

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

FILED
JAN - 6 2009

DEBRA DEROUSSE)

Appellant,)

v.)

STATE FARM MUTUAL)
AUTOMOBILE INSURANCE,)

Respondent.)

LAURA ROY

CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No.: ED91614

90093

Appeal from the Twenty-third
Judicial Circuit (Jefferson County)
Hon. M. Edward Williams, presiding
Case No. 07JE-CC00130

REPLY BRIEF OF APPELLANT

FILED

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CLERK, SUPREME COURT

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ARGUMENT

I. The Trial Court erred in entering judgment in favor of Respondent because there is a Question of Fact and Summary Judgment is not Warranted as a Matter of Law Whether The Policy of Insurance provides coverage for Appellant's Injuries

While Respondent attempts to discount the growing analysis of the term “bodily injury,” it is difficult to deny that courts across the country are viewing constraints on the common sense reading of these definitions with a wary eye. Beginning with its assertion that the definition at bar is similar to Citizens Insurance Co. of America v. Leiendecker, a simple side by side comparison of the policy language, without re-hashing the other distinctions raised in Appellant's brief, highlights the differences between the definitions. 926 S.W.2d 446 (Mo.App. 1998). On its face, the State Farm definition – “bodily injury to a person and sickness, disease or death which results from it” – is more expansive than the definition at issue in Leiendecker – “Bodily harm, sickness or disease”. To argue that these definitions are so similar as to require a simple affirmation of the trial court ignores the differences in the plain language of the policy. A closer examination of the definition demonstrates that when read as a whole, bodily injury is (1) bodily injury to a person, OR (2) sickness, OR (3) disease, OR (4) death which result from [the accident]. Under that plain reading, the plaintiff injuries would be considered bodily injuries.

In a similar argument, Respondent notes that the Indiana Supreme Court distinguishes State Farm Mutual Insurance Co. v. Jakupko, 881 N.E.2d 654 (Ind. 2008), a case relied upon by Appellant on brief, with a “subsequent holding” in State Farm Mutual Automobile Insurance Co. v. D.L.B., 881 N.E.2d 665 (Ind. 2008). However, D.L.B. was

in fact decided on the same day as Jakupko. In its opinion, the court notes that a cousin of the plaintiff who witnessed the plaintiff struck by a vehicle insured by a State Farm policy could not recover for emotional distress because he did not sustain a physical impact. While Jakupko is more factually similar for reasons detailed on brief, Respondent attempts to squeeze Appellant's facts into a D.L.B. type scenario. Such an analysis ignores the admitted fact that plaintiff was in a vehicle that did indeed sustain an impact. Appellant is not the third party victim of witnessing an accident. She testified that she slammed on her brakes when the body ejected from the uninsured vehicle hit the hood of her car. L.F. 89. The reasonable inference of these facts would demonstrate an "impact" between Appellant and at least her seat.

Of all the cases cited in the Footnote and the Indiana cases interpreting the same policy language, the growing trend toward acceptance of physical manifestations of emotional injuries as bodily injuries cannot be ignored. This increasing number and the additional question of fact whether plaintiff's injuries are physical as compared to emotional requires reversal of the trial court.

State Farm also seeks to discount the Appellant's injuries because two of plaintiff's treatment providers were not medical doctors. However, there is no requirement under the policy or Missouri law that states injuries require the treatment of a medical doctor. If that were the case, damages sustained for treatment by physical therapists, acupuncturists and similar professions would be in jeopardy.

In conclusion, there are genuine issues of material fact whether plaintiff sustained physical bodily injuries and, if not, whether bodily injury definition includes physical

manifestations of emotional injuries as a matter of law. As a result, the judgment in favor of Respondent and against Appellant should be reversed.

II. The trial court erred in not construing the policy against Respondent because the definition of bodily injury under the policy is ambiguous.

Where insurance policies are unambiguous, the rules of construction are inapplicable, and absent a public policy to the contrary, the policy will be enforced as written. Zelman v. Equity Mut. Ins. Co., 935 S.W.2d 673, 675 (Mo.App.1996). Courts will not create an ambiguity in order to distort the language of an unambiguous insurance policy. Id. However, where provisions of an insurance policy are ambiguous, they are construed against the insurer. Id. Language is ambiguous if it is reasonably open to two different constructions and the language used will be viewed in the meaning that would ordinarily be understood by the layman who bought and paid for the policy. Id. Where there is an ambiguity, the insured are entitled to a resolution of the ambiguity consistent with their objective and reasonable expectations. Id.

As set forth in the brief, Appellant identified at least two different constructions of the definition and also identified that by defining the definition with itself and including the term person in the definition, the policy definition was ambiguous. In response, Respondent once again relies on Leiendecker for the proposition that bodily injury as defined in that policy was unambiguous. 962 S.W.2d at 452.

However, State Farm chose to employ a different definition than the policy at issue in Leiendecker. Additionally, it now seeks to exclude certain types of injuries from coverage based on the interpretation of a definition instead of simply providing straight

forward exclusions for its insureds. For the reasons demonstrated, the policy language here is reasonably open to two different constructions and is not easily understood from the perspective of the layman who bought and paid for the policy. The fact that case law interpreting a homeowner's insurance policy is necessary before understanding the extent of coverage is evidence of the ambiguity.

As a result, the trial court's decision should be reversed.

III. The Trial Court erred in granting summary judgment because the State Farm policy was contrary to requirement of Missouri law to provide uninsured motorist coverage.

The issue under Point III is whether the State Farm policy complies with Missouri requirement for uninsured motorist coverage.¹ Section 379.203., R.S.Mo. This statute requires all motor vehicle policies to provide coverage for damages related to bodily injury, sickness or disease. Id. Respondent argues that Leiendecker controls this point because it has already determined the definition of bodily injury in a homeowner's insurance plan case that for obvious reasons does not consider the requirements of the Missouri Uninsured Motorist Act, limits bodily injuries to physical injuries. As a result, Leiendecker is not persuasive on this point. The question is whether the State Farm

¹ Respondent notes, as it did almost identically at the trial court, that Appellant references Section 303.010, R.S.Mo; however, in both her Brief in this Court and legal memorandum at the trial court, Appellants discusses Section 379.203, R.S.Mo.

policy conforms with the Act, not the definition of bodily injury. The interpretation of the coverage by State Farm answers that question in the negative.

As a result, the judgment of the trial court should be reversed.

IV. Appellant's Requested Review of her Physical Manifestations of Emotional Distress Argument was Properly preserved for Appellate Review.

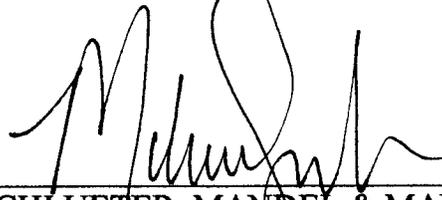
Under each section of its argument, State Farm contends that any question surrounding "physical manifestations of emotional distress" is not preserved because the petition does not contain a similar phrasing. While State Farm appears to sit in medical judgment of Appellant's injuries and single handedly determine that the injuries are not physical in nature, the issue presented to the court is whether the summary judgment was properly granted. In responding to a motion for summary judgment, the non-movant is required to set forth specific facts as provided in Rule 74.04 and may not rest upon the mere allegations or denials of his pleading. Rule 74.04(e). ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 381 (Mo.banc 1993).

When the Appellant sets forth her injuries in her deposition and these injuries are debated in the trial court and on brief, these are the facts under examination in the summary judgment, not the mere allegations of the petition. Clearly, the issue whether plaintiff's injuries fall within the definition of bodily injury, whatever definition that may be, is properly before this court.

CONCLUSION

The decision of the trial court should be reversed.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the page limitations prescribed in the Missouri Rules and local rules of this court in that it contains 6 pages, 1344 words and 111 lines.

The undersigned also certifies that the diskette submitted with this Brief in Microsoft Word format has been scanned for viruses.

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