

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

-----

MATTER OF STATE FARM MUTUAL  
AUTOMOBILE INSURANCE COMPANY

Appellant,

-Against-

No. 38

FITZGERALD

Respondent.

-----

20 Eagle Street  
Albany, New York 12207  
February 12, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
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:

HENRY MASCIA, ESQ.  
RIVKIN RADLER LLP  
Attorneys for Appellant  
926 RXR Plaza  
West Tower, 9th Floor  
Uniondale, NY 11556

FRANK BRAUNSTEIN, ESQ.  
FRANK J. LAINE, P.C.  
Attorneys for Respondent  
449 South Oyster Bay Road  
Plainview, NY 11803

Sharona Shapiro  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's go to number  
2 38.

3 Counselor, go ahead. We're ready for you.  
4 You want any rebuttal time, counselor?

5 MR. MASCIA: Yes, three minutes, Your  
6 Honor.

7 CHIEF JUDGE LIPPMAN: Three minutes, sure.  
8 Go ahead, counselor.

9 MR. MASCIA: May it please the court. My  
10 name is Henry Mascia, attorney for State Farm.

11 CHIEF JUDGE LIPPMAN: Counsel, what's the  
12 problem here? The - - - the policy that we're  
13 talking about seems to have very clear language when  
14 it says any other vehicle driven by Krauss (sic).  
15 What's confusing about that?

16 MR. MASCIA: There's nothing confusing  
17 about it. This court held, in Amato, that the term  
18 "motor vehicle", in Insurance Law 3420(f), is limited  
19 to the class of vehicles described in VTL 388. And  
20 that excludes police vehicles.

21 CHIEF JUDGE LIPPMAN: But are you relying  
22 on Amato? What are you - - -

23 MR. MASCIA: Yes.

24 CHIEF JUDGE LIPPMAN: I - - - because it  
25 seems that this is so vague; in this context, it

1 excludes police vehicles?

2 MR. MASCIA: No, in general, the term motor  
3 vehicle excludes police vehicle.

4 CHIEF JUDGE LIPPMAN: So you could never  
5 have - - - if you have a police officer driving a  
6 car, it can never come under the policy?

7 MR. MASCIA: No, that's not what that  
8 means.

9 CHIEF JUDGE LIPPMAN: What does it mean? I  
10 don't - - -

11 MR. MASCIA: It - - -

12 CHIEF JUDGE LIPPMAN: To me, it seems to  
13 fit our situation here.

14 MR. MASCIA: Well - - -

15 CHIEF JUDGE LIPPMAN: Unless you exclude  
16 all police vehicles in all situations.

17 MR. MASCIA: Because the - - - anyone who  
18 purchases SUM coverage, on their own private vehicle,  
19 is a named insured. So they're covered regardless of  
20 whether they're occupying a motor vehicle or walking  
21 down the street; they'd still be covered. So for  
22 example, in this case, Knauss, Officer Knauss, he had  
23 his own SUM coverage, so he'd be covered in the  
24 accident.

25 CHIEF JUDGE LIPPMAN: But you're driving a

1 vehicle - - -

2 MR. MASCIA: Correct.

3 CHIEF JUDGE LIPPMAN: - - - and your policy  
4 says something about whether you're covered when  
5 you're, you know, driving any other vehicle. Why is  
6 that not - - -

7 MR. MASCIA: Because the legislature  
8 specifically - - -

9 CHIEF JUDGE LIPPMAN: - - - determinative?

10 MR. MASCIA: - - - excluded police vehicle  
11 from that definition.

12 JUDGE PIGOTT: Why did they do that?

13 MR. MASCIA: Why did they do that? I think  
14 it's part and parcel of the entire statutory scheme.  
15 Police vehicles are excluded from VTL 388 in  
16 vicarious liability and Insurance Law 3420(e) and (f)  
17 and VTL 312.

18 JUDGE PIGOTT: Why'd they do that?

19 MR. MASCIA: Why did they exclude police  
20 vehicles from all of those?

21 JUDGE PIGOTT: What's the logic of this? I  
22 understand, you know, the case when you've got a  
23 self-insured city, but I'm - - - I'm mystified why  
24 you wouldn't get coverage.

25 MR. MASCIA: Are you saying why is that the

1 definition in the policy?

2 JUDGE PIGOTT: You're saying 388 applies;  
3 125 could apply just as well, which is what, I guess,  
4 the lower court - - - and I'm just wondering why - -  
5 - why would you exclude vehicles that drive on our  
6 highways from coverage?

7 MR. MASCIA: Well, because those police  
8 vehicles are not required to have uninsured motorist  
9 coverage, and the owners of those vehicles are not  
10 vicariously liable, and the owners of those vehicles  
11 are not even given the option to purchase SUM  
12 coverage. So that's why they're - - - that's why  
13 they're excluded as a class of vehicles.

14 CHIEF JUDGE LIPPMAN: Yeah, but I think  
15 that the judge is saying we get it when there's a  
16 self-insurer, you know, like the City of New York.

17 MR. MASCIA: Um-hum.

18 CHIEF JUDGE LIPPMAN: But why does this fit  
19 here? It doesn't - - -

20 MR. MASCIA: I think what - - - I think  
21 what you're getting at - - -

22 CHIEF JUDGE LIPPMAN: And why doesn't 125  
23 apply? I don't - - -

24 MR. MASCIA: Well, 125 doesn't apply  
25 because VTL 388 is specifically mentioned in the

1 statute. And the definition of a term in the statute  
2 has to be the same as the definition of the term in  
3 the policy. That's what this court has done for  
4 decades, and there's no reason to depart from that.  
5 And the reason is the legislature mandated this  
6 policy, and the legislature established the contents  
7 of this policy. So if you want to know what the  
8 policy means, you look to the statute.

9 CHIEF JUDGE LIPPMAN: Well, I first look at  
10 - - -

11 MR. MASCIA: That's what the court did in  
12 Wagoner.

13 CHIEF JUDGE LIPPMAN: - - - the language of  
14 the - - - of the policy - - -

15 MR. MASCIA: Um-hum.

16 CHIEF JUDGE LIPPMAN: - - - and then see  
17 what the statutory framework is around it.

18 MR. MASCIA: Yeah, and the policy - - - the  
19 policy doesn't define motor vehicle. So if the  
20 policy doesn't define motor vehicle, then - - - then  
21 this court has instructed, for many decades now, that  
22 you look to the statute. And the reason is because  
23 the legislature is the - - - is the body that  
24 mandated State Farm to issue this policy. Therefore  
25 the definition - - -

1 CHIEF JUDGE LIPPMAN: It seems to be plain  
2 language to me.

3 MR. MASCIA: Oh.

4 CHIEF JUDGE LIPPMAN: Plain language of the  
5 policy endorsement.

6 MR. MASCIA: You can't apply the plain  
7 language of the term "motor vehicle".

8 CHIEF JUDGE LIPPMAN: You're saying we  
9 can't do it in a vacuum? Is that what you're saying?

10 MR. MASCIA: Exactly. Just like the court  
11 - - - that's exactly what the court did in Wagoner.

12 JUDGE FAHEY: Well, you're saying the  
13 policy language - - - Judge Lippman, the policy  
14 language is correct, but you're just saying that the  
15 legislature has defined it such that this category of  
16 vehicles is exempt, right?

17 MR. MASCIA: Correct.

18 JUDGE FAHEY: That's really basically what  
19 you're saying.

20 Tell me, is there a distinction that has to  
21 be drawn between SUM coverage for uninsured vehicles  
22 - - - Amato was uninsured vehicles, right?

23 MR. MASCIA: Correct.

24 JUDGE FAHEY: - - - and underinsured  
25 vehicles, which usually is supplemental coverage that

1           you're purchasing on top of, and it's an option that  
2           somebody takes too. Is there a distinction you need  
3           to draw there?

4                       MR. MASCIA: Correct. The Appellate  
5           Division drew that distinction, but this court has  
6           instructed that SUM coverage is an extension of  
7           uninsured motorist coverage. And so they can't apply  
8           to two separate classes of vehicles, and they can't  
9           have two different definitions for the same word.  
10          And they're the same policy. And this court has  
11          recognized that they're part of the same statute.  
12          They were only renumbered - - -

13                      JUDGE FAHEY: They are from the same  
14          statute - - -

15                      MR. MASCIA: - - - subsequently.

16                      JUDGE FAHEY: - - - but actually, you make  
17          different decisions on them. One's required, right -  
18          - -

19                      MR. MASCIA: Correct.

20                      JUDGE FAHEY: - - - uninsured?  
21          Underinsured is not required.

22                      MR. MASCIA: It's required to be offered -  
23          - -

24                      JUDGE FAHEY: All right.

25                      MR. MASCIA: - - - to the insured.



1 JUDGE FAHEY: But it's not required to be  
2 purchased?

3 MR. MASCIA: Correct.

4 JUDGE FAHEY: Okay.

5 MR. MASCIA: But this court has held that  
6 they are part of the same policy, and so they can't  
7 have two different definitions.

8 JUDGE FAHEY: So - - - but because of that  
9 option, could there be a distinction drawn between an  
10 underinsurance question and its definition of a  
11 vehicle, and an uninsured question - - - vehicle and  
12 its definition of a vehicle?

13 MR. MASCIA: I don't think so, because that  
14 would be - - - because that would be inconsistent  
15 with this court's decisions in Rafellini and - - -

16 JUDGE FAHEY: No, that's okay, go ahead;  
17 finish your thought. I understand what you're  
18 saying.

19 MR. MASCIA: Can you repeat your question?  
20 I'm not - - - I think it may have been not - - -

21 JUDGE FAHEY: That's all right. Let's go  
22 on to the next question.

23 CHIEF JUDGE LIPPMAN: Go ahead, Judge.  
24 What else?

25 JUDGE FAHEY: Just one last question.

1           Following up on what Judge Pigott had asked, I would  
2           wonder what is - - - you might not know - - - what's  
3           the legislative policy behind this? What's the  
4           purpose of this exclusion?

5                     MR. MASCIA: Well, the legislature excluded  
6           these police vehicles, farm vehicles and fire  
7           vehicles all as a whole class. They excluded them  
8           from all of these different provisions. So you have  
9           to interpret the provisions in uniformity. And - - -

10                    JUDGE FAHEY: I see. So it's a vehicle  
11           definition, as it applies to municipal vehicles, and  
12           it applies across the board - - -

13                    MR. MASCIA: Correct.

14                    JUDGE FAHEY: - - - that exclusion. So it  
15           was a policy decision that they made.

16                    MR. MASCIA: Exactly. It was a policy  
17           decision that they made. And they - - - if the  
18           legislature specifically defines a term in the  
19           statute, then the policy mandated by that statute has  
20           to have the same definition. That's an unremarkable  
21           principle of law that this court has followed for  
22           decades.

23                    CHIEF JUDGE LIPPMAN: Okay, counselor.

24                    JUDGE FAHEY: Thank you.

25                    MR. MASCIA: Thank you.

1 CHIEF JUDGE LIPPMAN: Thanks, counselor.  
2 Counselor?

3 MR. BRAUNSTEIN: Good afternoon. Frank  
4 Braunstein for the respondent.

5 CHIEF JUDGE LIPPMAN: Counsel, are police  
6 vehicles excluded in the context of this policy  
7 endorsement?

8 MR. BRAUNSTEIN: Absolutely not, Judge.

9 CHIEF JUDGE LIPPMAN: Why not? Why not?

10 MR. BRAUNSTEIN: What State Farm is now  
11 arguing is that VTL 388 provides a definition of the  
12 term "motor vehicle" that should be used in this  
13 policy. VTL 388 - - -

14 CHIEF JUDGE LIPPMAN: Where do you get the  
15 definition that's used in this policy?

16 MR. BRAUNSTEIN: Every court to have  
17 considered the issue, which is basically the Second  
18 Department and the Fourth Department - - -

19 CHIEF JUDGE LIPPMAN: Yeah?

20 MR. BRAUNSTEIN: - - - has said 125. It's  
21 the broadest definition, and what - - -

22 CHIEF JUDGE LIPPMAN: And if it's 125, it's  
23 not excluded?

24 MR. BRAUNSTEIN: A hundred percent not.

25 CHIEF JUDGE LIPPMAN: And you acknowledge

1 if it's - - - whatever it is, 388, it is excluded?

2 MR. BRAUNSTEIN: No, Judge, because 388  
3 doesn't define motor vehicle. We're proceeding from  
4 a false premise here.

5 JUDGE ABDUS-SALAAM: What does it define,  
6 and why do we use it in Amato?

7 MR. BRAUNSTEIN: Be - - - motor vehicle - -  
8 - VTL 388 addresses vehicles and motor vehicles as  
9 two separate things. And it says any vehicle or  
10 motor vehicle - - - any vehicle or motor vehicle - -  
11 - let me - - - let me start that again. A vehicle is  
12 any - - - any vehicle as defined under 125, except it  
13 excludes fire vehicles and police vehicles.

14 CHIEF JUDGE LIPPMAN: And what was Amato  
15 directed at? I gather - - -

16 MR. BRAUNSTEIN: Amato was directed - - -

17 CHIEF JUDGE LIPPMAN: - - - that Amato, you  
18 believe, is not under general application, relates to  
19 the self-insured situation of a - - -

20 MR. BRAUNSTEIN: Well, it's very simply - -  
21 - Amato looked at the statutory scheme to really  
22 realize that the legislature did not intend to  
23 require the City of New York to go out and buy  
24 insurance for police vehicles.

25 CHIEF JUDGE LIPPMAN: So that's - - -

1 MR. BRAUNSTEIN: And that - - -

2 CHIEF JUDGE LIPPMAN: - - - what that was  
3 all about, Amato?

4 MR. BRAUNSTEIN: Exactly what it was all  
5 about. And that's what 388 says. If you're - - - if  
6 you're a vehicle or a motor vehicle, right, you need  
7 to have liability insurance, except for police and  
8 fire vehicles. And that's what Amato was all about,  
9 was to prevent municipalities from having to go out  
10 and buy commercial insurance policies.

11 Every other time the legislature has wanted  
12 to exclude a police vehicle from the broad definition  
13 of motor vehicle, it says so. And there's - - -  
14 there are examples. You know, VTL 311, VTL 359, VTL  
15 388, all say a motor vehicle is as defined in 125,  
16 which unquestionably includes police vehicles, and  
17 then excludes police or other vehicles for a specific  
18 statutory purpose. The statutory purpose, in 388,  
19 which this court addressed in Amato, was to prevent  
20 municipalities, like I said before, from having to go  
21 out and buy coverage. They should be allowed to  
22 self-insure.

23 CHIEF JUDGE LIPPMAN: So when you get back  
24 to Judge Pigott's original question about legislative  
25 purpose, you think that the purpose here all fits

1 together, that - - - that Amato makes sense in terms  
2 of self-insured municipalities and that this  
3 endorsement basically comes under 125 and that we can  
4 just look at the plain language and it's - - -

5 MR. BRAUNSTEIN: Correct, because I think  
6 any way you look - - -

7 CHIEF JUDGE LIPPMAN: I mean, that's your  
8 argument, in essence, the plain language of the - - -

9 MR. BRAUNSTEIN: Right, the plain - - -  
10 yeah, I mean, because as you kind of suggested  
11 before, I mean, every decision out of this court has  
12 been to read these terms broadly. There is no  
13 decision that's ever said let's look at some more  
14 restrictive definition. How would anyone in the  
15 state of New York know what provision to look at?  
16 There - - - there are several definitions of the term  
17 VTL - - - excuse me "motor vehicle".

18 JUDGE ABDUS-SALAAM: The case that I  
19 mentioned, Amato, has already determined that "motor  
20 vehicle" doesn't include police vehicles in this  
21 state. You're saying no case out of this court - - -

22 MR. BRAUNSTEIN: No.

23 JUDGE ABDUS-SALAAM: - - - has limited - - -

24 -

25 MR. BRAUNSTEIN: No. Amato said - - - I'm

1           sorry, but my understanding of Amato is Amato says it  
2           only requires - - - the State only requires liability  
3           insurance to be issued on vehicles as defined in 388.  
4           And 388 says a vehicle is - - - or I should just say  
5           - - - simplify it - - - a vehicle is a 125 vehicle,  
6           excluding police, fire and farm vehicles. And that's  
7           only for the requirements of - - -

8                         JUDGE ABDUS-SALAAM: So you're saying  
9           there's a distinction, under Amato, between motor  
10          vehicles and vehicles.

11                        MR. BRAUNSTEIN: Not so much that the court  
12          made that express distinction, no. I don't - - - I  
13          don't know that the court made that express  
14          distinction. But the context what - - -

15                        JUDGE ABDUS-SALAAM: If we didn't make that  
16          distinction, then does that mean there is a  
17          distinction or there's no distinction?

18                        MR. BRAUNSTEIN: I think there actually is  
19          a distinction because, like I said, 388 does not  
20          define - - - does not define the term "motor  
21          vehicle". 388 says a vehicle is a motor vehicle as  
22          defined in 125, and excludes police, fire and farm  
23          vehicles. That's really what the statute says. And  
24          then, as Amato went on to say, if police vehicles  
25          don't have to have liability insurance purchased for

1           them, and the requirement for uninsured motorist  
2           coverage is derived from the requirement to have  
3           liability insurance, then municipalities don't have  
4           to buy the coverage or provide the uninsured motorist  
5           coverage.

6                     JUDGE PIGOTT: I don't have it in front of  
7           me, but what - - - where's 388? What's it entitled?  
8           What's the chapter? Isn't it the permissive use  
9           business?

10                    MR. BRAUNSTEIN: It is. It is.

11                    JUDGE PIGOTT: Is that its main purpose,  
12           was the presumption of permissive use?

13                    MR. BRAUNSTEIN: Permissive use, and it  
14           directed which vehicles had to have liability  
15           insurance, I guess because they - - - in a way, I  
16           guess you could say they go hand in hand, because the  
17           liability insurance is purchased by the owner, who's  
18           vicariously liable, so they kind of do go hand in  
19           hand in that respect.

20                    CHIEF JUDGE LIPPMAN: Okay, counselor,  
21           anything else?

22                    MR. BRAUNSTEIN: That's it, Your Honor.

23                    CHIEF JUDGE LIPPMAN: Okay. Thank you.

24                    Counsel, rebuttal?

25                    MR. MASCIA: Yes.



1 CHIEF JUDGE LIPPMAN: Go - - - talk about  
2 Amato a little bit. I gather you disagree with - - -  
3 with your adversary on what Amato is driving at and  
4 what it means?

5 MR. MASCIA: Yeah, I mean, in order - - -

6 CHIEF JUDGE LIPPMAN: You don't think it  
7 was all about a self-insured municipality like in New  
8 York City?

9 MR. MASCIA: Sure, those were the facts.  
10 And you could distinguish the facts of any case, but  
11 the question is whether the distinction matters. And  
12 what matters in Amato is that this court held that  
13 the term "motor vehicle", the definition of that term  
14 is limited to the class of vehicles described in VTL  
15 388.

16 JUDGE PIGOTT: So that gets me back to the  
17 why.

18 MR. MASCIA: That condition has to apply -  
19 - -

20 JUDGE PIGOTT: - - - because you've got a  
21 guy who's a passenger in an automobile who's  
22 seriously hurt. He's - - - you know, the target - -  
23 - the defendant vehicle, say, is 25/50 - - - I'm not  
24 sure if it's in - - - and it's nowhere near enough to  
25 cover for the damage. The driver, with some

1 foresight, has supplemental underinsurance coverage  
2 and wants to use it to assist his passenger, and in  
3 the policy it says it will, and then somehow we say,  
4 well, because he's a firefighter or a police officer,  
5 it doesn't apply.

6 MR. MASCIA: Well, it's not because he's a  
7 police officer. It's just because - - - and - - -  
8 and I think if we just talk about the statutory  
9 scheme as a whole, I think - - - I think that can  
10 answer your question. I mean, VTL 388 basically says  
11 the owners of a certain class of vehicles are  
12 vicariously liable for their use. And then - - - and  
13 then Insurance Law 3420(e) says that insurance  
14 policies issued in the State have to covered insure -  
15 - - vicarious liability.

16 JUDGE PIGOTT: Right.

17 MR. MASCIA: And - - -

18 JUDGE PIGOTT: Well, you're saying it's the  
19 vehicle, not the fact that he's a police officer.

20 MR. MASCIA: Exactly.

21 JUDGE PIGOTT: All right.

22 MR. MASCIA: Exactly. Exactly.

23 JUDGE PIGOTT: So are we saying that  
24 passengers in police vehicles are less covered than  
25 if they were in their - - - in a personal vehicle?

1           Because if he'd been in - - - if the - - - if the  
2           owner was in his personal vehicle, SUM would kick in  
3           automatically, right?

4                       MR. MASCIA:   Exactly, and here's the reason  
5           why.  The reason why is because if he was in - - -  
6           now it's his personal vehicle, that particular  
7           vehicle has SUM coverage.  Police vehicles don't have  
8           - - - they're not required to purchase any insurance,  
9           so that's why they are excluded from that class.  And  
10          - - - and if you look at the priority of coverage - -  
11          - and I think this may get to the heart of your  
12          question - - - if you look at the priority of  
13          coverage, the coverage of the vehicle is first.  So  
14          it makes sense that - - - that police vehicles are  
15          not included, because - - -

16                      JUDGE PIGOTT:  Well, except that the SUM is  
17          the overlay.  In other words, the offending vehicle,  
18          if he's got 25/50, all of a sudden, but for this fact  
19          that it's a police vehicle, may have half-a-million  
20          dollars' coverage because of a premium that the - - -  
21          that the owner paid.

22                      MR. MASCIA:  Right.

23                      JUDGE PIGOTT:  And we're saying, well,  
24          unfortunately, we don't provide that for police and  
25          fire.

1                   MR. MASCIA: Right, and the reason is  
2 because the police and fire vehicles themselves are  
3 never required to have uninsured motorist coverage,  
4 and they don't even get the option to get SUM  
5 coverage which would have covered it. Do you see  
6 what I mean? And so - - -

7                   JUDGE PIGOTT: It's hard to believe they're  
8 out of luck.

9                   MR. MASCIA: Yeah, well, if I could just  
10 make - - -

11                  CHIEF JUDGE LIPPMAN: Go ahead. The last  
12 answer. Go ahead, counsel.

13                  MR. MASCIA: Sure. I mean, I think there's  
14 - - - there's also - - - it - - - it goes the other  
15 way as well. I mean, it's totally fortuitous that -  
16 - - that Officer Fitzgerald would get coverage here.  
17 I mean, it all depends on the happenstance of whether  
18 the driver happens to get - - - have SUM coverage on  
19 their own vehicle. But ultimately, there's - - -  
20 there's more at stake here than, you know, who  
21 recovers what from this car accident. What hangs in  
22 the balance is the uniformity of the statutory scheme  
23 and the respect for this court's precedent. And  
24 State Farm's position maintains that uniformity  
25 intended by the legislature - - -

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 LIPPMAN: Okay.

MR. MASCIA: - - - with respect to this  
court's precedent.

CHIEF JUDGE LIPPMAN: Thank you both.

MR. MASCIA: Okay.

CHIEF JUDGE LIPPMAN: Appreciate it.

(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, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of State Farm Mutual Automobile Insurance Company v. Fitzgerald, No. 38, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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

AAERT Certified Electronic Transcriber CET\*\*D-492

Agency Name: eScribers

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

Date: February 22, 2015