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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
Appellant,

-against-

FITZGERALD,

No. 119
(REARGUMENT)

Respondent.

20 Eagle Street
Albany, New York 12207
June 02, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
PRESIDING JUSTICE LUIS A. GONZALEZ
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: So let's start with -
2 - - with 119.

3 Counsel, you want any rebuttal time?

4 MR. MASCIA: Three minutes, Your Honor.

5 CHIEF JUDGE LIPPMAN: Three minutes? Go
6 ahead, you're on.

7 MR. MASCIA: May it please the court, my
8 name is Henry Mascia, attorney for State Farm.

9 The only thing this court needs to know to
10 decide this case is the definition of the term "motor
11 vehicle" in Insurance Law 3420 excludes police
12 vehicles.

13 JUDGE PIGOTT: You know, it struck me that
14 maybe you changed your mind, because what - - - as I
15 was going through this record, at some point - - -
16 and we'll probably be reminded of the time - - -
17 you've got an - - - you've got an insured here. I
18 know you want to argue the - - - that he's in a cop
19 car, and therefore you - - - you're not in it.

20 But he insured himself and he insured his -
21 - - his - - his passengers. And he told you - - - he
22 wrote you and said, I've got a 25/50 policy on the
23 other side. Under the SUM coverage, I need your
24 permission to settle that. And in doing that, he was
25 giving up any claim he may have had for any excess

1 against Mr. Walton or in the event that Mr. Walton
2 chose to implead the City in the - - - in the
3 underlying lawsuit that he would have had.

4 He gave that up. And you said fine, you
5 can settle for the 25/50, presumably because your SUM
6 coverage is going to kick in. And then at some point
7 you changed your mind.

8 MR. MASCIA: I'm not sure I'm following.

9 JUDGE PIGOTT: Well, let's start here. You
10 denied that they ever asked you for permission to
11 settle it, in - - - in your original papers in this
12 case, which was untrue. They pointed that out and
13 they included the - - - the - - their letter to you,
14 saying we want to settle this case be - - - for the
15 policy limits, which is required under the SUM
16 policy. And you wrote back - - - State Farm wrote
17 back - - - and said you can do that, and they did.
18 And they gave up any other claims they may have had
19 in this case because you said that.

20 Then later, when they demanded arbitration,
21 you said well wait a minute, there's no coverage,
22 because it's - - - they were in a police vehicle at
23 the time. Right?

24 MR. MASCIA: I - - - I'm not familiar - - -
25 I'm not familiar - - -

1 JUDGE PIGOTT: We'll skip over it. I know
2 you have - - - you want to make your motor vehicle
3 argument. I just thought I'd raise it, since it's in
4 the record.

5 MR. MASCIA: I - - - I do. And I - - - I
6 don't think that - - - whether that letter was sent
7 or not, I don't see what that has to do with the
8 definition of the term "motor vehicle".

9 JUDGE PIGOTT: It has nothing to do with
10 it, except for the fact that you were operating under
11 the - - - you were telling them they had SUM
12 coverage, and based upon your telling them that they
13 had SUM coverage, they gave up all the rights they
14 had against Mr. Walton, who was the tortfeasor in the
15 case. And you said go ahead and settle for 25/50.
16 Then when they demanded arbitration, because you
17 hadn't paid, they said well, wait a minute, the motor
18 vehicle that they were in is a police vehicle, and
19 under 125 of the V&T that's not - - - you know,
20 that's not covered. That's how you get where you are
21 now. Right?

22 MR. MASCIA: Yeah. And where we are now is
23 the court has to define - - - decide what the
24 definition of the term "motor vehicle" is - - -

25 JUDGE PIGOTT: No, they could decide - - -

1 MR. MASCIA: - - - before the endorsement -
2 - -

3 JUDGE PIGOTT: - - - for example, that you
4 insured your insured - - -

5 MR. MASCIA: Correct.

6 JUDGE PIGOTT: - - - and whether he was in
7 his own vehicle or in another vehicle, you were going
8 to cover it and you were going to give him SUM
9 coverage.

10 You then decided later, wait a minute, it's
11 a police vehicle, and because the City of New York
12 does not have to provide SUM coverage, this vehicle
13 is not covered, and we don't have to pay.

14 MR. MASCIA: If you're referring to the
15 driver - - -

16 JUDGE PIGOTT: Yeah.

17 MR. MASCIA: - - - Knauss, of course he
18 gets SUM coverage. Of course we'd say that.

19 JUDGE PIGOTT: As does - - - as does his
20 passengers.

21 MR. MASCIA: No, no, no. Well, yeah, but
22 the - - - the endorsement says that the named insured
23 gets SUM coverage all the time. It doesn't matter
24 whether they're operating - - - whether in a motor
25 vehicle or not. The passengers only get SUM co - - -

1 the driver SUM coverage if they're in a motor
2 vehicle.

3 JUDGE PIGOTT: So you're saying in this
4 accident, Mr. Knauss is going to get SUM coverage and
5 the person who was in the car when he had the
6 collision, even though it says, you know, the person
7 that - - - that is in your vehicle gets coverage,
8 that he doesn't because it's - - - it's a police
9 vehicle?

10 MR. MASCIA: Absolutely.

11 JUDGE PIGOTT: So you're saying it's a
12 police vehicle for the passenger, it's not a police
13 vehicle for the driver?

14 MR. MASCIA: No, I'm not saying that at
15 all. Officer Knauss doesn't need it to be a motor
16 vehicle for him to get SUM coverage. He's a named
17 insured.

18 CHIEF JUDGE LIPPMAN: Counsel, what - - -
19 what's complicated about this - - -

20 MR. MASCIA: Nothing.

21 CHIEF JUDGE LIPPMAN: - - - endorsement
22 language? What the endorsement says, clearly it
23 talks about any other vehicle driven by - - - by
24 Krause (sic), right?

25 MR. MASCIA: Any other motor vehicle

1 operated by Knauss.

2 CHIEF JUDGE LIPPMAN: Yeah, so what's - - -

3 MR. MASCIA: A police vehicle - - -

4 CHIEF JUDGE LIPPMAN: - - - what's

5 difficult - - -

6 MR. MASCIA: - - - is not a motor - - -

7 CHIEF JUDGE LIPPMAN: - - - what's

8 difficult to understand about that?

9 MR. MASCIA: Absolutely nothing.

10 CHIEF JUDGE LIPPMAN: So - - - so - - -

11 MR. MASCIA: The motor vehicle - - -

12 CHIEF JUDGE LIPPMAN: - - - why isn't there

13 - - - so why isn't there coverage here?

14 MR. MASCIA: Because - - - because the term

15 "motor vehicle" in the endorsement doesn't include

16 police vehicles. That's the definition - - -

17 JUDGE GONZALEZ: Well, it goes more than

18 that. What it goes to is that the definition of

19 "insured" it's really what's triggers the whole

20 thing.

21 MR. MASCIA: Correct.

22 JUDGE GONZALEZ: And the question is

23 whether the passenger under the SUM endorsement

24 constitutes an insured.

25 MR. MASCIA: That's right.

1 JUDGE GONZALEZ: Yeah. And then how - - -
2 whether or not it's a motor vehicle, then determines
3 whether he becomes an insured, whether he was
4 occupying a motor vehicle.

5 MR. MASCIA: Correct. That's exactly
6 right. And this court has always interpreted terms
7 in a state-mandated endorsement with reference to the
8 statutes that gave birth to them.

9 CHIEF JUDGE LIPPMAN: Counsel, what statute
10 determines whether this is a motor vehicle?

11 MR. MASCIA: Well, in Wagner, the court
12 looked at the entire statutory scheme, and
13 particularly the statute that mandated this policy,
14 which is Insurance Law 3420(f). And this court - - -

15 JUDGE PIGOTT: Well, it's insur - - - it's
16 the Insurance Law. And you keep arguing that "motor
17 vehicle" under the V&T is the definition that ought
18 to be used.

19 MR. MASCIA: Correct. Because the
20 Insurance Law is - - - expressly incorporates that.

21 JUDGE PIGOTT: Well, why wouldn't we just
22 use the - - - as your opponent argues - - - the - - -
23 the definition of a motor vehicle as it's found in
24 the Insurance Law, 5102?

25 MR. MASCIA: Because it's a totally

1 different - - - that - - - that doesn't - - - that
2 doesn't apply to the - - - to motor - - - because VTL
3 388 is specifically referenced in the statute that
4 gave birth to this endorsement. 125 doesn't have
5 anything to - - -

6 JUDGE FAHEY: But that's not the way - - -

7 MR. MASCIA: - - - do with that.

8 JUDGE FAHEY: - - - I understand, though.

9 The way I understand the sequence here is we have
10 3420(e), which has in the statute - - - it refers to
11 third-party coverage and any motor vehicle or any
12 vehicle defined under 388(2). 388(2) is the - - -
13 the section of the V&T that eliminates police and
14 fire vehicles from being covered.

15 MR. MASCIA: Correct.

16 JUDGE FAHEY: All right. That then is
17 imported by Amato to 3420(f)(1) - - -

18 MR. MASCIA: Correct.

19 JUDGE FAHEY: - - - and - - - thank you.

20 And then - then after that, it's found - - - it - it
21 - it - it says that there it's a motor vehicle. Now
22 the question is whether that definition of Amato is -
23 - - I think we've got a twofold question. Was that
24 right? In other words, was - - - was the - the Amato
25 analysis essentially correct? Was the Amato analysis

1 applicable at the same time, to this particular
2 circumstance, because in Amato, I think you were
3 dealing with a stacking issue, which is different
4 than the issue we're dealing with here. And then the
5 third question is, does it go to (f)(2)(A) on the
6 supplemental coverage? Because I think - - -
7 thinking back to what Judge Wachtler and Judge
8 Hancock dissented in Amato, they - - - at that time,
9 they both made reference to the fact that the statute
10 can be read - - - that - - - in 3420(e), which starts
11 it all for the Amato case, is - - - there's two
12 definitions of motor vehicle here: Any motor
13 vehicle, or any motor vehicle as defined as 388(2).

14 If that's the case, then the Second
15 Department's definition isn't unreasonable, but would
16 require us to overrule Amato. The other way of
17 looking at it would be, is - - - is their analysis
18 that it was not applicable to this particular
19 circumstance.

20 So that seems to be where we are on this
21 whole thing when you boil it down.

22 MR. MASCIA: More or less. But - - - and
23 this court has always held that the definition of the
24 term in the statute - - -

25 JUDGE FAHEY: Um-hum.

1 MR. MASCIA: - - - if that's the definition
2 in the statute, then that's the definition in the
3 policy that's mandated by that very same statute.
4 That's a very sensible way to interpret state-
5 mandated endorsements. And that's what this court
6 has always done.

7 JUDGE READ: Why would we read or should we
8 read "motor vehicle" in (f)(1) to mean the same as in
9 (f)(2)?

10 MR. MASCIA: Because they're part of the
11 same - - - the very same statute. And that's what
12 this court recognized in Rafellini, that they were
13 part of the same statute. They were only
14 subsequently renumbered.

15 JUDGE READ: You're talking about the
16 legislative history?

17 MR. MASCIA: Correct. They were only
18 subsequently renumbered later. They were - - - they
19 were one paragraph. They were one paragraph. And so
20 the term - - -

21 JUDGE GONZALEZ: Were they renumbered after
22 Amato or before Amato?

23 MR. MASCIA: I believe they were - - - I
24 don't know for sure whether it was before - - -

25 JUDGE GONZALEZ: Well, one was in 1988 and

1 the other was in 1984.

2 MR. MASCIA: Yeah, '84 was the - - - was
3 the renumbering.

4 JUDGE GONZALEZ: And Amato was in '88.

5 MR. MASCIA: Correct.

6 JUDGE GONZALEZ: So it was renumbered
7 before Amato?

8 MR. MASCIA: Correct. But you can't have a
9 different definition for the term motor vehicle in an
10 - - - for purposes of uninsured motorist coverage and
11 - - - and a different one for SUM coverage.

12 JUDGE READ: Why not?

13 MR. MASCIA: Because SUM coverage is an
14 extension of uninsured motorist coverage. That's
15 what this court has always interpreted - - -

16 JUDGE ABDUS-SALAAM: If it were for
17 purposes of stacking, would it be different?

18 MR. MASCIA: I'm sorry, I'm - - - I'm not
19 sure I follow you.

20 JUDGE ABDUS-SALAAM: Judge Fahey said that
21 we have a difference of definition because one of
22 these issues is stacking, and the other is SUM
23 coverage. So is there a difference simply because
24 one - - - we're dealing with stacking or not?

25 MR. MASCIA: No, because in Wagner - - -

1 JUDGE ABDUS-SALAAM: It's the same
2 definition?

3 MR. MASCIA: It's the same definition.
4 That's the way this court has always interpreted
5 state-mandated endorsements. That's a really
6 unremarkable - - -

7 JUDGE PIGOTT: But really - - -

8 MR. MASCIA: - - - principle.

9 JUDGE PIGOTT: - - - in your argument
10 before, where you said that you're going to - - -
11 you're going to cover your - - - your - - - Mr.
12 Knauss.

13 MR. MASCIA: Yes.

14 JUDGE PIGOTT: Well, your - - - your - - -
15 your - - - your SUM coverage says any vehicle
16 operated by you. So was he operating a vehicle and
17 therefore you're covering him?

18 MR. MASCIA: No, he - - - he - - - an
19 insured is, you, the named insured. So he's - - -
20 he's covered whether he's walking down the street or
21 in a motor veh - - - or in a motor vehicle. It
22 doesn't matter.

23 JUDGE PIGOTT: He - - - he walks into a
24 tree, and you're going to cover him?

25 MR. MASCIA: No, no. If he's walking down

1 the street, and he's injured by an under - - -
2 underinsured motor vehicle, he's covered.

3 JUDGE PIGOTT: By a vehicle, exactly. And
4 what I'm suggesting to you is that he's injured - - -
5 oh, I see. What you want to say is even though he's
6 in a - - - he's in a police car - - - we won't call
7 it a motor vehicle, because you don't want to - - -
8 but he was hit by a vehicle. That - - - that - - -
9 that car was hit by a vehicle, and that's why you're
10 covering him, because - - - because Mr. Walton was in
11 a vehicle.

12 MR. MASCIA: The - - - I think we're
13 talking about two different - - -

14 JUDGE PIGOTT: In other words, you can't -
15 - -

16 MR. MASCIA: - - - things.

17 JUDGE PIGOTT: - - - you can't say Mr.
18 Knauss was in a motor vehicle, because he you're
19 saying - - -

20 MR. MASCIA: He wasn't.

21 JUDGE PIGOTT: Pardon me?

22 MR. MASCIA: He wasn't.

23 JUDGE PIGOTT: All right. So - - - so
24 you're saying the reason that you've got SUM coverage
25 was because he was struck by another motor vehicle.

1 MR. MASCIA: Because he was injured by an
2 un - - - underinsured motor vehicle. Correct.

3 JUDGE PIGOTT: Okay. So - - - and so is
4 the passenger?

5 MR. MASCIA: Correct.

6 JUDGE PIGOTT: All right. So they both get
7 covered?

8 MR. MASCIA: They both don't get covered,
9 because the passenger - - -

10 JUDGE PIGOTT: You said you were going to
11 cover Mr. - - - Mr. Knauss.

12 MR. MASCIA: Yes, because he - - - because
13 if you - - - because he's covered as a named insured,
14 regardless of whether he's operating a motor vehicle
15 or not.

16 JUDGE GONZALEZ: Well, because under the
17 SUM he meets the definition of insured.

18 MR. MASCIA: Correct.

19 JUDGE GONZALEZ: The question now is
20 whether his passenger, because he's in a police motor
21 vehicle, whether that passenger meets the definition
22 of insured?

23 MR. MASCIA: Yes.

24 JUDGE GONZALEZ: And then we have to go to
25 the statute and see what the definition of a motor

1 vehicle is - - -

2 MR. MASCIA: Correct.

3 JUDGE GONZALEZ: - - - and whether police -
4 - - a motor vehicle is excluded or not included.

5 Now, with - - - with that in mind, VTL 125
6 has no exclusion for police vehicle. It defines the
7 vehicle, but it - - - and it has some exclusions,
8 because I think it - - -

9 MR. MASCIA: Yeah.

10 JUDGE GONZALEZ: - - - it excludes
11 snowmobiles - - -

12 MR. MASCIA: Um-hum.

13 JUDGE GONZALEZ: - - - it excludes all - -
14 - all vehicle terrains (sic) and I think - - -

15 MR. MASCIA: Um-hum.

16 JUDGE GONZALEZ: - - - for mobility of
17 people that are not able to walk, but it doesn't
18 exclude police vehicles.

19 MR. MASCIA: Correct.

20 JUDGE GONZALEZ: So why then - - - why
21 should then we exclude police vehicles from - - -
22 from the definition that you want us to - - -

23 MR. MASCIA: Because - - -

24 JUDGE GONZALEZ: - - - to implement?

25 MR. MASCIA: - - - because VTL 388 is

1 expressly mentioned in the statutes that mandated
2 this policy, and that's where this court has always
3 looked. There - - - if that's the definition - - -
4 if that's the - - - the definition of the term "motor
5 vehicle" that's in the statute that mandated this
6 policy, why would you look anywhere else?

7 JUDGE GONZALEZ: You don't think that the -
8 - - the absence of - - - of the exclusion of motor
9 vehicles from VTL 125 is fatal to your position?

10 MR. MASCIA: Absolutely not. It - - -
11 that's exactly the statutory scheme that the
12 legislature set up. It directed and aimed this
13 entire statutory scheme at a certain class of
14 vehicles. So when the - - - when the endorsement
15 refers to the term "motor vehicle", obviously it's
16 referring to that very same class of vehicles. And -
17 - -

18 CHIEF JUDGE LIPPMAN: But isn't 125 - - -

19 MR. MASCIA: - - - if you - - - if you
20 interpret it - - -

21 CHIEF JUDGE LIPPMAN: - - - to ensure that
22 there's no gaps in the SUM coverage?

23 MR. MASCIA: No, if you use 125, then
24 you're going to give more underinsured motorists
25 coverage than the person has liability coverage. And

1 that's the whole point of SUM coverage, is to make
2 them the same. And we know that the liability
3 coverage doesn't apply to police vehicles, because
4 that's what Insurance Law 3420(e) says. And the
5 regulations that implement that, similarly define the
6 term "motor vehicle" to exclude police vehicles.

7 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's
8 hear from your adversary - - -

9 MR. MASCIA: Thank you.

10 CHIEF JUDGE LIPPMAN: - - - and then - - -
11 then you'll have rebuttal time.

12 MR. BRAUNSTEIN: Thank you, Your Honor. If
13 - - - I may, State Farm's argument is 388 controls
14 and it's whole - - -

15 CHIEF JUDGE LIPPMAN: Why doesn't - - - why
16 doesn't it control?

17 MR. BRAUNSTEIN: Well, if - - - if I could
18 just continue that thought for just one moment,
19 Judge?

20 CHIEF JUDGE LIPPMAN: Go ahead.

21 MR. BRAUNSTEIN: That 388 controls, and it
22 excludes police and fire vehicles, and the
23 legislature has enacted this whole scheme to
24 eliminate police and fire vehicles from even the
25 possibility of UM coverage.

1 information, I - - - I guess, possibly.

2 JUDGE STEIN: Okay. And - - - and - - -
3 and do you think that that would affect the
4 availability of - - - of insurance coverage for
5 police officers?

6 JUDGE READ: Or the cost?

7 JUDGE STEIN: Or the cost?

8 MR. BRAUNSTEIN: I don't - - - I'm not
9 aware of any situations where this situation has
10 actually come up before, where even a police partner
11 is making a claim against the police officer's
12 policy.

13 Right, if the police officer is at all
14 negligent, the claim would be against the police
15 officer. It would be a liability claim.

16 JUDGE STEIN: But - - - but if we - - - if
17 we establish the rule that you're - - - that you're
18 asking for here, it would certainly allow for that
19 circumstance?

20 MR. BRAUNSTEIN: I think it would allow for
21 that circumstance, if they could get the information
22 from the police officer. I - - - I mean, I don't
23 know how that, as a practicality, could ever happen.
24 But I can't - - - I couldn't rule it out.

25 JUDGE READ: Do we have to overrule Amato

1 to rule in your favor?

2 MR. BRAUNSTEIN: I don't think you have to
3 overrule Amato. You know, the important thing here
4 is, you know, when we talk about the terms being
5 consistent throughout, 3420(e) talks about two
6 distinct things. And Judge Fahey made reference to
7 that earlier. It refers to a motor vehicle or a
8 vehicle as defined under 388. Okay? That's two
9 separate things.

10 Amato looked at that and said police
11 vehicles don't have to have liability coverage, all
12 right, that municipalities don't have to have
13 liability coverage. Amato was not addressing the
14 terms of any particular policy. They were not
15 addressing policy terms. It was a question - - -

16 JUDGE GONZALEZ: No, but Amato was
17 addressing the issue raised by the appellant with
18 respect to whether or not the police motor vehicles
19 are excluded. And let me just mention what I believe
20 the holding to be in Amato.

21 It says, "We hold that Insurance Law
22 Section 3420(f) providing that all 'motor vehicle'
23 insurance policies must contain uninsured motorist
24 coverage has no application to police vehicles."

25 So if we were to - - - in my humble view,

1 if we were to determine that - - - that with respect
2 to 3420(f)(2) that that doesn't apply, in essence, we
3 would be overruling Amato, don't you think?

4 MR. BRAUNSTEIN: Not really. Because Amato
5 was addressing - - - Amato was addressing whether or
6 not the City of New York had to provide in - - -
7 uninsured motorist coverage.

8 JUDGE GONZALEZ: That was the issue, and
9 that was the holding. But I think - - - at least,
10 again, to my humble view - - - a holding is not done
11 in a vacuum. There must be a process by which you
12 reach that holding. And I think it's called the
13 ratio decidendi - - - the ratio decidendi. So we
14 have to look at the basis of that holding. And the
15 basis of that holding, in essence, was that police
16 vehicles are not - - - or are to be excluded from
17 3420(f).

18 MR. BRAUNSTEIN: Well, you know, to put it
19 a different way, there is no prohibition against any
20 municipality going out and buying liability coverage
21 for its police vehicles. They're not required to do
22 it, but certainly they could do it if they wanted to.
23 And incorporated village - - - a small municipality
24 that cannot afford to self-insure, would buy un - - -
25 would buy liability coverage.

1 In that situation, 3420 would mandate that
2 that coverage provide uninsured motorist coverage.
3 There would be no - - - there would be no exception.

4 All Amato said - - -

5 JUDGE PIGOTT: Well, it would provide an
6 opportunity for it.

7 JUDGE READ: Yeah.

8 JUDGE PIGOTT: You don't have to buy it.
9 And - - - and you're right. I mean, there's a lot of
10 small communities that actually do insure their
11 vehicles - - -

12 MR. BRAUNSTEIN: Right.

13 JUDGE PIGOTT: - - - they just don't
14 provide for SUM. What your - - - what your opponent
15 is saying is your - - - your - - - not your insured -
16 - - the insured in your case had the foresight to get
17 SUM coverage, so he said if I get - - - if I get hit
18 by a 25/50, I'm covered. The div - - - the issue, it
19 seems to me, comes down to the way - - - the way - -
20 - the way it's written in says, you, any member of
21 your family or any passenger in your vehicle, which
22 would seem to cover your person too.

23 And if that happened, and there was a
24 lawsuit involving the City, anything the City paid in
25 terms of Workers' Compensation or med pay or anything

1 else, is going to come out of that - - - out of that
2 lien that they're going to have for the SUM coverage.

3 So I - - - to me, this is an insurance
4 case. It has nothing to do with the fact that
5 there's - - - that there's an automobile that has a
6 pol - - - that's a police car. It's an insurance
7 policy that Knauss bought that's supposed to cover
8 your client.

9 MR. BRAUNSTEIN: Right. You know, I - - -
10 well, in - - - I would say in general, I agree with
11 that completely.

12 JUDGE PIGOTT: Good.

13 MR. BRAUNSTEIN: And then you have like a
14 whole line of cases that speak of - - - I mean, when
15 - - - when this court, you know, spoke in Shaw and
16 said the interpretation of uninsured motorist
17 statutes must not be caught up in narrow and
18 technical analysis and give the words the meaning
19 that effectuate what people expect it to mean, when
20 people read the term "motor vehicle" - - -

21 JUDGE ABDUS-SALAAM: Well, counsel, those -
22 - - counsel, those cases - - - you - - - you said
23 there were a line of cases. But we have Amato which
24 already has decided - - - or we determined what the
25 definition of "motor vehicle" is for insurance law

1 purposes. 3420 is - - - is the insurance provision.
2 And the provision you would like us to look at, 125
3 of the VTL, is not mentioned in 3420. But 388 is.

4 MR. BRAUNSTEIN: But the only - - -

5 JUDGE ABDUS-SALAAM: And so - - -

6 MR. BRAUNSTEIN: I'm sorry.

7 JUDGE ABDUS-SALAAM: - - - why would we - -
8 - why would we look to another portion of the VTL
9 when Insurance Law 3420 tells us to look at 388?

10 MR. BRAUNSTEIN: For two reasons. One is
11 this court has always basically said that this - - -
12 the - - - the overall uninsured motorist scheme has
13 to be read basically as broadly as possible to
14 satisfy public policy concerns. And the second is,
15 the only time 388 is mentioned in 3420, it's
16 mentioned in contrast - - - excuse me - - - the only
17 time 388 is mentioned in 3420 is when it's mentioned
18 in contrast to the term "motor vehicle".

19 It says a motor vehicle or a vehicle in 388
20 - - - as defined in 388. Those are two separate
21 things. They are not the same thing.

22 So to say then that that provides some sort
23 of definition that has to carry over to uninsured, I
24 don't think that really follows.

25 JUDGE ABDUS-SALAAM: Are you saying that

1 388 doesn't define "motor vehicle", only "vehicle"?

2 MR. BRAUNSTEIN: VTL 388 only defines the
3 term "vehicle". It says, a vehicle is a motor
4 vehicle under 125, except it excludes police and fire
5 vehicles. And like I said, 3420(f)(5), I think it
6 is, specifically speaks to uninsured motorist
7 coverage for fire vehicles. The legislature did not
8 exclude police and fire vehicles from uninsured
9 motorist coverage. They only said municipalities
10 don't have to buy it. It doesn't affect a personal
11 policy bought by Knauss.

12 JUDGE GONZALEZ: Yeah, that's your
13 representation of the way you read Amato. But again,
14 I go back to the words. And these are quotes from
15 Amato. "Insurance Law Section 3420(f) providing that
16 all motor vehicle insurance policies must contain
17 uninsured motorist coverages has no application to
18 police vehicles."

19 Now, if that is so, and that's what Amato
20 stands for, we're dealing now with 3420(f)(2). But
21 there's an argument that 34(f)(22) (sic) starts with,
22 "any such policy", which I think automatically refers
23 back to 3420(f)(1), is an extension - - - if it is -
24 - - and I'm not saying that it is - - - but an
25 argument can be made that it's an extension of

1 3420(f)(1). And if Amato says what it says, why
2 cannot then it be said that it applies equally to
3 3420(f)(2)?

4 MR. BRAUNSTEIN: I think it can apply to -
5 - - if it applies to (f)(1), I don't think I would
6 argue that it doesn't apply to (f)(2).

7 JUDGE GONZALEZ: So therefore if it doesn't
8 - - - if we were to - - - again, and forgive me for
9 repeating myself, but then, if we were to take your
10 position, we, in essence, would be overruling Amato.

11 MR. BRAUNSTEIN: Again, I don't think so,
12 because again, as you said talking about the ratio
13 decidendi of the decision, Amato decided that
14 municipalities are not required to buy liability
15 insurance. It then said - - - it then said the
16 obligation to provide uninsured motorists is derived
17 from the requirements of what's contained in a
18 liability policy.

19 If you don't have to provide a liability
20 policy, you don't have to provide uninsured motorist
21 coverage. I think all of that follows. That is not
22 to say that Amato, which was not addressing a
23 specific uninsured motorist policy, was attempting to
24 define that term for those policies.

25 JUDGE GONZALEZ: But how do you still get

1 by the - - - the words - - - and again, and I'm
2 quoting: "Uninsured motorist coverage has no
3 application to police vehicles"?

4 MR. BRAUNSTEIN: Because of where those
5 words came from, from what just came before, that if
6 you don't have to have - - - if - - - if the
7 legislature exempted municipalities from buying
8 liability insurance, we cannot make them provide
9 uninsured motorist coverage. In Amato, the City of
10 New York was self-insured. They were not providing
11 liability insurance. Since the obligation - - -
12 since the obligation to provide the uninsured
13 motorist coverage would be derived from that
14 liability policy, they didn't - - - the obligations
15 of uninsured motorists did not apply to those police
16 vehicles.

17 JUDGE GONZALEZ: Well, that's basically
18 your argument to my question as to whether or not - -
19 -

20 MR. BRAUNSTEIN: Yes.

21 JUDGE GONZALEZ: Okay.

22 CHIEF JUDGE LIPPMAN: Anything else,
23 counsel?

24 JUDGE PIGOTT: You don't raise - - - I'm
25 looking at 32 of the record, where State Farm sent a

1 letter to your law firm, I guess, saying, "State Farm
2 hereby grants permission for you to accept the
3 primary tortfeasor offer of 25,000 dollars. Upon
4 settlement, please forward a copy of the payment and
5 the executed release." And it says, "Our insured,
6 Michael Knauss and the party making the claim,
7 Patrick Fitzgerald."

8 I took that to mean that they accepted your
9 insured as - - - as being covered.

10 MR. BRAUNSTEIN: I think they did.

11 JUDGE PIGOTT: You don't raise that
12 argument, I guess.

13 MR. BRAUNSTEIN: I didn't raise an estoppel
14 argument, no. But I think certainly they would be
15 estopped, just like they argued in the record that
16 125 was the - - - they implicitly argued that 125 was
17 the governing provision. Their initial argument was
18 a police vehicle is not a motor vehicle under 125.
19 And then as time has gone on, it's evolved to a
20 position of now we have to look at 388.

21 JUDGE GONZALEZ: So you think that the fact
22 that under 125 police vehicles are not excluded from
23 the definition of 125, that's fatal to their - - -

24 MR. BRAUNSTEIN: Exactly. This - - - the
25 public policy of this state, as set forth in the

1 statutes and of every decision from this court has
2 been to make sure that people such as Fitzgerald are
3 covered; that passengers - - - anybody who is the
4 beneficiary of one of these policies, is covered.
5 That's always - - - every decision, that's - - - the
6 Countrywide decision where this court said that a
7 motorcycle could be deemed an automobile, because
8 that was the scope, that was what the courts and the
9 legislature were trying to do.

10 Never before have the courts looked to
11 contract this definition. Looking at a case where
12 the City was determined not to have to provide
13 uninsured motorist coverage, to determine that that
14 case now defines a term in a policy, where the court
15 doesn't say that in that case, and it would be
16 artificially limiting a definition that anybody who
17 would read "motor vehicle", right, the average ex - -
18 - the averaged insured, the reasonable expectations
19 of the averaged insured, to learn that a motor
20 vehicle is not - - - excuse me, a police car is not a
21 motor vehicle, I think most people would be surprised
22 to hear that.

23 CHIEF JUDGE LIPPMAN: Okay. Thanks,
24 counsel.

25 MR. BRAUNSTEIN: Thank you.

1 CHIEF JUDGE LIPPMAN: Counselor, what was
2 the legislature trying to do here, and how does - - -
3 if we - - if we agree with you, how does it further
4 what they're trying to do with this statutory scheme?

5 MR. MASCIA: The purpose of SUM coverage is
6 to provide the same level of protection for liability
7 insur - - - coverage and underinsured motorist
8 coverage. If you - - - if you apply underinsured
9 motorist coverage to police vehicles, then you're
10 giving more underinsured motorist coverage than
11 liability - - -

12 JUDGE PIGOTT: No, you're not. In fact,
13 the City isn't involved in this lawsuit at all,
14 right? I mean, they have not been noticed - - -

15 MR. MASCIA: No.

16 JUDGE PIGOTT: - - - they're not - - -
17 they're not involved in it, other than the fact that
18 - - - that there was a patrol vehicle involved. But
19 - - -

20 MR. MASCIA: Correct.

21 JUDGE PIGOTT: - - - the claim is with your
22 insured - - -

23 MR. MASCIA: Right.

24 JUDGE PIGOTT: - - - who paid you a
25 premium. And the policy says you're insured and any

1 passenger, and they're saying we're a passenger, he's
2 insured, we should get paid. The City of New York
3 has nothing whatsoever to do with this liability or
4 anything having to do with it.

5 MR. MASCIA: That's right. They - - - they
6 don't have anything to do with it. But the - - - the
7 policy, the way it defines it "insured" is that you,
8 the named insured, is always covered. It doesn't
9 matter whether they're - - - what vehicle they're in
10 at all.

11 JUDGE PIGOTT: Right.

12 MR. MASCIA: Right.

13 JUDGE PIGOTT: And so are their passengers.

14 MR. MASCIA: If they're in a motor vehicle.
15 That's - - - that's the - - - to be an other insured,
16 you have to be in a motor vehicle.

17 JUDGE PIGOTT: But you're saying he's in a
18 motor vehicle but his passenger isn't?

19 MR. MASCIA: I'm saying it doesn't matter
20 whether he - - - I'm saying he's not in a motor
21 vehicle, and he's still covered.

22 JUDGE PIGOTT: Okay.

23 MR. MASCIA: I'm saying Knauss is not in a
24 motor vehicle, and he's still covered. That's what
25 the policy says.

1 And - - - and this idea that - - - and if
2 you use the Appellate Division's rationale, you're -
3 - - you're going to create uncertainty with respect
4 to every single state-mandated endorsement that's out
5 there, because this court has always interpreted
6 state-mandated endorsements with reference to the
7 statutes that mandated them.

8 CHIEF JUDGE LIPPMAN: You're going to
9 create uncertainty by interpreting the endorsement in
10 its plain language?

11 MR. MASCIA: Yes, absolutely, because this
12 court has always interpreted - - -

13 CHIEF JUDGE LIPPMAN: Isn't that kind of a
14 contradictory position?

15 MR. MASCIA: Not based on this court's
16 precedent.

17 CHIEF JUDGE LIPPMAN: Would they expect - -
18 - when someone reads this endorsement, what would
19 they expect? Would they expect that the passenger
20 would be covered?

21 MR. MASCIA: This is the legislative
22 interpretation - - -

23 CHIEF JUDGE LIPPMAN: No, no, I asked a
24 quest - - - I asked you a question, counsel.

25 MR. MASCIA: They might.

1 CHIEF JUDGE LIPPMAN: What would be - - -

2 MR. MASCIA: They might.

3 CHIEF JUDGE LIPPMAN: - - - the reasonable
4 expectation.

5 MR. MASCIA: They might. I - - - I don't
6 know if they would. That's not the - - -

7 JUDGE PIGOTT: Well, wasn't it your
8 reasonable expectation when you said settle the case
9 and we'll - - - and we'll cover you?

10 MR. MASCIA: No, because the - - - they
11 only covered him for 25,000 dollars. That's - - -
12 that's - - -

13 JUDGE PIGOTT: No. He was - - - that's - -
14 - that's the - - - the - - - the - - the drunk - - -
15 pardon me - - - Mr. Walton's coverage was 25/50, and
16 - - - and they wrote to you and said there's 25/50.
17 We've got SUM. So we want to get paid over and above
18 the 25/50. In order to do that under - - - under
19 provision 10 of the SUM coverage, we need your
20 permission. And you said, you have our permission to
21 settle that case, and - - - and you did it in a
22 context of your insured Knauss and the party making
23 the claim, being Fitzgerald.

24 And in doing that, you must have believed
25 that the SUM coverage required you to give permission

1 to settle that case with respect to - - - with
2 respect to Mr. Walton.

3 MR. MASCIA: We don't know the terms of
4 that settlement. And I don't think that that
5 necessarily means - - -

6 JUDGE PIGOTT: Of course you don't.

7 MR. MASCIA: - - - that.

8 JUDGE PIGOTT: But the point is, they don't
9 need your permission, unless it's - - - unless they
10 want the SUM coverage. And you said, you have our
11 permission. Right?

12 MR. MASCIA: But they - - - they could have
13 given the permission with the - - - with the
14 understanding that they could litigate that issue
15 later.

16 JUDGE PIGOTT: No, there's a reservation of
17 rights requirement in things like that.

18 MR. MASCIA: I - - - I - - - I don't know
19 the answer to that. I don't know why - - - I mean,
20 we don't know exactly - - -

21 JUDGE PIGOTT: It could have been an
22 oversight.

23 MR. MASCIA: - - - what - - -

24 JUDGE PIGOTT: It could have been a letter
25 went out just to cover the - - -

1 MR. MASCIA: I don't really know. That's
2 never been raised by any of the parties or any of the
3 lower courts.

4 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
5 you both. Appreciate it.

6 MR. BRAUNSTEIN: Thank you.

7 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of State Farm Mutual Automobile Insurance Company v. Fitzgerald (Reargument), No. 119 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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