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COURT OF APPEALS

STATE OF NEW YORK

CARLSON,

Appellant,

-against-

NO. 47

AIG,

Respondent.

REARGUMENT
20 Eagle Street
Albany, New York
October 18, 2017

Before:

CHIEF JUDGE JANET DIFIORE
PRESIDING JUSTICE RANDALL T. ENG
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE PAUL FEINMAN
ASSOCIATE JUDGE ROWAN D. WILSON

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next matter on today's
2 calendar is appeal number 47, Carlson v. AIG.

3 Good afternoon, counsel.

4 MR. MARKARIAN: Good afternoon, Your Honors. May
5 it please the court. Ed Markarian for the plaintiff, and
6 we request two minutes for rebuttal.

7 CHIEF JUDGE DIFIORE: Okay, sir.

8 MR. MARKARIAN: Thank you, Your Honors.

9 Your Honors, as the court knows, there are three
10 issues in this case; the hired-auto insurance coverage
11 question; the permission question; and the statutory
12 "issued or delivered" question under Section 3420.

13 JUDGE GARCIA: Well, if we decide the hired-auto
14 issue against the position you're advocating, doesn't that
15 really dispose of the other issues?

16 MR. MARKARIAN: Your Honor, that question was
17 asked last time by me. I think I said it was moot. I - -
18 - I think the actual doctrine is judicial restraint that a
19 court should decide only the issues necessary. So we ask
20 that you find in our favor on all issues, Your Honors.

21 JUDGE STEIN: Can I ask you, because there's been
22 a lot about the missing cost-for-hire schedule. Can you
23 point to me where in the record you raised its absence
24 before the trial court?

25 MR. MARKARIAN: At the motion court, Your Honor,



1 the argument was the generic argument that the insurance
2 company had the burden of conclusively proving that their
3 documentary evidence showed their defense conclusively.

4 JUDGE STEIN: So - - -

5 MR. MARKARIAN: That was the argument.

6 JUDGE STEIN: - - - how - - - how - - - how was
7 that preserved for purposes of our review?

8 MR. MARKARIAN: Because the burden is the same
9 now, Your Honor. They have to explain on this record how
10 they have conclusively proven that there is no coverage.

11 JUDGE STEIN: But haven't we said that - - - that
12 an appropriate - - - that the court has to be alerted to
13 the issue, so that it - it can properly address and review
14 it in order to preserve it for our review?

15 I under - - - I realize that the - - - the rules
16 are different for what the Appellate Division can - - -can
17 review, but - - -

18 MR. MARKARIAN: Correct, Your Honor. Two points
19 on that. Number one is that the standard for preservation
20 is that had they produced - - - had the issue been raised
21 more specifically than it was, they could have done
22 something about it. And they have never contended that
23 they have been able to produce a schedule. We were here
24 last time. They did not say that. They were specifically
25 asked a direct question, can you produce a schedule. They



1 said - - - they tried - - - they did not answer the
2 question. They did not say they could produce it. And so
3 that's - - -

4 JUDGE GARCIA: And what would the schedule have
5 shown, in your view?

6 MR. MARKARIAN: It would have shown what the
7 underwriting evidence shows, Your Honor, which is
8 overwhelming.

9 JUDGE GARCIA: But if - - - if the underwriting
10 evidence is there was liability for these vehicles, there
11 was potential liability for these vehicles, right? I mean,
12 you proved it in the first trial.

13 MR. MARKARIAN: Correct.

14 JUDGE GARCIA: But you lost the verdict on a
15 Respondeat, on a vicarious liability theory, right?

16 MR. MARKARIAN: Correct, Your Honor.

17 JUDGE GARCIA: So how is that inconsistent? I
18 mean, if they had been using this vehicle with the
19 permission of DHL, you would have won.

20 MR. MARKARIAN: Correct. Your Honor, and the
21 insurance amicus makes its point, and it's technical, but
22 it's crucial. And you have to understand the nine symbols
23 of coverage. Their insurance amicus is saying that DHL did
24 have coverage. It wanted coverage under Symbol 1, which is
25 any auto coverage. And they say that that means they were



1 literally covered for any auto in the universe, and that's
2 a misstatement of how insurance coverage works for Symbols
3 1 through 9.

4 As the plaintiff's expert explained, but also in
5 the Donegal case, in the Bamber case that we have cited in
6 our reply to the amicus explains, you don't have coverage
7 for any auto under Symbol 1. You have coverage for any
8 covered auto. So for DHL to have coverage for itself, as
9 your questions says they would want, and as the insurance
10 amicus says, if they're going to have coverage for
11 themselves under Symbol 1, there has to be coverage under
12 Symbols 2 through 9. You don't have coverage for every
13 auto in the universe.

14 Symbols 2 through 6 are the autos that DHL owns.
15 Of course it has coverage for those. It can have coverage
16 for an auto it doesn't own under Symbol 7 if it
17 specifically lists that vehicle in the policy. And it can
18 have coverage for non-employee - - - or for employee
19 vehicles under Symbol 9.

20 But if DHL wants coverage for the cart - - -
21 contractor vehicles, the only symbol they can provide that
22 coverage for DHL under Symbol 1 is hired-auto coverage
23 under Symbol 8. So they did want the coverage.

24 JUDGE GARCIA: But - - - but can't they have
25 coverage, which I assume they did in the first trial, for



1 your theory of vicarious liability? Wouldn't they need
2 coverage for that?

3 MR. MARKARIAN: Yes. And they had it.

4 JUDGE GARCIA: All right.

5 MR. MARKARIAN: And they weren't liable for that.
6 But that's - - - this is not that question. This is not a
7 vicarious liability coverage ca - - - this is a coverage
8 case.

9 JUDGE GARCIA: I understand, but a lot of your
10 brief also talks about DHL's obligation to have coverage,
11 and they have these vans and they have these markings and -
12 - - but in a way, they do have coverage because - - -

13 MR. MARKARIAN: They do.

14 JUDGE GARCIA: - - - when they're using those
15 vans for the right purposes, they're responsible, and their
16 insurance carriers, I assume, came in and defended them in
17 that first trial.

18 MR. MARKARIAN: Yes.

19 JUDGE GARCIA: Now that verdict got thrown out
20 because you didn't have a vicarious liability theory on the
21 permission issue. And it seems to me, part of the struggle
22 maybe, we're having with this case is it's - - - it's a
23 somewhat unusual use of 3420. Because it seems to me, that
24 statute goes to you have an insolvent defendant. They're
25 not really interested one way or another bringing their



1 insurance carrier in. You can kind of go around that and
2 bring them in. You lost on appeal in the first trial, and
3 now you're flipping a theory to bring in the carriers under
4 this other statute.

5 MR. MARKARIAN: We're not - - -

6 JUDGE GARCIA: And I never saw that in another
7 case, and maybe you could (indiscernible).

8 MR. MARKARIAN: That's - - - we're not flipping
9 it, Your Honor. Had they specifically identified the
10 vehicles, there would be coverage. When they placed the
11 coverage under Symbol 8, which is they wanted the coverage,
12 the only way they can have the coverage that they want is
13 to insure the vehicles under Symbol 8.

14 Symbol 8 through Symbol 1 gives the coverage to
15 DHL, and that's why they had coverage. That's why they had
16 counsel at the first trial. But when you get the coverage
17 for Symbol 8, you also - - - the policy is explicit. The
18 coverage is for you and anyone driving the vehicle and
19 owning the vehicle. And that's why the coverage is not
20 just for DHL. It's for the contractors and the driver too.

21 JUSTICE ENG: Now, regarding the cartage
22 agreement itself, which is extensive. It's some fourteen
23 pages. Now, where is it in the cartage agreement that you
24 have an expression of control of the vehicles by - - - by
25 DHL. Where is it that we can find that?



1 MR. MARKARIAN: Your Honor, there are many
2 provisions in the agreement that show control, but I think
3 that it's - - -

4 JUSTICE ENG: Well, control of the vehicles, we
5 had control of the operation of MVP, and that's exhaustive.
6 But what about control of the vehicles themselves as being
7 utilized in their service.

8 MR. MARKARIAN: I'm going to - - - I'd like to
9 answer it two ways. Generally, Your Honors, when you ask
10 in this business, this cartage business, when you ask
11 someone to step into your shoes - - - and more than half of
12 the vehicles - - - you're hiring all of these fleets, and
13 more than half of the vehicles making your deliveries are
14 these contractor vehicles, you are controlling them. But
15 the more important point, Your Honor, is - - - and the
16 Academy of Trial Lawyers brief shows this very well,
17 there's this whole sub-industry out there for sub-haulers.

18 And for sub-haulers, they're insured on a cost-
19 of-hire basis. And to hold - - - as the insurance amicus
20 says that we should ignore what the cost-of-hire schedule
21 does is a ruling that all these vehicles nationwide
22 identified on a cost-of-hire schedule, none of them are
23 going to have coverage, and that would be devastating, Your
24 Honor. If they're on the schedule, they're covered.

25 JUDGE STEIN: Well, is this a question of whether



1 the vehicles are covered or of whether 3420 applies?

2 MR. MARKARIAN: Well, third - - -

3 JUDGE STEIN: Are those - - - are those the same
4 questions, they can - - -

5 MR. MARKARIAN: No, they're not, Your Honor.

6 JUDGE STEIN: Okay.

7 MR. MARKARIAN: 3420 is just whether we can AAIC
8 directly in New York, and the answer to that is yes.
9 That's an important issue of statutory consequence.

10 May I address that quickly, Your Honor?

11 CHIEF JUDGE DIFIORE: Yes, please.

12 MR. MARKARIAN: Just on the AAIC 3420 issue, you
13 have to look to see whether the statute when it was amended
14 in 2008, did they change the meaning of "issued or
15 "delivered" in (d) because now it's - - - well, it was
16 "issued or issued for delivery". Now it's "issued or
17 delivered", which is the same language in (a). When you
18 look at the legislative history, you'll see two things:
19 you'll see all of the amendments brought in the protections
20 of the statute.

21 The Appellate Division here allows an insurance
22 company to eviscerate the statute simply by mailing the
23 policy outside of New York to a non-New York address of the
24 insured. That's not what was going on in 2008. On the
25 other hand, you'll see a whole series of non-substantive



1 edits, pure edits, that were done in 2008. For example,
2 the word "hereof" was twice replaced with "of this
3 section". The word "his" was - - -

4 JUDGE STEIN: That may be true, but don't we have
5 to look at the plain language, it was changed. We have to
6 assume that it was changed for some reason.

7 MR. MARKARIAN: Right.

8 JUDGE STEIN: And there's not much said about it,
9 so it's really not clear, but the fact of the matter is is
10 that it's not the same language as it was before.

11 MR. MARKARIAN: Correct, Your Honor.

12 JUDGE STEIN: And - - - and - - - and we've never
13 interpreted this new language - - -

14 MR. MARKARIAN: Correct, but the - - -

15 JUDGE STEIN: - - - correct?

16 MR. MARKARIAN: - - - plain language of Preserver
17 was "issued" or "issued for delivery". It's no - - - it's
18 not substantively different. And when you look at what
19 they changed - - -

20 JUDGE STEIN: Well, but it may not be, but - - -
21 but when - - - I mean, it may or may not be. And this
22 language, is this - - - is this language used elsewhere in
23 the - - -

24 MR. MARKARIAN: Yes, it - - -

25 JUDGE STEIN: - - - country?



1 MR. MARKARIAN: - - - it - - -

2 JUDGE STEIN: Okay.

3 MR. MARKARIAN: Well, it was used elsewhere in
4 the statute. It was used in subdivisions (a), (e), and
5 (f).

6 JUDGE STEIN: Well, that's - - -

7 MR. MARKARIAN: And when they changed the statute
8 in 2008, they changed "issued or issued for delivery" to
9 "issued or delivered" in (d), and in (j), they changed
10 "issued or renewed" to "issued or delivered".

11 JUDGE STEIN: So if we change - - - if we
12 interpret it in this particular way, it's going to effe - -
13 - in the way you're proposing, it's going to effect other
14 provisions and - - - and we don't know what the effect on
15 those provisions are going to be.

16 MR. MARKARIAN: We do. We know that an insurance
17 company can now defeat all of these protections of 3420,
18 which are for ins - - - injured parties and for policy
19 holders. They can defeat them all just by mailing the
20 policy from an office outside of New York. When you look
21 at the legislative history, there's no reference to
22 Preserver. Preserver was decided thirteen days before the
23 statute was amended - - -

24 JUDGE STEIN: But we - - - but we were addressing
25 different language. If the language had been what it is



1 today, we don't know that it - - - we - - - that we would
2 have reached the same interpretation.

3 MR. MARKARIAN: I submit that when you see they
4 tweaked subdivision (j) the same way and you see all the
5 other non-substantive edits, it was purely an editorial,
6 non-substantive change. And to hold otherwise, allows this
7 important statute to be defeated by a mailing test. And I
8 submit that would be bad public policy.

9 The Preserver test is correct. If an insurance
10 company takes payment to - - - to insure somebody who is
11 located in New York and creates risks in New York, they
12 should be subject to the New York law. To allow an
13 insurance company to defeat that by a mailing test, I
14 submit, would be a - - - an improper result.

15 CHIEF JUDGE DIFIORE: Thank you, sir.

16 MR. MARKARIAN: Thank you, Your Honors.

17 CHIEF JUDGE DIFIORE: Counsel?

18 MR. SZCZEPANSKI: Good afternoon, Chief Judge
19 DiFiore. And may it please the court.

20 I'd like to begin with the questions of Judge
21 Stein and Judge Garcia and address the issues of - - - of
22 control and permission in the context of those questions.

23 First, Judge Stein, you are absolutely correct.
24 Not only was the issue of this, the purportedly missing
25 schedule, not raised below, but on pages 1538 to 1540 of



1 the record, you can see where the plaintiff's counsel took
2 the position that the policy was clear and unambiguous.

3 With respect to your question, Judge Garcia, what
4 would the underwriting have shown, the underwriting have
5 show - - - would have shown that - - - and in fact, the
6 plaintiff's position in its resp - - - in his response to
7 the amicus brief takes this position at pages 5 and 6. "It
8 would have shown that the policy was intended to provide
9 hired auto coverage." We don't dispute that. The policy
10 provides coverage to DHL for any vehicle, any covered auto;
11 whether it's a hired auto, a rented auto, or a DHL-owned
12 auto.

13 But that is not the question in this appeal. The
14 question is whether MVP is an insured. And in order to
15 answer that question, the court has to determine whether
16 the MVP van was at the time of the accident, hired by DHL,
17 and being used with DHL's permission.

18 JUDGE WILSON: But were the MVP vans at any point
19 covered by the policy?

20 MR. SZCZEPANSKI: The - - - thank you, Judge.

21 JUDGE WILSON: Isn't that - - - isn't that what
22 the schedule would show if we had it?

23 MR. SZCZEPANSKI: Well, Judge Wilson, according
24 to the plaintiff's response to the amicus brief, the
25 schedule would show fairly consistently what the columns in



1 the schedule indicate. It would show a state-by-state
2 breakdown of where DHL does business, a cost of hire per
3 state, and various factor and premium calculations.

4 The plaintiff does not take the position that the
5 schedule would show either a list of vehicles or a list of
6 contractors.

7 JUDGE WILSON: Number of vehicles?

8 MR. SZCZEPANSKI: The - - - the - - - the number
9 of vehicles hired and/or not owned and owned is reflected
10 in the underwriting files that were produced as part of the
11 motion to dismiss, but it does not appear that those
12 figures would be included in the schedule.

13 Again, Judge Wilson, I think the most the
14 schedule would show is a point that is not in dispute here,
15 which is that the policies were meant to cover DHL's
16 liability for hired autos.

17 JUDGE GARCIA: And that, counsel, going back to
18 an earlier point, would that cover - - - I mean, I assume
19 that would cover liability related to certain vehicles like
20 these if they had been used with your permission. So the
21 first trial. That would be a calculated liability in your
22 policies, right?

23 MR. SZCZEPANSKI: I think that's right, Judge
24 Garcia. If the trial - - - suppose the trial had gone the
25 other way and the Appellate Division had affirmed the - - -



1 the judgment on the verdict.

2 JUDGE GARCIA: All right.

3 MR. SZCZEPANSKI: DHL would have been covered for
4 that judgment. If MVP had sought coverage at that point,
5 MVP would have had an additional burden, because MVP is not
6 the named insured. So to establish coverage as an insured,
7 MVP would have had to establish that the van was hired by
8 DHL and being used with DHL's permission. Now - - -

9 JUSTICE ENG: There are circumstances in which
10 DHL's permission comes into play; is that not a fact under
11 the cartage agreement?

12 MR. SZCZEPANSKI: I - - - I'm not sure - - -

13 JUSTICE ENG: There's one situation that I - - -
14 that I saw in the agreement, and that's where, of course,
15 MVP seeks to use a vehicle for a competing service. And if
16 that's done, it requires the written permission of DHL, and
17 requires that the markings be taken off. So it does
18 contemplate permission under some circumstances; does it
19 not? That DHL does stand in a position to give permission.

20 MR. SZCZEPANSKI: I don't think it contemplates -
21 - - I thank you for the question, Judge Eng. I don't think
22 it contemplates permission to use the vehicle, but I do
23 agree with your point that the parties - - -

24 JUSTICE ENG: Well, no, but it says explicitly
25 they can't use a vehicle for that purpose without their



1 written authorization.

2 MR. SZCZEPANSKI: Yes. And - - - and we think
3 that that - - - those provisions that govern DHL's
4 intellectual property or its marks are - - - reflect DHL's
5 interest in controlling its brand. It does not reflect
6 control over the vehicle itself.

7 In fact, on the rec - - - in the record on page
8 433, Your Honor, there is a particular provision at the
9 very end of Section 3.5.1 in which MVP agrees that it will
10 not permit its vehicles to be used for anything other than
11 services under the agreement. So I think taken as a whole,
12 Judge Eng, the cartage agreement makes clear that whatever
13 may be said, even if the plaintiffs - - - even if we
14 adopted the plaintiff's arguments for a moment that we - -
15 -

16 JUSTICE ENG: Under the cartage agreement, might
17 it have been permissible for MVP to do a delivery for DHL
18 in an unmarked vehicle with a driver in a green jumpsuit;
19 would that have been permissible?

20 MR. SZCZEPANSKI: Under - - - and you're
21 referring to the - - - the marked section, Judge Eng. I
22 think - - -

23 JUSTICE ENG: Well, I'm referring - - - I'm
24 referring to their doing their duty as an independent
25 contractor. Would the cartage agreement permit them to - -



1 - to deliver this service without a marked truck, and
2 without a uniformed driver?

3 MR. SZCZEPANSKI: Up to - - - on behalf of a
4 competitor?

5 JUSTICE ENG: On behalf of - - - D - - - yes.

6 MR. SZCZEPANSKI: I think, I'm familiar with the
7 provision you're referring to, Your Honor, and I think if
8 it weren't marked with a DHL mark - - -

9 JUSTICE ENG: But could they do DHL's business in
10 an unmarked vehicle with a non-uniformed driver?

11 MR. SZCZEPANSKI: I don't know that anything
12 would have precluded that, Your Honor, but the - - - the
13 agreement clearly contemplates that the work would be done
14 in DHL vehicle and certain uniforms.

15 JUSTICE ENG: Because what I'm looking at is a
16 high element of control here that seems to permeate this.

17 MR. SZCZEPANSKI: Well, I think, Your Honor, I -
18 - - what I think the court should distinguish between
19 attempts to control DHL's branding and its intellectual
20 property and how it appears on uniforms in vehicles and
21 attempts to control the vehicle itself.

22 JUSTICE ENG: Well, it's even more than that.
23 What about COD provisions, for example. It says that MVP
24 shall collect monies for COD shipments and remit them.
25 When you're collecting money for a service, are you not



1 acting as an agent?

2 MR. SZCZEPANSKI: No, Judge Eng. I think you're
3 acting in an arm's-length relationship under a contract,
4 and I would go back to the - - - the question that you
5 asked of my friend in - - - in his initial argument.
6 There, to - - - there - - - there may be instances under
7 the agreement where DHL attempts to have hold over its
8 intellectual property and its brand, but when it comes to
9 the vehicles itself, the cartage agreement makes absolutely
10 clear that MVP has free control of the manner and means of
11 production including - - -

12 JUSTICE ENG: What about routing specifications?

13 MR. SZCZEPANSKI: - - - its work.

14 JUSTICE ENG: What does that mean? I know in the
15 agreement it says that MVP shall be responsible for - - -
16 for routing. But then it says they should follow the
17 routing specifications of DHL. What does that mean?

18 MR. SZCZEPANSKI: Right. I think there's clearly
19 some interplay, Judge Eng, but the agreement does afford
20 MVP the discretion to determine the routes. So I think
21 looking at the agreement at a whole, there are some
22 provisions that one side or the other may want to pick out
23 and cite as evidence of control or a lack of control. But
24 on balance and taking the agreement as a whole, and the
25 documentary evidence conclusively establishes that it was



1 MVP that controlled the vehicles. But even if this court -
2 - - and I wanted to pick up on a question that Judge Rivera
3 had asked in the initial argument.

4 Judge Rivera, you asked the question that is it
5 possible to assume that because MV - - - because DHL
6 retains the services of MVP, they hire MVP, aren't they
7 implicitly hiring the vehicles, even if it's unstated. And
8 although we disagree with that proposition, I just wanted
9 to - - - to fully respond to your question because I think
10 even if this court assumes that hiring of MVP constitutes
11 hiring of the vehicles and that hiring of the vehicles
12 somehow constitutes an implicit permission to use the
13 vehicles, that permission is limited to work being
14 performed under the cartage agreement itself. So - - -

15 JUDGE WILSON: But there's a difference there
16 between what Symbols 9 and Symbols 8 say, right, in the
17 agreement, where Symbol 9 has a specific carve out of the
18 type you just articulated and Symbol 8 doesn't.

19 MR. SZCZEPANSKI: Well, I - - - I think that's
20 true, Judge Wilson, but the fact that - - - I don't think
21 this is a case about symbols, but if it were, the fact that
22 Symbol 1, which broadly covers any auto, I think that's
23 sufficient to subsume all of the other symbols. And it
24 reflects the party's intent to cover DHL's liability for
25 any auto, including hired autos. That's not an issue that



1 we dispute.

2 The question is whether MVP is an insured. And
3 in - - - and that requires a different analysis to the
4 questions whether the vehicle was hired and used with
5 permission.

6 And I think on that question of permission, we
7 have something here that is not typically found in other
8 cases. We have a determination - - -

9 JUDGE WILSON: I want to make sure I understand
10 you, then.

11 MR. SZCZEPANSKI: Yes.

12 JUDGE WILSON: It sounds to me like you're not
13 disputing that it was hired.

14 MR. SZCZEPANSKI: We - - -

15 JUDGE WILSON: It's really the permission part.

16 MR. SZCZEPANSKI: No. We do dispute that - - -
17 we do dispute that it was hired, and we do dispute
18 permission. What we're saying is that we don't dispute, we
19 agree, that the policy was intended to provide hired-auto
20 coverage to DHL. There's no question about that. And
21 that's what the underwriting information reflects. It
22 reflects that DHL's liability for any auto, including a
23 hired auto, was covered.

24 JUDGE WILSON: And so you're still - you're still
25 disputing that the MVP vehicles were hired autos under the



1 contract.

2 MR. SZCZEPANSKI: Absolutely correct.

3 JUDGE WILSON: Okay.

4 MR. SZCZEPANSKI: That's a separate analysis.

5 And just to conclude, the Fourth Department's decision in
6 which it found that the driver of the vehicle was on a
7 personal errand and that his employment did not create the
8 necessity for the travel is - - - is - - - and I see that
9 my time has expired, Chief Judge; may I conclude?

10 CHIEF JUDGE DIFIORE: Please continue.

11 MR. SZCZEPANSKI: That is a critical
12 determination for this appeal, because essentially it
13 reflects that it is undisputed and on the record that the
14 driver was operating outside the scope of the cartage
15 agreement, outside the scope of his employment, at the time
16 of the accident.

17 Given that, even if the plaintiff could establish
18 that the vehicle was hired and even if the plaintiff could
19 establish that some permission existed at some point to use
20 the vehicle, at the time of the accident there - - - or was
21 not and could not have been permission. So even if the
22 plaintiff's arguments were accepted at this stage of the
23 appeal, it's our view that the decision should,
24 nonetheless, be affirmed.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



1 MR. SZCZEPANSKI: Thank you very much.

2 CHIEF JUDGE DIFIORE: Counsel?

3 MR. KOVNER: May it please the court. My name is
4 Paul Kovner, and I represent American Alternative Insurance
5 Company.

6 I think the plaintiff is asking the court, in
7 essence, to apply the test which you enunciated in the
8 Preserver case, but that language was changed as Your
9 Honors have noted by the amendment to 3420 in 2008.

10 JUDGE GARCIA: But that's - - - that's actually
11 not the argument you made in the Appellate Division, right?

12 MR. KOVNER: I beg your pardon?

13 JUDGE GARCIA: In the Appellate Division, you
14 didn't make that argument, correct?

15 MR. KOVNER: What we said in the Appellate
16 Division was the court should construe the language in the
17 amended statute which says "issued or delivered", but we
18 also made the argument that even if the court were to apply
19 the "issued for delivery" standard in the Preserver case,
20 there should - - - the action should still be dismissed
21 because the policy was not issued for delivery in New York.

22 So I don't think the issue has been preserved by
23 the public policy arguments that they're making about the
24 potential impact on injured victims in New York. They
25 didn't raise the issue at the motion level, and they didn't



1 raise the issue in the Appellate Division, so I think the
2 argument relating to public policy has not been preserved
3 in this court.

4 And I think what this court needs to do, should
5 it reach the issue, and obviously, as His Honor pointed
6 out, if you decide in favor of the defendants on the hired-
7 auto issues, it need not reach the interpretation of the
8 amended statute. But if you do reach the interpretation of
9 the amended statute, I think the Fourth Department got it
10 right; "issued or delivered" requires that the policy
11 either be issued in New York or delivered in New York.

12 JUSTICE ENG: All right. Well, that's literal.
13 Is there anything that suggests that this should be what it
14 means something so literal to restrain or - - - or narrow
15 the protection and the coverages that obviously the
16 legislature seeks to expand?

17 MR. KOVNER: Well, I think the legislature did
18 expand the coverage here when it - - -

19 JUSTICE ENG: Yes.

20 MR. KOVNER: - - - changed the statute. But to
21 answer your question directly, I think in the Preserver
22 case, this court did construe the word "issued" in the same
23 way that the Fourth Department did. Where was it
24 underwritten? Here, the policy was issued in New Jersey,
25 because that's where American Alternative was located. But



1 as I said, I believe the - - -

2 JUDGE FEINMAN: But the - - -

3 JUDGE STEIN: It - - -

4 JUDGE FEINMAN: I'm sorry.

5 JUDGE STEIN: 3420 is in derogation of the common
6 law; is it not?

7 MR. KOVNER: Yes.

8 JUDGE STEIN: So - - - so does that require us to
9 construe - - - construe this language narrowly?

10 MR. KOVNER: Yes, I think it does. And as I
11 said, I - - - because the plaintiff has raised questions
12 about whether the amendments increased protections or
13 decreased protections for injured motorists, I think
14 there's a reasonable concer - - - interpretation which
15 would suggest that it did increase the protection because
16 under the issued or delivered language, the plaintiff could
17 bring a direct action with respect to a policy which was
18 issued in New York, but delivered to and insured located in
19 another state.

20 So with that in mind, I think the amendment did
21 increase the coverage available to injured plaintiffs.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MR. KOVNER: Thank you.

24 CHIEF JUDGE DIFIORE: Counsel?

25 MR. LAWLESS: Good afternoon. May it please the



1 court. My name is Patrick Lawless, and I represent the
2 respondent, DHL.

3 The sole claim against DHL in this case is a
4 conspiracy claim that was properly dismissed by the lower
5 court and affirmed by the Fourth Department.

6 New York State doesn't recognize a civil cause of
7 action for conspiracy. There has to be an underlying tort,
8 which in this case would be misrepresentation or fraud,
9 which is subject to a heightened pleading requirement. The
10 conclusory and vague allegations of the complaint don't
11 meet this requirement, especially in light of the prior
12 determinations of the Fourth Department.

13 Unless the panel has any further questions for
14 me, I'll rest on my brief.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 Counsel?

17 MR. MARKARIAN: Thank you, Your Honor.

18 JUDGE WILSON: Could you just address that last
19 point? Are you contesting that?

20 MR. MARKARIAN: We do think that this is such a
21 distorted case where DHL is fronting the insurance that we
22 have concerns that they are in lockstep with the insurance
23 company, so we would ask for discovery on those points.
24 That's where those issues come from.

25 On the other issues, Your Honors, there was a



1 question about vicarious liability, and I would ask that
2 the court not be distracted by the vicarious liability
3 holding at the first trial because this is an insurance
4 coverage case and the policy says who is an insured. You,
5 meaning DHL. We're not trying to enforce a judgment
6 against DHL. It says, you, DHL, and anyone else while
7 using with your permission the covered auto you own or
8 hire. So it's not about vicarious liability of DHL, it's
9 the driver who is covered under the express language of the
10 policy, and also his employer, the owner of the vehicle is
11 expressly covered. This is not a vicarious liability.
12 It's strictly coverage, and that vehicle is covered under
13 the terms of the policy.

14 CHIEF JUDGE DIFIORE: Counsel argues that as to
15 permission, that the timing of the crash - - -

16 MR. MARKARIAN: Yes.

17 CHIEF JUDGE DIFIORE: - - - is what was key.

18 MR. MARKARIAN: Right.

19 CHIEF JUDGE DIFIORE: Would you address that?

20 MR. MARKARIAN: Yes. Thank you, Your Honor.

21 This comes into the Symbol 8 versus Symbol 9 point. And
22 we've now supplied the court with the Hanneman case that
23 makes the exact argument we've been making. What they're
24 asking the court to do is say that non-business use equals
25 no permission. And that's not what the policy says. The



1 policy says in 8 versus 9; and 9, when it says "non-
2 business use" means no coverage, it's explicit. Doesn't
3 say that in Symbol 8.

4 And so the Hanneman case makes the same analysis
5 we do. You know how to take away the coverage for non-
6 business use. And they don't do it in Symbol 8 like they
7 do in Symbol 9. And I would ask the court again, this is a
8 distorted case because DHL and the - - - as the policy
9 holder, they are united with the insurance companies.

10 I would ask the court to consider the garden
11 variety hired-auto case because the holding here will apply
12 there. I have a business. I have one truck. It broke
13 down this morning. I go to Ryder. I rent the truck for
14 the day. I tell my driver, don't go to Burger King when
15 you make the delivery and he goes to Burger King and he
16 gets in the accident. I need the hired auto coverage to be
17 just as good as my owned auto coverage. That's the
18 principal of hired-auto coverage. That's why the policy
19 equates hired auto with owned and hired in the same
20 sentence of the policy and why under Symbol 8 it does not
21 withdraw the coverage for a non-business use. You need the
22 hired auto coverage to be just as good.

23 JUSTICE ENG: In some other jurisdictions, of
24 course, you have a requirement that the vehicle be
25 specifically contracted for and that there be exclusive



1 control. Now, do you think the - - - the court should set
2 up a nebulous guideline over here as to what is hired and
3 what is not when other jurisdictions have specifically
4 outlined what they believe the requirements are?

5 MR. MARKARIAN: Your Honor, on a 3211 motion, we
6 need to see what the insurance company thought. We - - -
7 that's the key on hired-auto coverage, we need to see if
8 the insurance company thought it was insured as hired, and
9 we will know that - - - we do know it from the
10 underwriting. We will know it some more from the cost-of-
11 hire schedule. So we don't need this test.

12 In the Dairylea case from this court, the first
13 thing this court did was not get into the single tank - - -
14 single truck rule and the control. The first thing this
15 court did was look to see if there was an exclusion. It
16 looked to the policy. And that's what the court needs to
17 do here. What does the policy say? If the insurance
18 company wants to insure this vehicle, and now the amicus
19 admits DHL wanted this insurance, the only way to get it
20 here was under Symbol 8 for hired-auto coverage, and that
21 should control the analysis on a 3211 motion. What did the
22 insurance company say.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. MARKARIAN: Your Honors.

25 (Court is adjourned)



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C E R T I F I C A T I O N

I, Gina Gattone, certify that the foregoing transcript of proceedings in the Court of Appeals of Carlson v. AIG, No. 47 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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