of the case was \$750,000 (i.e. 50% of \$1.5 million).

Prior to trial, McGann made a number of settlement demands, ranging between \$1 million and \$2 million. Transcontinental's settlement offers ranged from \$350,000 to \$600,000. Transcontinental had reserved the case at \$750,000. However, the \$750,000 was never actually offered, because after Transcontinental went to \$600,000 at the start of the trial, McGann refused to drop below \$1 million.

During the year prior to trial, Transcontinental updated plaintiff as well as an outside law firm plaintiff retained to monitor the matter, and advised them that the trial would take place in early 2002. Plaintiff's umbrella policy allowed it to participate in the defense of the uninsured but plaintiff elected not to participate.

The trial was bifurcated. After the liability phase, the jury returned a verdict of 100% fault attributable to Rice. Prior to the damage phase of the case, the parties settled for \$1.5 million. Transcontinental paid its \$1 million and plaintiff paid the

- remaining \$500,000.

According to defendants, prior to the trial, plaintiff's claims representative essentially agreed with Kehoe's liability assessment of a 50/50 split, and the fact that Kehoe misjudged the liability verdict does not entail bad faith on the part of Transcontinental.

Plaintiff however, argues that Transcontinental's conduct with respect to this case amounted to bad faith. In support of this position, plaintiff points to the fact that because of the serious nature of the injuries suffered by McGann and the unfavorable liability situation, early on in the development of Transcontinental's claims file, it was decided that the services of an accident reconstruction expert (ARE) would have to be obtained. Transcontinental placed its reliance on the ARE to establish that McGann was vastly exceeding the speed limit at the time of the accident. However, the ARE was never utilized, and, at the time of trial, photographs taken at the scene of the accident could not be located, resulting in a missing document charge.

Plaintiff argues that Kehoe's evaluation of a 50/50 liability split was contingent on Transcontinental being able to adduce testimony from an ARE, and although an ARE was retained, no final report was issued. Moreover, Transcontinental failed to conduct any follow up investigation with the ARE after its initial retention, photographic evidence was subsequently lost and no

- expert testimony was offered at trial.

Plaintiff additionally contends that throughout the course of the litigation, McGann indicated that the case could be settled within the primary policy limits. Even on the day that the liability trial began, Transcontinental purportedly could have settled for its \$1 million policy limit. According to plaintiff, its failure to do so constitutes a gross disregard for the interests of the insured and the excess carrier.

In opposition to the cross motion, defendants assert that Kehoe did not consider the opinion of an ARE to be a factor in forming his opinion that liability would be allocated 50/50 by a reasonable jury. As Kehoe testified at his deposition and as set forth in the accompanying affidavit, Kehoe's opinion that liability would be allocated 50/50 was based on the fact that both parties to the underlying litigation had testified inconsistently about their positioning just prior to impact, and that McGann undisputedly rear-ended Rice's truck. Kehoe believed that calling an ARE as an expert witness would not be constructive.

Defendants also state that the ARE who consulted with Kehoe had misplaced the photographs in question. In any case, it is averred that these photographs were amateur depictions of the accident scene which were immaterial to Three Star's defense, because the record was already undisputed as a result of McGann's deposition testimony and the professional photographs of the

vehicles, that McGann rear-ended Rice's truck.

Defendants argue that any negligence on the part of Kehoe cannot be imputed to Transcontinental so as to warrant a bad faith claim against Transcontinental. Furthermore, such conduct by Kehoe allegedly had no bearing on Transcontinental's decision not to offer its policy limits. According to defendants, Kehoe never wavered on his assessment that liability should be allocated 50/50, meaning that he continued to so advise Transcontinental even after he decided that the ARE would not be a helpful witness. Defendants assert that Transcontinental's reliance on Kehoe's assessment was reasonable and not proof of bad faith.

Both sides adhere to the findings of *Pavia v. State Farm Mutual Automobile Ins. Co.*, 82 NY2d 445 [1993]. The Court of Appeals set forth the standard by providing the following:

In order to establish a prima facie case of bad faith, the plaintiff must establish that the insurer's conduct constituted a "gross disregard" of the insured's interests - that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer...In other words, a bad faith plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted(*Id.* at 453-4).

In applying the standard for determining bad faith on the part of an insurer, no exact formula exists. Plaintiff contends that in

- considering all the facts and circumstances relating to the insurer's investigation of the claim, a number of factors must be evaluated. Relying on the case, *Pinto v. Allstate*, (221 F.3d 394 [2<sup>nd</sup> Cir 2000]), which analyzed *Pavia*, plaintiff asserted the following factors: plaintiff's likelihood of success on the issue of liability, the potential damage award, the financial burden on each party if the insurer refuses to settle, whether the claim was properly investigated, the information available to the insurer when the demand for a settlement was made and any other relevant proof tending to establish or negate the insurer's good faith in refusing to settle.

*Pavia* clearly states that the plaintiff in a bad faith action must show that the insurer lost an actual opportunity to settle the claim at a time when all serious doubts about the insurer's liability were removed.

According to the plaintiff, the evidence presented here, that counsel stood by his 50/50 liability assessment even after he declined to put an expert on the stand, that he did not inform plaintiff of the trial until the day of jury selection, and that he refused to settle the cases for a sum less than \$1 million constitutes sufficient evidence to warrant a trial.

This court disagrees. At best counsel's conduct is some evidence of negligence. However, negligence on the part of counsel does not, in and of itself, constitute bad faith, and vicarious

liability for the alleged negligence of counsel cannot be imputed to an insurer (*Feliberty v Damon*, 72 NY2d 112 [1988]). Plaintiff's success thus requires a showing of gross or reckless conduct of which the defendant was aware. It is this court's opinion that while counsel's conduct may have indeed been negligent, it cannot be considered gross or reckless.


Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the within action is dismissed; and it is further

ORDERED that plaintiff's motion for summary judgment is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/17/05

  
\_\_\_\_\_  
HON. WALTER B. TOLUB, J.S.C.

**FILED**  
MAR 21 2005  
NEW YORK  
COUNTY CLERK'S OFFICE