

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----

COUNTRY-WIDE INSURANCE COMPANY,

Appellant,

-against-

No. 21

PREFERRED TRUCKING SERVICES CORP.,

Respondent.

-----

20 Eagle Street  
Albany, New York 12207  
January 15, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

THOMAS TORTO, ESQ.  
Attorneys for Appellant  
419 Park Avenue South, Suite 504  
New York, NY 10016

ALEXANDER J. WULWICK, ESQ.  
ROURA & MELAMED  
Attorneys for Respondent  
233 Broadway, Suite 2700  
New York, NY 10279

Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 21, Country-  
2 Wide.

3 Do you want any rebuttal time, counselor?

4 MR. TORTO: Yes, Your Honor, may I have two  
5 minutes?

6 CHIEF JUDGE LIPPMAN: Yeah, sure.

7 MR. TORTO: Thanks.

8 CHIEF JUDGE LIPPMAN: Two minutes; you're  
9 on. Go ahead.

10 MR. TORTO: Good afternoon. May it please  
11 the court, my name is Thomas Torto. I represent the  
12 plaintiff/appellant Country-Wide Insurance Company.  
13 We urge that Country-Wide could not properly disclaim  
14 as to the - - -

15 CHIEF JUDGE LIPPMAN: Why couldn't you  
16 disclaim as to Preferred?

17 MR. TORTO: Because - - -

18 CHIEF JUDGE LIPPMAN: What - - - what  
19 stopped you from doing it?

20 MR. TORTO: Because the insured - - -  
21 Preferred was still cooperating as long as the driver  
22 of the insured's vehicle was ostensibly still  
23 cooperating.

24 JUDGE GRAFFEO: And how is the driver  
25 cooperating? Because I thought he refused to come to

1           depositions. He didn't appear that he was working  
2           with you folks at all.

3                   MR. TORTO: Not until October 13th of 2008  
4           did the driver unequivocally state that he would not  
5           appear at his deposition. Up - - -

6                   JUDGE PIGOTT: How far along in the  
7           litigation were you by that point?

8                   MR. TORTO: In the underlying case,  
9           depositions were ordered, and they were set for, say,  
10          like September 25th - - -

11                   JUDGE PIGOTT: Of - - -

12                   MR. TORTO: - - - of 2008.

13                   JUDGE SMITH: The deadline kept getting  
14          extended - - -

15                   MR. TORTO: Yes.

16                   JUDGE SMITH: Yeah, I mean, the - - - it  
17          sounds like what they - - - they - - - the lawyer  
18          kept coming back saying, I'm still trying to get in  
19          touch with him, Judge; I haven't managed to yet. And  
20          the Judge would say, okay, I give you another ninety  
21          days.

22                   MR. TORTO: Correct.

23                   CHIEF JUDGE LIPPMAN: But what's - - - when  
24          - - - what's your responsibility? You're supposed to  
25          - - - when you're reasonably - - - within a

1 reasonable period of time when you know, that's when  
2 you're supposed to disclaim?

3 MR. TORTO: You - - -

4 CHIEF JUDGE LIPPMAN: You knew what - - -  
5 what Preferred was doing, right?

6 MR. TORTO: That's true. You have - - -

7 CHIEF JUDGE LIPPMAN: So why - - -

8 MR. TORTO: You have that principal on the  
9 one hand - - -

10 CHIEF JUDGE LIPPMAN: Why was what - - -  
11 what was happening with Preferred dependent on Arias?  
12 What's - - - what's - - - why did you have to - - -  
13 what's the theory of waiting for him?

14 MR. TORTO: Because Arias, in my - - - my  
15 argument, he is Preferred. He's the permissive  
16 driver. Preferred is liable - - -

17 CHIEF JUDGE LIPPMAN: Their interests are  
18 not exactly the same, are they?

19 MR. TORTO: I - - - I think they are.  
20 They're united in interest.

21 JUDGE PIGOTT: Well, you had one policy.  
22 You - - - obviously, the owner wasn't there at the  
23 time of the accident. The person that knew what was  
24 going on and could - - - testify with respect to that  
25 was - - - was Arias.

1 MR. TORTO: Right. The - - - the owner, he  
2 was an officer of the corporation, Mr. Markos. He's  
3 merely a president of the corporation, who, by - - -  
4 based on his record, had no personal knowledge of how  
5 this accident occurred.

6 CHIEF JUDGE LIPPMAN: Couldn't - - -  
7 couldn't their interests diverge, though, depending  
8 on what Arias says?

9 MR. TORTO: No, I don't believe so.

10 CHIEF JUDGE LIPPMAN: No?

11 MR. TORTO: I believe - - - I believe that  
12 Arias and - - - and the corporation are united in  
13 interest. The corporation is vicariously liable  
14 under 388 of Vehicle and Traffic Law, and also  
15 respondent-superior for the negligence of its driver,  
16 Mr. Arias.

17 JUDGE GRAFFEO: As a more general question,  
18 what should be the test as to when an insurance  
19 company should issue a disclaimer?

20 MR. TORTO: Well - - -

21 JUDGE GRAFFEO: What - - - are there  
22 several factors we should look at - - -

23 MR. TORTO: You - - -

24 JUDGE GRAFFEO: - - - or is there a certain  
25 thing that should happen?

1 MR. TORTO: You got - - - on the one hand,  
2 Your Honor, you have the requirement that an  
3 insurance company is obligated to promptly disclaim  
4 as soon as the pertinent facts and circumstances  
5 become apparent to it.

6 On the other hand, you've got the  
7 principle, the legal principle, articulated in  
8 Thrasher and most recently in Stradford from this  
9 court. An insurance company must make every  
10 reasonable effort - - - exhaustive efforts - - - to  
11 secure the cooperation of their insured more than  
12 disclaim.

13 CHIEF JUDGE LIPPMAN: How do you balance -  
14 - - how do you balance those two interests?

15 MR. TORTO: Well, I - - - I would suggest  
16 that the - - - the obligation to - - - to secure the  
17 cooperation of the insured trumps the obligation to  
18 promptly disclaim. I mean, they could have  
19 disclaimed maybe in 2007 - - -

20 JUDGE GRAFFEO: Because our policy in the  
21 state is to try to make sure we can secure coverage  
22 for - - -

23 MR. TORTO: Correct.

24 JUDGE GRAFFEO: - - - for the injured  
25 parties? That - - - that takes precedence over the

1 responsibility to disclaim timely?

2 CHIEF JUDGE LIPPMAN: So in that - - - in  
3 that - - - in that circumstance, you don't have to do  
4 it as soon as reasonably possible after you know?

5 MR. TORTO: I - - - I would argue that you  
6 - - - you would not. And then in effect, because you  
7 are - - -

8 CHIEF JUDGE LIPPMAN: So you're conceding  
9 in this case you didn't because you were waiting for  
10 - - - for Arias.

11 MR. TORTO: I'm concede - - - I'm - - - my  
12 argument is that of a disclaimer as to Preferred in  
13 July 2008, as the lower courts held that we should  
14 do, would have been premature as long as the driver  
15 was still cooperating.

16 JUDGE PIGOTT: What was he doing at that  
17 point in July of 2008?

18 MR. TORTO: The driver?

19 JUDGE PIGOTT: Yeah.

20 MR. TORTO: At that point, he had not - - -  
21 his attitude had not risen to the level of - - -

22 JUDGE PIGOTT: What - - - what was actually  
23 going on? In other words - - -

24 MR. TORTO: They were trying to contact  
25 him.

1 JUDGE PIGOTT: Pardon me?

2 MR. TORTO: They were trying to contact  
3 him.

4 JUDGE PIGOTT: So - - -

5 JUDGE GRAFFEO: Was he still working for  
6 Preferred at that point?

7 MR. TORTO: I don't believe so. It - - -

8 JUDGE GRAFFEO: I couldn't tell. I  
9 couldn't tell from the papers.

10 MR. TORTO: You can't tell. You know, they  
11 - - - I mean - - -

12 JUDGE READ: So how late could you disclaim  
13 under the circumstances of this case?

14 MR. TORTO: I would say October 13th of  
15 2008 was the trigger date when the driver  
16 unequivocally stated he's not appearing and he - - -

17 JUDGE READ: To the depositions?

18 MR. TORTO: - - - he doesn't care what  
19 happens. And - - - and that's what the lower courts  
20 held. I mean - - -

21 CHIEF JUDGE LIPPMAN: And was the date that  
22 you actually disclaimed, your view is, it's de  
23 minimis between when you learned of it and when you  
24 actually did the disclaimer?

25 MR. TORTO: Right. The disclaimer is



1 November 6th.

2 CHIEF JUDGE LIPPMAN: Yeah, so - - -

3 MR. TORTO: Some twenty days - - -

4 CHIEF JUDGE LIPPMAN: - - - so your

5 argument is that is - - -

6 MR. TORTO: Right.

7 CHIEF JUDGE LIPPMAN: - - - timely.

8 MR. TORTO: Well, the Appellate Division,  
9 in my opinion, penalized Country-Wide for pursuing  
10 its obligation imposed by this court in Thrasher and  
11 in the other cases to make every effort to secure the  
12 cooperation of the insured. The insured is  
13 Preferred, but the only way Preferred can act is  
14 through its agent.

15 CHIEF JUDGE LIPPMAN: Yeah, but what length  
16 - - -

17 JUDGE RIVERA: But at what - - -

18 CHIEF JUDGE LIPPMAN: What length of time  
19 is appropriate between if you have to do it as soon  
20 as reasonably possible after you know, and then  
21 trying to do your due diligence? Can that go on for  
22 another year or what - - -

23 MR. TORTO: I, you know - - -

24 CHIEF JUDGE LIPPMAN: - - - what's the  
25 balance here?

1 MR. TORTO: All I - - - it's a sui generis,  
2 I would say, Judge Lippman, because in Allstate  
3 against Gross, the court said you got to look at the  
4 facts and circumstances of each particular case to  
5 make - - - to make that determination.

6 JUDGE SMITH: Does - - -

7 JUDGE RIVERA: So how many - - - I'm sorry.  
8 How - - - how often does, let's say with Arias, does  
9 Arias have to be unavailable, you can't find him,  
10 he's unwilling to be - - - he's unresponsive. How  
11 often does that have to happen before your hopes that  
12 you'll find him or that he'll agree are - - -

13 MR. TORTO: I would say - - -

14 JUDGE RIVERA: - - - no longer going to  
15 offset the - - - the duty to - - - to disclaim?

16 MR. TORTO: I would say over a - - - a  
17 significant period of time that the carrier has to  
18 keep doing follow-ups with a recalcitrant insured - -  
19 -

20 JUDGE READ: A year?

21 JUDGE RIVERA: Yes, how long would that - -  
22 - a year?

23 MR. TORTO: It could be.

24 JUDGE RIVERA: Yeah.

25 MR. TORTO: And it - - - but it has to

1 reach the point, though, where the insured says,  
2 basically, you know, drop dead, I'm not coming, don't  
3 bother me.

4 JUDGE SMITH: Well, there - - - but there  
5 are some insureds who really, who will never say  
6 that. You can go ten years, and you won't get - - -  
7 I mean, there's got to be a point when you say,  
8 enough is enough.

9 MR. TORTO: Well, you know, the standard is  
10 whe - - - is when the insured's attitude has risen to  
11 the level of an avowed - - -

12 JUDGE SMITH: Well, supp - - - well,  
13 suppose the insured's attitude is I'll get back to  
14 you. And he says, I'll get back to you, every time  
15 you contact him.

16 MR. TORTO: Right.

17 JUDGE SMITH: After - - - yeah. After - -  
18 - after the first decade can you say, maybe he's not  
19 going to get back to me?

20 MR. TORTO: I don't know. At some point,  
21 the carrier has to make that determination. But I  
22 say in this case - - -

23 JUDGE RIVERA: Well, what's the point - - -

24 JUDGE GRAFFEO: You're saying four months  
25 wasn't - - - wasn't unreasonable?

1 MR. TORTO: No, because Markos has nothing  
2 to do with - - - it's not determinative here. Let's  
3 assume that Markos is not co - - - he's not  
4 cooperating, and they should have disclaimed in - - -  
5 in July of 2008. I say, so what? As long as the  
6 driver's still cooperating, he could provide a  
7 defense, not only for himself, but for the insured,  
8 who's trucking - - -

9 JUDGE SMITH: Does - - - does the insured  
10 have - - - does the insurer have - - - have some  
11 discretion? I mean, suppose if you had decided to  
12 disclaim after Markos told you to forget about it,  
13 would that necessarily have been wrong?

14 MR. TORTO: I think it would have been  
15 premature.

16 JUDGE SMITH: So you would - - - you - - -  
17 you could have - - - you would have been sued for - -  
18 - you would have had to give coverage to Preferred  
19 even though - - - even though Markos had told you to  
20 forget about it.

21 MR. TORTO: That's right, and in this case,  
22 it actually benefited the - - -

23 JUDGE SMITH: But isn't it - - - isn't it  
24 possible that there could be a situation where it'd -  
25 - - where it'd be perfectly reasonable for the

1 insurance company to do either one thing or the  
2 other? To either disclaim or wait a few more months  
3 than we might want - - - even though they could  
4 disclaim, we might want to encourage them to wait a  
5 few more months?

6 MR. TORTO: Yes, I think that's this case.  
7 By - - - by continuing to secure - - - trying to get  
8 the cooperation of the driver - - -

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. TORTO: - - - it benefited the - - -  
11 the injured party in this case - - -

12 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll  
13 have your rebuttal.

14 MR. TORTO: - - - to appeal in court.

15 CHIEF JUDGE LIPPMAN: Thank you, counsel.

16 MR. TORTO: Thank you.

17 MR. WULWICK: May it please the court, Alex  
18 Wulwick for the respondents.

19 CHIEF JUDGE LIPPMAN: Counsel, why - - -  
20 why shouldn't we view this that they're doing their  
21 due diligence? It's to everyone's advantage,  
22 including the - - - the insured that - - - that they  
23 go and they - - - and they really do everything they  
24 can to - - - before they decide that they have to  
25 disclaim. What's wrong with that?

1 MR. WULWICK: Because they knew certainly -  
2 - - the question, I think, was raised as to how long  
3 this had gone on even before July of 2008, and  
4 actually Country-Wide had issued a - - - a - - -  
5 recommended the investigation be closed in May 18 - -  
6 - on May 18th of 2007.

7 CHIEF JUDGE LIPPMAN: Yeah, but they're  
8 saying that Arias is united in interest with  
9 Preferred and that it - - - it made sense for them to  
10 wait and make sure - - -

11 MR. WULWICK: That's - - - you see, I  
12 think, that's where I think they're wrong. They're -  
13 - - they're not united.

14 CHIEF JUDGE LIPPMAN: Why? Tell us.

15 MR. WULWICK: They're not united in  
16 interest because they're as - - - it's not a - - -  
17 there's no dispute that Preferred and Arias are  
18 separate insureds under the policy.

19 JUDGE PIGOTT: Yeah, but it's one policy.

20 MR. WULWICK: One policy.

21 JUDGE PIGOTT: The best thing that happened  
22 to you was that - - - that they failed to cooperate.  
23 You now have the best of both worlds. You've got - -  
24 - you've got an insurance company trying like the  
25 devil to - - - to defend these people on - - - on

1           this - - - on - - - as a result of this accident.  
2           They - - - they - - - investigators, letters, you  
3           can't think of - - -

4                         MR. WULWICK:   But - - -

5                         JUDGE PIGOTT:   - - - another thing they  
6           should have done.  What's great news for you is, that  
7           because of the default - - - because they - - - of  
8           the default and a judgment, you now have a free path  
9           in to prove up your case.  You get a two-something-  
10          million-dollar judgment unopposed.  And now, I guess  
11          you took an assignment from - - - from the insureds,  
12          right?

13                        MR. WULWICK:   Well, I think that the way  
14          the law works is that we - - - we - - - actually I  
15          don't know about any assignments, Your Honor, but I  
16          know that we're limited - - -

17                        JUDGE PIGOTT:   Well, you can't - - - you  
18          can't sue anything against the carrier unless you get  
19          an assignment from the - - - from the defendants,  
20          right?

21                        MR. WULWICK:   Well, we're limited to the -  
22          - - to the policy limits of 500,000 dollars plus  
23          interest running on that appeal presently.

24                        JUDGE PIGOTT:   Right, but that claim - - -  
25          I thought that claim runs to the - - - to the

1 defaulting defendants. They're the ones that ought  
2 to be going to Country-Wide and saying, you didn't  
3 defend us enough, and now we have this judgment  
4 against us.

5 MR. WULWICK: As the record stands now,  
6 Your Honor, all - - - the only thing I know about is  
7 that we have a default judgment against - - -

8 JUDGE PIGOTT: Right, but generally  
9 speaking, it - - - in my experience, what you do - -  
10 - what you do if you're the plaintiff is, you go to  
11 that defendant and say, look, we're either going to  
12 take your house, or you can assign your rights  
13 against Country-Wide to us, and then we'll assert  
14 your rights on behalf on Country-Wide. I didn't see  
15 that in the record, but I want to assume that's true.

16 MR. WULWICK: No, that's - - -

17 JUDGE PIGOTT: But then - - - so what  
18 you're asserting are the driver and the - - - and the  
19 owner's rights, right, under that policy?

20 MR. WULWICK: Essentially.

21 JUDGE PIGOTT: And they're the ones that  
22 didn't cooperate. And they're the ones - - - now  
23 you're saying, well, you didn't wait long enough to  
24 see if someday we were going to come around and  
25 cooperate. And I don't understand why that entitles



1           you to - - - to get the full amount of the policy.

2                   MR. WULWICK:   Because Your Honor, what - -  
3           - we're only operating under the law, 3420, the  
4           Insurance Law.  The decision by this court in Jetco  
5           that says that after a reasonable amount of time, the  
6           insurer is obligated to disclaim and give the - - -  
7           give the insured sufficient time to - - - to obtain  
8           alternative means of - - - of defense and insurance.  
9           And it's not even a question of four months, although  
10          four months has been held by this court and others as  
11          - - - as a matter of law to be too long to disclaim,  
12          but we are talking about their efforts to get  
13          cooperation from the insureds going back to May of  
14          2007 and then again the - - - the file was closed in  
15          January of 2008, which is now eleven months, or ten  
16          months, before - - -

17                   JUDGE SMITH:  As a general proposition  
18          though, it's in your - - - maybe not in your interest  
19          in this case - - - but it's in the - - - it's in the  
20          plaintiff's interest for the insurance company to try  
21          really hard to get that cooperation.  And - - -

22                   MR. WULWICK:  Yes, Your Honor.  But by the  
23          same token in Jetco, this court said that there's  
24          also an obligation on the insurance company to give  
25          sufficient time to the insureds to disclaim.  And

1           that was - - -

2                       CHIEF JUDGE LIPPMAN:   How do you weigh the  
3           various policy considerations in both directions?

4                       MR. WULWICK:   I think - - -

5                       CHIEF JUDGE LIPPMAN:   In the bigger  
6           picture, you would - - - you've just agreed that due  
7           diligence is really important - - -

8                       MR. WULWICK:   Yes, Your Honor.

9                       CHIEF JUDGE LIPPMAN:   - - - and that they  
10          shouldn't disclaim.   How do you - - - how do you  
11          weigh that versus the other consideration of the  
12          insured knowing early on that this is a disclaimer?

13                      MR. WULWICK:   I think it's weighed here by  
14          the - - - by the very facts of the record.   The - - -  
15          the insurance company, Country-Wide, knew as early,  
16          say, of May of 2007, then again in January 2008, that  
17          there was going to be no cooperation.   They received  
18          no cooperation from Markos - - -

19                      JUDGE SMITH:   From - - - from Preferred,  
20          you mean?

21                      MR. WULWICK:   From Preferred - - -

22                      JUDGE SMITH:   I mean, they did eventually -  
23          - - they - - - I mean, as I gather, you're not - - -  
24          you're not challenging that as to Arias - - -

25                      MR. WULWICK:   No.

1 JUDGE SMITH: - - - they didn't have to  
2 disclaim before they did.

3 MR. WULWICK: No, we're not. But as to - -  
4 - as to Preferred through Markos - - -

5 JUDGE SMITH: But I - - - but isn't - - -  
6 but then doesn't - - - couldn't you try the case, if  
7 you're - - - if you're representing Preferred? You  
8 could try it without a Preferred witness. You could  
9 try it with Arias' testimony.

10 MR. WULWICK: Yes, Your Honor. If he were  
11 to cooperate, the case could be tried with his  
12 cooperation, but - - - but - - -

13 JUDGE SMITH: So - - - so if they - - - if  
14 they had - - - if they had disclaimed when Mark - - -  
15 after Markos told them, forget about it; I'm not  
16 interested, wouldn't you come in screaming and say,  
17 they've - - - they've disclaimed prematurely? They  
18 can try this case with or without - - - without  
19 Markos.

20 MR. WULWICK: I might be able to - - - to  
21 claim that, but after four months, as a matter of  
22 law, the disclaimer is late.

23 JUDGE PIGOTT: That's - - - that's - - -  
24 that's your position that it's a matter of law, even  
25 though they spent a year and a half trying to track

1           these people down in every way I can think of, that  
2           because when they - - - they close their file, and  
3           they're still litigating with respect - - - with the  
4           driver, that somehow that - - - that means that they  
5           got to pay you the policy?

6                     MR. WULWICK:   Still litigating with respect  
7           to the driver, perhaps, only based on his - - - his  
8           throwaway assurance that he would show up for a  
9           deposition, which he reneged on, but certainly not  
10          through the - - - the - - - not through the  
11          cooperation of Markos, whom they knew for - - -

12                     JUDGE PIGOTT:   But Markos - - - Markos is  
13          irrelevant to this - - - Judge Smith - - -

14                     MR. WULWICK:   Well, actually, I don't see  
15          how he is, Your Honor.

16                     JUDGE PIGOTT:   - - - asked but - - - it's  
17          permissive use.  He - - - the - - -

18                     MR. WULWICK:   Markos - - -

19                     JUDGE PIGOTT:   The only person that was  
20          there at the time of the accident - - - it's a  
21          presumptive permissive use.  I mean, Markos - - -

22                     MR. WULWICK:   Yes.

23                     JUDGE PIGOTT:   - - - isn't coming in and  
24          saying he didn't have a right to drive my truck.  So  
25          you got a - - - you've got a driver who as a result

1 of his conduct - - - his negligence, you allege - - -  
2 causes an accident in which your guy is injured.

3 MR. WULWICK: Your Honor, I cannot  
4 emphasize too strongly, this is not a VTL acci - - -  
5 highway accident case. This is a construction  
6 accident case. The injuries occurred because the  
7 plaintiff was - - - was doing some sort of gravel  
8 work on a runway in a - - - on an airport - - -

9 JUDGE PIGOTT: Was the plaintiff working  
10 for - - - for Markos?

11 MR. WULWICK: No, Your Honor.

12 JUDGE PIGOTT: He didn't? Okay.

13 MR. WULWICK: A third party. He was doing  
14 construction work on a runway. He opened the latch  
15 of the door of the truck, to get some gravel down.  
16 The latch was left, and unfortunately as he's doing  
17 what he's doing, the latch - - - the door unlatches  
18 and comes swinging against him and causes his injury.  
19 This is not a - - - this is not a 388 - - -

20 JUDGE SMITH: Why is that - - - why is that  
21 relevant?

22 MR. WULWICK: Because what - - - what  
23 Country-Wide tried to find out from Markos early on  
24 and never did was what his involvement was with the  
25 truck. And perhaps Arias told Markos, you know, this

1 latch on the truck has - - - has been really acting  
2 up and you have to be careful; it's very dangerous.  
3 Maybe Markos knew about that. Maybe Markos as owner  
4 of the truck - - -

5 JUDGE PIGOTT: That's not your concern.  
6 It's - - - it's Country-Wide's, and they tried to do  
7 everything they possibly could - - -

8 JUDGE SMITH: You - - - you - - -

9 JUDGE PIGOTT: - - - to find all that out.

10 MR. WULWICK: But - - -

11 JUDGE SMITH: I mean, I'm sorry. Are you  
12 saying you had to prove negligence by Preferred?

13 MR. WULWICK: I don't - - - I don't say we  
14 had to, I say it's possible, and Country-Wide could  
15 not claim that Markos was irrelevant to this - - - to  
16 this case, simply by saying that he was the owner of  
17 the truck, and therefore, vicariously liable under  
18 some sort of respondent-superior.

19 JUDGE SMITH: Well, but I - - - I still - -  
20 - I'm not - - - I still don't see why it would be - -  
21 - why you couldn't reasonably expect the carrier's  
22 lawyer to defend the owner of the truck, if he only -  
23 - - if he has the driver's testimony?

24 MR. WULWICK: He might defend the owner of  
25 the truck because he's a separate insured. But the -

1 - - the Preferred - - - Preferred, through Markos, is  
2 also a separate insured. There are two insureds on  
3 the policy. There's no reason why Country-Wide could  
4 not have disclaimed as to the uncooperative Preferred  
5 through Markos, and then say, okay, Mr. Arias would  
6 have - - -

7 JUDGE SMITH: Well, why - - - why isn't it  
8 - - - why - - - he suggesting that there is a reason  
9 he couldn't have disclaimed, which is that the - - -  
10 the - - - Markos' noncooperation did not really  
11 prevent him from defending the case. I mean, it's -  
12 - - in principle, as he wrote, if you can defend the  
13 case, you've got to defend it, even if one of your  
14 insureds is giving you trouble?

15 MR. WULWICK: Markos - - - I think it's  
16 arguable that Markos did prevent - - -

17 JUDGE SMITH: But how did - - - how did  
18 Markos' - - -

19 MR. WULWICK: - - - the defense of the case  
20 as - - -

21 JUDGE SMITH: How does Markos' refusal to  
22 cooperate prevent - - - prevent him from defending  
23 the case?

24 MR. WULWICK: Because Markos - - - because  
25 I think it's a - - - a imperative for an insurance

1           company to know what the owner of the truck knew  
2           about the - - - the possible defective - - -

3                   JUDGE PIGOTT: But that's not your concern.  
4           You're the plaintiff. You're going to prove that  
5           there was negligence in that - - - as a result of  
6           which your guy was - - - was injured. And Arias is  
7           the guy that was there with the truck.

8                   MR. WULWICK: But Your Honor, Preferred's -  
9           - - Country-Wide's argument is solely based on the  
10          fact that they - - - that Markos was irrelevant to  
11          this appeal - - - to this case, which is - - -

12                   JUDGE PIGOTT: It's irrelevant to you, is  
13          my point.

14                   MR. WULWICK: But it - - - that may - - -  
15          that may be the case ultimately, but so far as the  
16          Insurance Law is concerned, they could not say he's  
17          irrelevant to the case; we have to wait to disclaim  
18          for who knows how long a time - - -

19                   JUDGE PIGOTT: Right, but - - - but by  
20          saying it's irrelevant to you, you're saying it's - -  
21          - it doesn't make a difference to me. I'm - - - I'm  
22          the plaintiff; I'm suing the case. But Country-Wide  
23          cannot limp into this courtroom with one - - - one of  
24          two witnesses and defend themselves against me; I'm  
25          entitled to a default, and I get the 200 - - - I get



1 the path to 500,000 dollars by default.

2 MR. WULWICK: In either case, Your Honor,  
3 again, I can only go back to the fact that there are  
4 two insureds on the policy.

5 JUDGE GRAFFEO: Well, weren't - - - wasn't  
6 there discussions with Arias from August to October  
7 about a deposition? So if he had agreed and had come  
8 in and had been disposed - - - had been deposed, he  
9 could have said something about his employer, like  
10 you just mentioned. You know, I told the employer  
11 there was a problem with the door latch on this - - -  
12 on this vehicle. So I'm having trouble seeing why  
13 you see these parties as so distinct?

14 MR. WULWICK: Only because they are  
15 distinct, because they're two separate - - - they're  
16 mentioned as two separate insureds under the policy.  
17 Our - - - Preferred by virtue of - - - the - - - the  
18 main - - - the main policy holder; Arias by virtue of  
19 his permissive use of the truck - - -

20 JUDGE PIGOTT: But wasn't - - - wasn't the  
21 coverage identical? I mean, you're only - - - you're  
22 only talking about one policy with a half-a-million-  
23 dollar coverage, right?

24 MR. WULWICK: Yes, Your Honor, but it  
25 doesn't mean that Preferred is - - - is at the top,

1 and then we have Markos and Arias at the - - -

2 JUDGE PIGOTT: No, but I'm wondering - - -

3 MR. WULWICK: - - - branching off.

4 JUDGE PIGOTT: Judge Smith, I guess,  
5 alluded to this a little bit. If - - - if one of  
6 them fails to cooperate, they can still go forward.  
7 I mean, if - - - if Arias disappeared - - -

8 MR. WULWICK: But that's - - - that's the  
9 point, Your Honor, if they can still go forward, they  
10 can't say we have to wait to - - - to disclaim as to  
11 Preferred because we're waiting for Arias to - - - to  
12 come through on their search.

13 JUDGE GRAFFEO: Maybe they were hoping  
14 Markos was going to encourage Arias.

15 MR. WULWICK: They may have been hoping - -  
16 -

17 JUDGE GRAFFEO: - - - to participate.

18 MR. WULWICK: I don't know what they may  
19 had been hoping, Your Honor, but certainly enough  
20 time went by for them to be able - - - if - - - if  
21 they - - - if the - - - the two insured are separate  
22 insureds, they had enough time to disclaim as to  
23 Preferred, certainly more than enough time, more than  
24 four months - - - but okay, four months - - -

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 MR. WULWICK: Do you mind if I - - -

2 CHIEF JUDGE LIPPMAN: Thanks. No - - -

3 MR. WULWICK: - - - the - - - present the  
4 preservation issue?

5 CHIEF JUDGE LIPPMAN: Counsel, your - - -  
6 your time is up, counsel. Thank you.

7 Counsel, rebuttal?

8 MR. TORTO: Briefly, Your Honors. I'd just  
9 like to emphasize again that I would argue that Mr.  
10 Arias speaks on behalf of the corporation. Why is it  
11 that the only way that Preferred Trucking can  
12 cooperate is through Mr. Markos? Preferred Trucking  
13 can cooperate through Mr. Arias, because he's an  
14 employee. He's an authorized driver of the truck.

15 JUDGE SMITH: Your - - - your adversary  
16 suggests - - - not just now, but I think he did in  
17 his brief - - - that you haven't preserved this  
18 point. Did you make this argument below?

19 MR. TORTO: Yes, at pages 256 and pages 335  
20 of the record, we made a specific argument that  
21 Country-Wide's disclaimer was timely - - -

22 JUDGE GRAFFEO: In Supreme Court?

23 MR. TORTO: Yeah, in Supreme Court. As to  
24 both Preferred and Mr. Arias. We said it's timely.  
25 Now the - - - the respond - - - the respondents

1 didn't - - - never argued that Country-Wide's  
2 disclaimer is untimely. They - - - they - - - they  
3 measured it from the date that Mr. Arias refused to  
4 cooperate, October 18th of 2008. Nowhere do they  
5 make that argument.

6 This decision was a sua spon - - - I mean,  
7 the - - - where the judge basically split the baby,  
8 and said that Country-Wide's disclaimer is timely as  
9 to Mr. Arias - - -

10 JUDGE SMITH: So you're really saying the  
11 first time the idea of a - - - of a - - - of what  
12 would be an untimely to one and timely as to the  
13 other, came from the Supreme Court justice's opinion?

14 MR. TORTO: That's right. Sua sponte. And  
15 then - - -

16 JUDGE PIGOTT: The fact - - - the fact that  
17 the court made that determination practically meant  
18 nothing, right? I mean, as long as - - - as long as  
19 you were wrong about one, you were done.

20 MR. TORTO: That's right. Right, we - - -  
21 we - - - you know, I'm - - - to me, the big problem  
22 with this case - - - I mean, the hurdle was to  
23 establish that they exercised the requisite due  
24 diligence to secure the cooperation of the insured.  
25 It's a heavy burden. But, you know, they went

1 through Herculean efforts to try to get the  
2 cooperation here, and they end up getting, you know,  
3 whacked, because they continued to seek the  
4 cooperation of the really important witness, the  
5 driver.

6 JUDGE PIGOTT: When - - -

7 JUDGE RIVERA: So other - - - other than -  
8 - - other than the insured's saying I refuse to  
9 cooperate, what - - - what would put you on notice  
10 that they're not going to cooperate anymore?

11 MR. TORTO: Basically that, or the insured  
12 has to, you know, affirmatively state I'm not  
13 cooperating; you're on your own; don't bother me.

14 JUDGE RIVERA: So you think that should be  
15 the rule?

16 MR. TORTO: But - - -

17 JUDGE RIVERA: An affirmative statement  
18 from the insured, I will not cooperate?

19 MR. TORTO: Right, that - - -

20 JUDGE RIVERA: Conduct alone will not do  
21 it.

22 MR. TORTO: Well, it could.

23 JUDGE PIGOTT: Well, conduct can and in  
24 fact, if you - - - even if Mr. Arias came in and said  
25 I'm going to tell you something. I'm absolutely

1 negligent and I'm not going to - - - and I'm not  
2 going to participate in anything that says I'm not,  
3 because I'm not going to perjure myself.

4 MR. TORTO: Right. But here, I mean, that  
5 happened October 8th. There's no dispute that that  
6 happened October 18th - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but you agree  
8 that there could be circumstances short of their  
9 saying, I will not cooperate, that tells you that  
10 they're not cooperating, and your responsibility, if  
11 that were the case, is to disclaim at that point.

12 MR. TORTO: Right, but - - - but I'm  
13 saying, even if - - - even if Mr. Markos, you know,  
14 had some information that might be relevant, and he  
15 doesn't cooperate, I don't think Country-Wide could  
16 disclaim, as long as the driver's still cooperating.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.

18 MR. TORTO: Because they could - - -

19 CHIEF JUDGE LIPPMAN: Okay.

20 MR. TORTO: - - - they could defend the  
21 case.

22 CHIEF JUDGE LIPPMAN: Thank you, counsel.

23 MR. TORTO: Thank you.

24 CHIEF JUDGE LIPPMAN: Thank you both.

25 (Court is adjourned)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Country-Wide Insurance Company v. Preferred Trucking Services Corp., No. 21 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

Date: January 23, 2014