

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

-----

CARLSON,

Appellant,

-against-

NO. 47

AIG,

Respondent.

-----

20 Eagle Street  
Albany, New York  
March 28, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

EDWARD J. MARKARIAN, ESQ.  
MAGAVERN MAGAVERN GRIMM LLP  
Attorney for Appellant  
1100 Rand Building  
14 Lafayette Square  
Buffalo, NY 14203

KEVIN D. SZCZEPANSKI, ESQ.  
HODGSON RUSS LLP  
Attorney for Respondent AIG  
The Guarany Building  
140 Pearl Street  
Suite 100  
Buffalo, NY 14202

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

PAUL KOVNER, ESQ.  
RUBIN, FIORELLA & FRIEDMAN LLP  
Attorney for Respondent American Alternative Insurance Co.  
630 Third Avenue  
3rd Floor  
New York, NY 10017

PATRICK J. LAWLESS, ESQ.  
WILSON ELSEER MOSKOWITZ EDELMAN & DICKER LLP  
Attorney for Respondent DHL Express  
150 East 42nd Street  
New York, NY 10017

1 CHIEF JUDGE DIFIORE: Next on the calendar is  
2 appeal number 47, Carlson v. AIG.

3 Good afternoon, counsel.

4 MR. MARKARIAN: Good afternoon, Your Honors. May  
5 it please the court. My name is Ed Markarian, I'm the  
6 attorney for the plaintiff, and we would request two  
7 minutes for rebuttal, please.

8 CHIEF JUDGE DIFIORE: Yes, sir.

9 MR. MARKARIAN: Your Honors, the Appellate  
10 Division erred in this case in holding, as a matter of law,  
11 on a CPLR 3211 motion that the contractor vehicles could  
12 not be insured as hired autos under the defendant's  
13 insurance policies.

14 JUDGE GARCIA: Counsel, on that point, on the  
15 hired auto point, and I know - - - I'm not saying we will  
16 do this, but if we were to find these weren't hired  
17 vehicles used with permission, do we have to get to the  
18 third - - - the other issue, the statutory issue on issued  
19 or delivered?

20 MR. MARKARIAN: Your Honor, that may be moot at  
21 that point. On the issued or - - - I thought you meant on  
22 the AAIC issue, of the - - -

23 JUDGE GARCIA: No, on the issued or delivered.

24 MR. MARKARIAN: On the issued or delivered issue.

25 JUDGE GARCIA: Because there would be no coverage

1 at that point, right?

2 MR. MARKARIAN: Your Honor, could you ask it  
3 again? I'm just not following.

4 JUDGE GARCIA: If - - - if we were to disagree  
5 with you on to the hired auto, or agree with the Appellate  
6 Division that these are not hired autos, would we need to  
7 get to the issued or delivered?

8 MR. MARKARIAN: No, that is of the AAIC issue,  
9 Your Honor, the statutory issue - - -

10 JUDGE GARCIA: Yeah.

11 MR. MARKARIAN: - - - the 3420, no, you would not  
12 have to reach that. And that is a compelling issue of  
13 statewide importance. But I - - - if I don't prevail on  
14 the other issue - - -

15 JUDGE GARCIA: Okay.

16 MR. MARKARIAN: - - - that issue is a hollow  
17 victory for me, and I understand that jurisdictionally,  
18 that you might not be able to reach it, because it would be  
19 moot.

20 JUDGE GARCIA: Fair enough.

21 MR. MARKARIAN: So I understand - - -

22 JUDGE WILSON: Am I - - - am I correct that the  
23 3420 claim does not apply to AIG because they're not an  
24 insurer here?

25 MR. MARKARIAN: That's correct. National Union

1 is the insurer that stays in the case even if the 3420  
2 issue is successful for AAIC, which it should not be, Your  
3 Honor. But National Union would still be in the case.

4 So with respect to the hired auto question, Your  
5 Honors, there are four important points that the court  
6 needs to consider. Number one is that federal law requires  
7 that these vehicles have five million dollars of coverage.

8 JUDGE GARCIA: But wouldn't that be a question  
9 for DHL, if that happens at some point, and they are  
10 underinsured, the Feds can certainly - - - that would be  
11 some kind of penalty or - - - but what we're looking at is  
12 a contract here.

13 MR. MARKARIAN: That's right.

14 JUDGE GARCIA: So what is the contract provided  
15 for in terms of what vehicles are insured? They may have a  
16 problem at some point with the Feds if the catastrophe you  
17 have in your brief happens, but I don't see how that  
18 affects how we look at this.

19 MR. MARKARIAN: I think it's supremely relevant,  
20 Your Honor, because this is a 3211 motion. They're asking  
21 you to review cold documents in a vacuum, and we submit you  
22 should - - -

23 JUDGE GARCIA: Which is generally the case in an  
24 insurance contract though, right, if the language is clear?

25 MR. MARKARIAN: But Your Honor, when you can see

1 business motives from the documents they've submitted to  
2 you, and you can see the Federal Law requires as coverage,  
3 and to assume that you'll - - -

4 JUDGE STEIN: But that's - - - that's - - -  
5 that's extrinsic to the contract itself; isn't - - - is it  
6 not?

7 MR. MARKARIAN: It's a business motive, Your  
8 Honor. You're being asked to conclude on 3211 - - -

9 JUDGE RIVERA: No, but the question is why are  
10 you looking at the documents if you first start out with  
11 the - - - the insurance policy itself, if that resolve the  
12 question. Unless you're going to stand up and argue that  
13 it's am - - - the provisions are ambiguous, and if the  
14 court were to agree with you, that's a different argument.  
15 But if - - - if the court finds it's unambiguous, we don't  
16 look at the other documents; isn't that correct?

17 MR. MARKARIAN: Your Honor, it is ambiguous. I  
18 do think business motives are relevant to understanding the  
19 documents in front of you.

20 JUDGE STEIN: Did you argue that it was ambiguous  
21 in the courts below?

22 MR. MARKARIAN: Yes, Your Honor. Yes.

23 JUDGE STEIN: I thought you argued that it was  
24 unambiguous in your favor.

25 MR. MARKARIAN: Well, that's correct. That's

1 going so far to the other extreme, at the motion court,  
2 they said it was so unambiguous, but at a minimum, that  
3 preserves that it's ambiguous. And they argued forcefully,  
4 Your Honors.

5 JUDGE STEIN: Let me ask you another question.  
6 Has - - - has this provision been in - - - in other  
7 insurance policies pretty pervasively, the hired auto  
8 provision?

9 MR. MARKARIAN: Yes, Your Honor. This court in  
10 the - - -

11 JUDGE STEIN: And have we ever had trouble  
12 interpreting it, or have we ever said that it was ambiguous  
13 and, I mean, did - - -

14 MR. MARKARIAN: Yes, Your Honor. You did in the  
15 Jefferson case. You found an ambiguity with respect to the  
16 notice issue, and then you looked to the cost-of-hire  
17 schedule to determine that the vehicle was covered.

18 JUDGE RIVERA: So what makes it ambiguous here?

19 MR. MARKARIAN: The biggest ambiguous factor,  
20 Your Honor, is that they didn't give you the whole  
21 insurance policy. You can't say that the policy is  
22 unambiguous when you don't have the whole policy. You  
23 don't have the most important schedule list.

24 JUDGE GARCIA: How do you get around the  
25 permission issue? Because even if, let's say, we could

1           assume that, in some sense, these vehicles could be hired  
2           by DHL, you know, for use by MV - - - MVP owns them, and  
3           somehow DHL is hiring them, DHL still has these provisions  
4           in their contract with MVP about use outside of business  
5           hours, and that's clearly what happened here. I mean,  
6           there's already been a finding of that. So how do you get  
7           around the permission restriction in the contract language?

8                   MR. MARKARIAN: Because the language in this  
9           policy on permission is exactly the same for hired and  
10          owned vehicles. And just like MVP, in this case, was found  
11          - - -

12                   JUDGE GARCIA: They're an owner, they're an  
13          owner. And we have a statute that talks about the  
14          presumption of permission when you're an owner. These  
15          aren't - - -

16                   MR. MARKARIAN: That's correct.

17                   JUDGE GARCIA: You're not saying that DHL is an  
18          owner.

19                   MR. MARKARIAN: I'm saying that they defined  
20          "hired", permission as to hired in their insurance policy  
21          the same exact way that they define permission as to owned.

22                   JUDGE GARCIA: Where is that?

23                   MR. MARKARIAN: It is at - - - it's at - - -  
24          right in the insurance pol - - - I'll read - - -

25                   JUDGE GARCIA: If you could.

1 MR. MARKARIAN: Yes. "Who is an insured? Anyone  
2 else" - - -

3 JUDGE RIVERA: I'm sorry, where - - - where are  
4 you reading - - -

5 JUDGE ABDUS-SALAAM: Yeah.

6 JUDGE RIVERA: - - - in the policy?

7 MR. MARKARIAN: This is right from the policy.

8 JUDGE RIVERA: But what page in the appendix,  
9 would it - - -

10 JUDGE ABDUS-SALAAM: What would it be in the  
11 record?

12 JUDGE RIVERA: Or if you could just say the  
13 provision; do you have the provision number there?

14 MR. MARKARIAN: Yes.

15 It's record pages 1815 to 1816.

16 JUDGE RIVERA: Thank you.

17 MR. MARKARIAN: "Who is an insured? Anyone else  
18 while using with your permission a covered auto you own,  
19 hire, or borrow."

20 So permission is in the same sentence of their  
21 policy as own and hire.

22 JUDGE GARCIA: Right. But I think the problem I  
23 have with that argument is, and even the Vehicle and  
24 Traffic Law, it's not defining permission; it's saying  
25 owner, you get a presumption of permission, which is I

1 think why MVP had a problem even in the Appellate Division  
2 originally on appeal.

3 But when you hire a vehicle, you're not the  
4 owner. So permission is something different. Own - - -  
5 you're - - - you're defining the term permission by owner  
6 and then saying it also applies to hired vehicle.

7 MR. MARKARIAN: Only because this insurance  
8 policy refers - - - "permission" refers to own and hire in  
9 the same sentence. And - - -

10 JUDGE GARCIA: Right. And "owner", you get a  
11 presumption, "hired vehicle" you do not.

12 MR. MARKARIAN: I don't think that permission in  
13 one sentence can have two different definitions, Your  
14 Honor.

15 JUDGE GARCIA: But it doesn't. It has a  
16 different definition because of the Vehicle and Traffic  
17 Law, whatever that statute is, that says an owner is  
18 presumed to have given permission, which is what the  
19 Appellate Division used here.

20 MR. MARKARIAN: I - - -

21 JUDGE GARCIA: Permission means the same thing.  
22 It's just, do you have a presumption of it or not.

23 MR. MARKARIAN: Well, the statutory definition is  
24 constructive permission, and that's - - - that has to have  
25 the same meaning when it's defined in the same sentence of

1 the insurance policy.

2 JUDGE GARCIA: But it's not defined. Permission  
3 isn't defined in that sentence.

4 MR. MARKARIAN: It incorporates a statutory  
5 definition. It has to, Your Honor, to give the coverage  
6 that's required by the Statute. And if they wanted to,  
7 they could have written differently, because they did draw  
8 that distinction in their policy between Symbols 8 and  
9 Symbols 9.

10 Symbol 9 says that employee vehicles, if they're  
11 not used in the course of the employer's business, then  
12 they're not coverage. For hired vehicles, they don't have  
13 that limitation. And again, that shows that if they wanted  
14 to limit it, if they wanted to give that definition of  
15 permission a different definition, they did so in limiting  
16 language in the policy. And they did not do that with  
17 respect to hired autos. So it has to be the same  
18 definition of permission.

19 Your Honors, the most crucial document here is  
20 the cost-of-hire schedule. We have overwhelming  
21 underwriting evidence showing that these vehicles - - -

22 JUDGE STEIN: Did you have discovery here?

23 MR. MARKARIAN: We did have discovery, Your  
24 Honor. Not complete. We know it's not complete, there has  
25 been ongoing discovery, we certainly have not found out

1 where the cost-of-hire schedule is, and that's the most  
2 important schedule in the policy on the hired auto  
3 question. We need to have that document.

4 If you look at the Manchester case, which we've  
5 cited, it goes through carefully showing how the hired auto  
6 coverage was found there based on the cost-of-hire  
7 schedule, which we don't have here, and this is 3211. They  
8 have not established conclusively with their documents that  
9 the coverage cannot be found.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MR. MARKARIAN: Thank you, Your Honors.

12 CHIEF JUDGE DIFIORE: Counsel.

13 MR. SZCZEPANSKI: Good afternoon, Chief Judge  
14 DiFiore, and may it please the court. I am Kevin  
15 Szczepanski here for National Union and the AIG defendants.

16 JUDGE STEIN: Why - - - why is the absence of  
17 that cost-of-hire provision not determinative of whether  
18 you conclusively established your position as - - - on  
19 documentary evidence?

20 MR. SZCZEPANSKI: A couple of points, Judge  
21 Stein. First, and as a threshold matter, there was a  
22 question about - - - and Your Honor asked the question  
23 about discovery. The record, on page 1315, reflects the  
24 fact that in between the first and the second stage of  
25 briefing and argument below in the Supreme Court, Mr.

1 Carlson was afforded discovery.

2 He - - - he did not serve document demands or  
3 interrogatories. Instead, he served a notice to admit and  
4 a single notice of deposition of the excess underwriter.  
5 So clearly, he had an opportunity to depose the primary  
6 policy underwriter, and for whatever reason, chose not to  
7 do so.

8 To respond more directly to your question, there  
9 is a threshold question, and I think Judge Rivera touched  
10 on, it's a question of ambiguity. And here, we're dealing  
11 with two fairly common terms. The question of hire means  
12 to obtain the use of someone, someone's services, or  
13 something for payment. Permission means authorization.  
14 These are common, everyday terms, and that's probably why -  
15 - -

16 JUDGE GARCIA: On that point - - -

17 MR. SZCZEPANSKI: Yes.

18 JUDGE GARCIA: - - - I was having a little  
19 trouble with this. Are there different definit - - -  
20 definitions - - - are there different areas of permission,  
21 in terms of a vehicle owned by MVP, or a hired vehicle; are  
22 there different provisions in this contract covering what  
23 you can do with the vehicle if is owned by MVP or if it's  
24 hired? I was having some trouble with that.

25 MR. SZCZEPANSKI: No. Thank you, Judge Garcia.

1 No, not at all, there's no distinction whatsoever. And the  
2 argument that my colleague was making earlier, that somehow  
3 the definition of permission changes because there needs to  
4 be some tie-in between Section 388 of the Vehicle and  
5 Traffic Law and the policy language, I think that's a  
6 valiant effort to try to create permission, but I don't  
7 think it works, because as Your Honor pointed out, Section  
8 388 imposes liability on an owner for accidents involving  
9 vehicles used with express or implied permission. And  
10 here, it's very clear and it's undisputed, in fact, that  
11 MVP is the owner.

12 JUDGE ABDUS-SALAAM: So counsel, is it so clear  
13 here that hired is unambiguous or is it ambiguous; what do  
14 you say?

15 MR. SZCZEPANSKI: I think it's crystal clear that  
16 it is unambiguous. And I agree with the plaintiff's first  
17 position on that issue below that it is unambiguous. And I  
18 think with good reason. There really is nothing about the  
19 context of the term or the complexity of the definition  
20 that should render it unambiguous.

21 And that being the case, Judge Abdus-Salaam, I  
22 think the analysis of the underwriting evidence is a moot  
23 point.

24 But to get back to your question, Judge Stein,  
25 there - - - there is an argument, the plaintiff has raised

1 the argument about this schedule. I don't know that it's a  
2 missing schedule, it just appears to not exist.

3 JUDGE WILSON: Is it part of the contract?

4 MR. SZCZEPANSKI: The - - - the schedule is part  
5 of the declarations, which is part of the contract, Judge  
6 Carter, but happens to be empty. And so to attempt to fill  
7 it in from the underwriting information, would effectively  
8 be the importation of extrinsic evidence.

9 JUDGE WILSON: The advice I got very early on was  
10 never call a judge by his or her name, because you're  
11 liable to get it wrong sometimes.

12 MR. SZCZEPANSKI: Yes. Duly noted.

13 But Your Honor, thank you for the question. It  
14 is a critical point. If the - - - if the schedule is  
15 blank, then any attempt to complete it would resort to  
16 extrinsic evidence.

17 Let me speak briefly about that schedule then.  
18 The schedule does not list - - - there's no room in the  
19 schedule for description of particular makes and models of  
20 vehicles. It plainly would not tell us whether any  
21 particular vehicle, much less the MVP van is a hired auto.  
22 It contains - - -

23 JUDGE WILSON: What's your basis for saying that?

24 MR. SZCZEPANSKI: Judge - - -

25 JUDGE WILSON: Do you have the schedule?

1 MR. SZCZEPANSKI: There is - - - Your Honor, it  
2 is - - - it is not in the pol - - - it is not in the policy  
3 itself, and it's not in the underwriting file. As best we  
4 know, there isn't one. There are similar - - - there are  
5 schedules in the underwriting file that were - - - was  
6 produced to the plaintiff. My basis for saying that  
7 though, your - - -

8 JUDGE WILSON: So you're resorting to extrinsic  
9 evidence to demonstrate what would be in the cost-of-hire  
10 schedule, if it existed.

11 MR. SZCZEPANSKI: Not at all, Your Honor. I'm  
12 resorting to the - - - the line items of the schedule  
13 itself. The line items include state - - -

14 JUDGE WILSON: You don't have the actual schedule  
15 from this policy.

16 MR. SZCZEPANSKI: We have a sch - - - we have a  
17 form for the schedule, Your Honor, and we - - - so we know  
18 it's item 4 in the declarations, the - - -

19 JUDGE RIVERA: I guess the point is, how do you  
20 know the form matches the document, if you say - - -

21 MR. SZCZEPANSKI: No, that - - -

22 JUDGE RIVERA: - - - the document isn't in any  
23 file. So how do you know?

24 MR. SZCZEPANSKI: Well, that's a fair point,  
25 Judge Rivera. I think the answer to that is, if the

1 plaintiff's position is that this schedule, as reflected in  
2 item 4 of the declarations, should be somewhere in the  
3 underwriting file, then presumably, it's a fair inference  
4 that that schedule would match the categories of  
5 information that are in the - - - in item 4 itself.

6 But you're correct. We do not - - - we have no  
7 similar schedule in the underwriting file. We have charts  
8 that contain information about the numbers of vehicles.

9 And for purposes of underwriting, Judge Stein, it  
10 is - - - it looks to be like what Mr. Flynn, who is the  
11 excess underwriter, was primarily concerned about, was not  
12 any particular vehicle or make and model of vehicle, but  
13 the number of vehicles. How many vehicles did DHL own, how  
14 many vehicles were not owned - - -

15 JUDGE ABDUS-SALAAM: Does it matter - - - does  
16 the number matter if - - - what - - - what if the policy  
17 covered all DHL vehicles?

18 MR. SZCZEPANSKI: Well, the answer to your first  
19 question is, no, Your Honor, it doesn't matter. And the  
20 answer to the second question is, as to DHL, it does cover  
21 every vehicle, whether DHL owns it or not. This policy  
22 broadly covers DHL for any - - - for an accident involving  
23 any vehicle, anywhere in the world. But the coverage is  
24 narrower for entities besides DHL. For those entities, the  
25 accident has to involve a vehicle that DHL hires, and that

1 is used with DHL's permission. And the - - -

2 JUDGE GARCIA: And on that point, counsel, let's  
3 say this schedule, if it was anywhere, it would list, or it  
4 would go to, as I understand it, the vehicles that would be  
5 covered, right, the hired vehicles. But you would still  
6 need permission, right. It wouldn't - - - the schedule is  
7 never going to answer the permission question, right?

8 MR. SZCZEPANSKI: The - - -

9 JUDGE GARCIA: So if there's no permission,  
10 what's the difference as to what's on the schedule?

11 MR. SZCZEPANSKI: That's - - - that's exactly  
12 right, Judge Garcia. If you assume for a moment, and it's  
13 a hefty assumption, let's assume for a moment that there  
14 were such a schedule, and it's listed all 7,000 non-owned  
15 vehicles of DHL in all the forty-three states in which it  
16 does business in, the MVP van were on that schedule, then  
17 we would not have a very good argument on the hired auto  
18 side. But we would still have the issue of permission.

19 And even if the vehicle is hired, the fact  
20 remains that there is no evidence in the record, and we do  
21 have a benefit of a trial record below. It's a little bit  
22 different than on the typical CPLR 3211(a) motion. There  
23 is no evidence to suggest that DHL did anything or said  
24 anything that could be construed as permission.

25 The witnesses, not only DHL, but the MVP

1 witnesses in the underlying trial, testified that DHL had  
2 no ability to authorize the use of a vehicle for - - - for  
3 business purposes, much less for a personal errand.

4 JUDGE GARCIA: Is there any language in the  
5 contract with MVP about what MVP's vehicles could be used  
6 for that were work - - - you know, the DHL-labeled vehicles  
7 could be used for outside of business? Was there a  
8 restriction in that contract between DHL and MVP?

9 MR. SZCZEPANSKI: There was not, Judge Garcia.  
10 There - - - there was not. There's - - - there's a - - -  
11 the closest that you come to it is, there is a provision  
12 that governs whether MVP may deliver packages for a DHL  
13 competitor, and the provision provides that it may, but it  
14 needs to have DHL's permission to do so. We don't know  
15 whether that situation ever came up.

16 But there's nothing that limits the - - - there's  
17 nothing that - - - that limits MVP's use or operation of  
18 these vehicles. In fact, and we've cited to this in our  
19 brief, and - - - and we can - - - you look - - - I would  
20 direct the court to pages 431 to 433 of the record.  
21 Essentially, reflects sweeping control on the part of MVP  
22 of its own vehicles. It has the sole authority to decide  
23 what vehicles to furnish, how to operate those vehicles,  
24 how to staff those vehicles - - -

25 JUDGE RIVERA: So what - - - what's your

1 position? That - - - that DHL hires MVP to run - - - to do  
2 the business, which is DHL's business, which I want to know  
3 if you think there's a difference because they're basically  
4 doing your business, your business is to deliver items, and  
5 that's what you hire them to do; as opposed to the manner  
6 by which they complete this agreement with you?

7 MR. SZCZEPANSKI: And - - - and - - - and I  
8 represent National Union, Your Honor, but I understand your  
9 - - -

10 JUDGE RIVERA: Yes, I'm sorry.

11 MR. SZCZEPANSKI: - - - your question.

12 JUDGE RIVERA: DHL, yes.

13 MR. SZCZEPANSKI: No, I understand your question.

14 JUDGE RIVERA: I'm sorry.

15 MR. SZCZEPANSKI: Essentially, and this is  
16 consistent with the decisions of courts, both this court in  
17 Dairylea, and in other courts across the country, including  
18 the decision in Phillips.

19 DHL has hired MVP to perform transportation  
20 services. And then affords MVP sole control over the  
21 manner and means by which - - -

22 JUDGE RIVERA: I understand. But how - - - how  
23 are they going to accomplish that service without - - -  
24 without the trucks?

25 MR. SZCZEPANSKI: True. True enough, Judge.

1 JUDGE RIVERA: What would you have - - - you've  
2 got to be hiring, or they - - - I'm sorry, DHL has got to  
3 be hiring - - -

4 MR. SZCZEPANSKI: Yes.

5 JUDGE RIVERA: - - - with the understanding that  
6 the only way they can accomplish the task for which they  
7 are hired is through these trucks. And they go through - -  
8 - - - every detail in their agreement to say, this is what  
9 the trucks need to look like, I need the DHL label and logo  
10 on it, they have to wear these uniforms.

11 MR. SZCZEPANSKI: Certainly, Your Honor. And let  
12 me take that - - - that question in two parts. First, I'll  
13 take the last part first. Certainly, there are provisions  
14 in the agreement governing what the uniforms should look  
15 like, and - - -

16 Chief Judge - - -

17 CHIEF JUDGE DIFIORE: You may.

18 MR. SZCZEPANSKI: Thank you.

19 There are provisions that govern the manner in  
20 which MVP protects and uses DHL's intellectual property.  
21 But - - - and this is to the first part of your question,  
22 Judge Rivera. There is a difference between how MVP treats  
23 DHL's trademarks or intellectual property, and whether DHL  
24 exercises control over the use of the vehicles themselves.

25 And the color of the uniforms and the - - - the

1 depiction of the - - - of the intellectual property marks  
2 does not establish control; they're two different  
3 questions. And I think that, again, the plaintiff has  
4 tried valiantly to - - - to contort that into some means of  
5 controlling the vehicles, but it just doesn't work that way  
6 under the - - - the cartage agreement or the policy.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MR. SZCZEPANSKI: And I thank you very much.

9 CHIEF JUDGE DIFIORE: Counsel.

10 MR. KOVNER: Good afternoon, Your Honors, and may  
11 it please the court. My name is Paul Kovner, and I  
12 represent American Alternative Insurance Company.

13 And my argument today is limited to the issue  
14 which is unique to American Alternative, specifically,  
15 whether plaintiff had the right to bring a direct action  
16 against my client.

17 And our contention is that under the amendment to  
18 the Statute, they could only bring a direct action as to  
19 policies which were issued or delivered in New York. And  
20 we think the Fourth Department was correct in its decision  
21 that the policy was neither issued nor - - -

22 JUDGE STEIN: Did - - - did - - - did AAIC know  
23 that DHL had a facility and a relationship with MVP in New  
24 York? Do we - - -

25 MR. KOVNER: I don't know that it did or not, but

1 I - - -

2 JUDGE STEIN: Is there any reference in the  
3 insurance policy to any risks in New York?

4 MR. KOVNER: I don't believe there is, but I  
5 don't think it really mattered, because the policy was not  
6 issued in New York. And therefore, the Statute wouldn't  
7 apply.

8 JUDGE WILSON: That's not an argument you made to  
9 the Appellate Division, correct?

10 MR. KOVNER: Pardon?

11 JUDGE WILSON: That's not an argument you made to  
12 the Appellate Division.

13 MR. KOVNER: Well, actually, I think there's been  
14 a lot of controversy about that, and the plaintiff contends  
15 that we did not make that argument, and even the Appellate  
16 Division, in its decision, says that we conflated the two  
17 standards, that is, the prior standard which was issued for  
18 delivery with the standard in the amendment, which is  
19 issued or delivered.

20 Frankly, Your Honors, I reread the briefs that we  
21 submitted in the Appellate Division, and I would say that  
22 we did specifically argue in that court that the standard  
23 was issued or delivered, which is the standard in the  
24 amendment.

25 However, we spent a great deal of time in the

1           brief arguing the prior standard, because that was the  
2           standard which was argued extensively - - -

3                   JUDGE RIVERA:   Was - - - was the amendment - - -  
4           was the amendment - - - was the amendment intended to give  
5           broader application of the Statute, or to narrow the  
6           application of the Statute?

7                   MR. KOVNER:   That's an interesting question, Your  
8           Honor, that I've been struggling with.  And I would submit  
9           that you could say that the amendment was designed to  
10          broaden the protection, because it added to the analysis  
11          the question of where the policy was issued.  And that was  
12          not a factor which was present prior to the amendment.  So  
13          you could have - - -

14                   JUDGE ABDUS-SALAAM:   But where did you get - - -  
15          where do you get that sense of why the amendment was  
16          enacted, counsel - - -

17                   MR. KOVNER:   That's just - - -

18                   JUDGE ABDUS-SALAAM:   - - - as opposed to just try  
19          to be consistent with other wording in the Statute?

20                   MR. KOVNER:   That's just my own gloss on the  
21          language because I've been struggling with the question of  
22          whether the amendment provides greater protection or less  
23          protection.  But I think the legislature, in its infinite  
24          wisdom, chose the standard that is set forth in the  
25          amendment.  And therefore, under that standard, as the

1 Fourth Department held, plaintiff may not bring a direct  
2 action against my client.

3 If they are no further questions, thank you very  
4 much.

5 CHIEF JUDGE DIFIORE: Thank you.  
6 Counsel.

7 MR. LAWLESS: Good afternoon. May it please the  
8 court, my name is Patrick Lawless. I represent defendant  
9 DHL.

10 The only claim in this action that's alleged  
11 against DHL is that DHL entered into a conspiracy with AIG  
12 to withhold the amount of available insurance coverage, for  
13 obvious reasons.

14 If you - - - if you look at the allegations in  
15 the complaint, they're very broad, they're very  
16 speculative, and conclusory; they don't rise to the level  
17 of asserting a claim. New York does not recognize a claim  
18 for civil conspiracy. The plaintiff has to allege an  
19 underlying tort.

20 Assuming that it's fraud, they don't even set out  
21 the elements of a fraud claim for obvious reasons, based on  
22 the decision from the Fourth Department in the first  
23 Carlson action, that Mr. Porter was acting on his own and  
24 wasn't acting within the scope of his employment, and based  
25 on a Fourth Department's recent decision that there is no

1 coverage to begin with.

2 JUDGE RIVERA: So now - - - now - - - now that  
3 you're representing DHL, not - - - not the first gentleman  
4 who got up.

5 MR. LAWLESS: Yes, yes. I'm the one who  
6 represents DHL.

7 JUDGE RIVERA: Well, now let me - - - yes, yes.

8 MR. LAWLESS: Yes.

9 JUDGE RIVERA: Yes. So let me get - - - let me  
10 circle back to that question that I asked him, and I  
11 appreciate his answer.

12 Given the relationship between DHL and MVP,  
13 right, which is - - - MVP is basically doing your business,  
14 how - - - how is it that you would be entering that  
15 arrangement, if not also anticipating that they can only  
16 complete the arrangement for DHL and do the work for DHL if  
17 they don't use these trucks, and therefore, the hiring is  
18 of the trucks?

19 MR. LAWLESS: Well, I - - - I think - - -

20 JUDGE RIVERA: I mean, how - - - how else are  
21 they going to complete the service?

22 MR. LAWLESS: But I - - - I think my colleague  
23 answered that, and I would - - -

24 JUDGE RIVERA: I want to hear from DHL.

25 MR. LAWLESS: Yeah.

1 JUDGE RIVERA: Yeah.

2 MR. LAWLESS: But - - - but I think it's - - -  
3 it's one thing - - -

4 JUDGE RIVERA: Um-hum.

5 MR. LAWLESS: - - - when you have the agreement  
6 to ensure a certain quality control and that its - - - its  
7 trademark and image is protected, and then it leaves up to  
8 MVP's discretion on how to - - - how - - - how to complete  
9 that task. So they were hired - - - MVP is hired to - - -  
10 to transport and - - - and to complete deliveries, and how  
11 MVP does that is up to MVP. And there is - - -

12 JUDGE RIVERA: But you're not expecting them to  
13 do it without trucks?

14 MR. LAWLESS: I'm sorry?

15 JUDGE RIVERA: DHL is not expecting them to do  
16 that without vehicles, correct?

17 MR. LAWLESS: But it's - - - it's up to MVP to  
18 use whatever vehicles that - - - that they deem appropriate  
19 for that task.

20 JUDGE ABDUS-SALAAM: Would - - - would this be a  
21 different case, counsel, if DHL insisted that MVP only use  
22 its trucks to transact DHL's business, as opposed to being  
23 able to be a free agent, essentially?

24 MR. LAWLESS: I - - - I think it may, but I - - -  
25 I think in this case, that's - - - that's exactly what

1           happened, is that all the discretion was left up to MVP as  
2           to how to complete the task that it was hired to do.

3                   JUDGE ABDUS-SALAAM:   So you're saying DHL would  
4           only be exercising control or exclusive control if it  
5           required MVP to just do its business.

6                   MR. LAWLESS:   I - - - I'm - - -

7                   JUDGE ABDUS-SALAAM:   You would say, no, that  
8           wouldn't be enough.

9                   MR. LAWLESS:   I - - - I'm not saying - - - I - -  
10          - I wouldn't say that would be enough, but I think, I - - -  
11          and going back to the point of permission, I think this is  
12          all moot based on the - - - the Fourth Department's finding  
13          of - - - of lack in permission.

14                   But - - - but to answer that question, I - - - I  
15          wouldn't concede that that would be enough.

16                   CHIEF JUDGE DIFIORE:   Thank you, counsel.

17                   MR. LAWLESS:   Thank you.

18                   CHIEF JUDGE DIFIORE:   Mr. Markarian.

19                   MR. MARKARIAN:   Thank you, Your Honor.

20                   JUDGE STEIN:   Well, how does Dairy- - - our  
21          decision in Dairylea play into all of this?

22                   MR. MARKARIAN:   Dairylea is very helpful, Your  
23          Honor, because Dairylea has a two-step analysis, and the  
24          Appellate Division, in this case, jumped to step two  
25          without doing step one.   Step one in Dairylea, Dairy - - -

1 this court looked at the policy to find out if there was  
2 coverage on the policy, thereby indicating that there could  
3 be coverage for the tanker in Dairylea. But when it looked  
4 at the policy, it found an exclusion.

5 In our case, when you look at the policy, without  
6 the cost-of-hire schedule, but assuming the cost-of-hire  
7 schedule shows that these vehicles are insured as hires,  
8 that's step one of Dairylea, you stop right there; there's  
9 coverage under the policy. Dairylea only went to a control  
10 analysis - - -

11 JUDGE STEIN: But if we - - - if we disagree with  
12 you on that, doesn't Dairylea make a distinction between  
13 control over various aspects of how the business is carried  
14 out, and control over the vehicles themselves?

15 MR. MARKARIAN: But Dairylea says you need to  
16 hire a particular truck. But that logic - - -

17 JUDGE STEIN: Well, if we get to that second - -  
18 -

19 MR. MARKARIAN: Yes.

20 JUDGE STEIN: - - - factor, where - - - where are  
21 we here?

22 MR. MARKARIAN: We - - - what - - - what we have  
23 here is, instead of hiring a particular truck, you have  
24 hiring a complete fleet; that's what they're doing. So  
25 it's the same logic of Dairylea. If you're not - - - you

1 can't have a separate contract for 7717 vehicles. What  
2 they do is they hire fleets, and they have a separate  
3 cartage agreement for each fleet, which is what the  
4 underwriting expert explained.

5 I would love to address permission and make three  
6 points on permission, it seems to be very important.

7 CHIEF JUDGE DIFIORE: Please do.

8 MR. MARKARIAN: Number one, you have to construe  
9 the policy against insurance company. Number two, if the  
10 permission analysis were different for hired vehicles than  
11 it is for owned vehicles, there would have been no reason  
12 for the insurance company to put in Symbol 9 that there  
13 would be - - - there's a limitation that the coverage went  
14 away if it was for a nonbusiness use, because the  
15 definition of permission would have already wiped that out.  
16 It would have had to be in Symbol 9.

17 So you construe the insurance policy against the  
18 insurer, they have to have that meeting, otherwise they  
19 wouldn't have to put the limitation in Symbol 9. And  
20 again, it's - - - they wrote the policy. They wrote it to  
21 say, hired, owned, permission in one sentence. I don't  
22 think it's a fair construction - - -

23 JUDGE GARCIA: Isn't that your - - - your  
24 argument on this, we have this case Murdza, right, where  
25 Brown & Wood is the lessee, there's an owner, PHH, or

1           whoever it is that's - - - they are the owner. Brown &  
2           Wood puts this thing in their - - - in their contract  
3           saying, you can only use this for business, and we say,  
4           okay, that's good enough here. But as an owner, you're  
5           implied to have given permission, even though the BMW sub  
6           that's leasing the car from you has put this provision and  
7           it can get off.

8                         You're kind of flipping that, right? And you're  
9           saying, well, the owner here, which is MVP, they can be  
10          liable, but the - - - the hired auto, you can give  
11          permission. It almost seems to be flipping Murdza on its  
12          head to me.

13                        MR. MARKARIAN: Respectfully, no, Your Honor,  
14          because they wrote the policy. They could have written it  
15          the way you're saying. Just like Symbol 9, they could have  
16          said, there's no coverage if it's for nonbusiness use.

17                        JUDGE GARCIA: But you're imputing permission to  
18          the person hiring rather than the owner. And Murdza said,  
19          well, you can give do that with the owner, and again, I  
20          think it was PHH, or whoever the company was there, but not  
21          Brown & Wood; Brown & Wood, you went by what their policy  
22          was with respect to their employees. But now, you want to  
23          impute permission to the one that's hired the vehicle.

24                        MR. MARKARIAN: This is crucial, Your Honor. And  
25          this is what the Appellate Division in this - - - did in

1           this case. Because I thought before you were talking about  
2           permission went away when it was for a nonbusiness purpose,  
3           but I think your question now is that the permission can  
4           never be granted. So that means that there's a hired auto  
5           schedule that says, these vehicles are covered, but then  
6           the permission language erases the coverage, that's an  
7           illogical result.

8                    JUDGE GARCIA: No, but if the person were using  
9           that vehicle to deliver a DHL package, you would have  
10          coverage.

11                   MR. MARKARIAN: And that's - - - and that's what  
12          it says, any it does not take that coverage away when it's  
13          for a nonbusiness use, which they did do in Symbol 9 for  
14          employee vehicles.

15                   JUDGE GARCIA: Doesn't the "permission" part say  
16          that?

17                   MR. MARKARIAN: No, because they are - - - they  
18          are writing the policy. When they want to take that away,  
19          they expressly do so in Symbol 9 for employee vehicles;  
20          they don't do it for hired autos.

21                   JUDGE GARCIA: I'm sorry, I couldn't hear the  
22          first part of your statement.

23                   MR. MARKARIAN: When they want to take away the  
24          permission for nonbusiness use, for employee vehicles, they  
25          expressly do so in Symbol 9; they don't do so for hired

1 auto in Symbol 8. They wrote the policy, it should be  
2 construed against them. They've equated permission for  
3 owned to permission to hired.

4 And I'm sorry I'm over, Your Honor. Can I have  
5 thirty seconds on the cost of hire?

6 CHIEF JUDGE DIFIORE: You may, sir.

7 MR. MARKARIAN: The cost-of-hired schedule is at  
8 page 1812 of the record. It says - - - this is their  
9 schedule, in the record, in the policy, "Per schedule on  
10 file with company." We need to see that schedule.

11 If you look at the Manchester case, you'll see  
12 how these schedules work. Judge Stein asked about is there  
13 any reference to New York State, well, there very well  
14 could be in their cost-of-hire schedule, because it gives a  
15 state breakdown. So it's going to break down by state.

16 So all of the DHL contractors in New York, let's  
17 say there are five, and let's say DHL pays them a million  
18 dollars, that'll be in the next column. And you'll see the  
19 underwriting evidence in this case, Your Honors, the  
20 underwriters are exchanging the information to complete  
21 this schedule. They're asking for the state breakdown.  
22 They want to know if the contractor insurance is primary.

23 They're doing this for the cost-of-hire schedule  
24 that we don't have on a 3211 motion, and the motion should  
25 be denied. And that's our position.

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

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. MARKARIAN: Thank you, Your Honors.

(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, Meir Sabbah, 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.



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

Agency Name: eScribers  
  
Address of Agency: 352 Seventh Avenue  
Suite 604  
New York, NY 10001  
  
Date: April 03, 2017