

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

FILED

OCT 27 2008

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

BRIEF OF APPELLANT

FILED

MAY 14 2009

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TABLE OF CONTENTS

Description	Page #
Table of Authorities _____	3
Jurisdictional Statement _____	7
Statement of Facts _____	8
Points Relied On _____	11
Argument _____	13
Conclusion _____	28
Certificate of Compliance _____	30
Certificate of Service _____	31
Appendix _____	32

TABLE OF AUTHORITIES

Case Law	Pg #
<u>Aim Ins. Co. v. Culcasi</u> , 229 Cal. App. 3d 209, 280 Cal. Rptr. 766, (1991)	17
<u>Albin v. State Farm Mut. Auto. Ins. Co.</u> , 498 So. 2d 171 (La. Ct. App. 1986), writ denied, 498 So.2d 1088 (1986)	17
<u>Am. Motorists Ins. Co. v. S. Sec. Life Ins. Co.</u> , 80 F.Supp. 2d 1280 (M.D.Ala. 2000)	15
<u>Arnold v. Am. Family Mut. Ins. Co.</u> , 987 S.W.2d 537 (Mo.App. 1999)	26
<u>Artcraft v. Lumberman's Mut. Cas. Co.</u> , 126 N.H. 844, 497 A.2d 1196 (1985)	17
<u>Billings v. State Farm Mut. Ins. Co.</u> , 741 S.W.2d 886 (Mo. App. 1987)	24,26-8
<u>Centermark Properties, Inc. v. Home Indem. Co.</u> 897 S.W.2d 98 (Mo.Ct.App 1995)	22
<u>Chase Resorts, Inc. v. Safety Mut. Cas. Corp.</u> , 869 S.W.2d 145 (Mo.Ct.App. 1993)	22
<u>Citizens Ins. Co. of America v. Leiendecker</u> , 962 S.W.2d 446 (Mo.App.E.D. 1998)	14, 19
<u>Crabtree v. State Farm Insurance Co.</u> , 632 So.2d 736 (La. 1994)	13, 20
<u>Dahlke v. State Farm Mut. Auto. Ins. Co.</u> , 451 N.W.2d 813 (Iowa 1990)	17
<u>Douthet v. State Farm Mut. Auto. Ins. Co.</u> , 546 S.W.2d 156 (Mo banc 1977)	26
<u>Doyle v. Engelke</u> , 580 N.E.2d 245 (Wis. 1998)	19
<u>Employers Cas. Ins. Co. v. Foust</u> , 29 Cal. App. 3d 382 105 Cal. Rptr. 505 (1972)	16
<u>Evans v. Farmers Insurance Exchange</u> , 34 P.3d 284 (Wy. 2001)	19, 20

<u>Farm Bureau Mut. Ins. Co. v. Hoag</u> , 136 Mich. App. 326, 356 N.W.2d 630 (1984)	17
<u>Fildes v. State Farm Mutual Automobile Insurance Company</u> , 873.S.W. 833 (Mo.App.1984)	18, 19
<u>Garvis v. Employers Mut. Cas. Co.</u> , 497 N.W.2d 254 (Minn. 1993)	16, 18
<u>Gen. Star Indem. Co. v. Sch. Excess Liability Fund</u> , 888 F. Supp. 1022 (N.D. Cal. 1995)	15
<u>Greenman v. Mich. Mut. Ins. Co.</u> , 173 Mich. App. 88, 433 N.W.2d 346 (1988)	17
<u>Harrison v. MFA Mut. Ins. Co.</u> , 607 S.W.2d 137 (Mo.banc 1980)	26
<u>Hebert v. Webre</u> , 982 So.2d 770 (La.2008)	20
<u>Holcomb v. Kincaid</u> , 406 So. 2d 646 (La. Ct. App. 1981)	16
<u>Jarrett v. Jones</u> , No. SC88700 (Mo. 2008)	23
<u>ITT Commercial Finance v. Mid-America Marine</u> , 854 S.W.2d 371 (Mo.banc 1993)	13, 21, 22, 25
<u>Kramer v. Ins. Co. of North America</u> , 54 S.W.3d 613	27
<u>Kufalk v. Hart</u> , 636 F. Supp. 309 (N.D. Ill. 1986)	16
<u>Lanigan v. Snowden</u> , 938 S.W.2d 330 (Mo.App.W.D. 1997)	13, 14, 19, 21, 22-3
<u>Lavanant v. General Acc. Ins. Co. of America</u> , 584 N.Y.S.2d 744, 79 N.Y.2d 623 (N.Y. 1992)	21, 23
<u>Levy v. Duclaux</u> , 324 So.2d 1 (La.Ct.App.1975)	19
<u>McGuire v. Am. States Ins. Co.</u> , 491 So. 2d 606 (Fla. Dist. Ct. App. 1986)	16
<u>Moore v. Continental Cas. Co.</u> , 252 Conn. 405, 746 A.2d 1252 (2000)	16

<u>Omaha Indem. Co. v. Pall, Inc.</u> , 817 S.W.2d 491 (Mo.App 1991)	26
<u>Peters v. Employers Mutual Casualty Company</u> , 853 S.W.2d 300 (Mo. Banc 1993)	22
<u>Ragsdale v. Armstrong</u> , 916 S.W.2d 783 (Mo.banc 1996)	26
<u>State Farm Fire & Cas. Co. v. Basham</u> , 206 Mich. App. 240, 520 N.W.2d 713 (1994)	17
<u>State Farm Mutual Automobile Insurance Co v. Jakupko</u> , 856 N.E.2d 778 (Ind.Ct.App. 2006)	20
<u>State Farm Mut. Auto Ins. Co. v. Jakupko</u> , 881 N.E.2d 654 (Ind. 2008)	13, 20
<u>State Farm Fire & Cas. Co. v. Nikitow</u> , 924 P.2d 1084 (Colo. App. 1995)	16
<u>Trinity Universal Ins. Co. v. Cowan</u> , 40 Tex. Sup. Ct. J. 583, 945 S.W.2d 819 (1997)	18
<u>Trinh v. Allstate Insurance Co</u> , 109 Wash.App. 927 (WACA. 2002)	15
<u>Twin City Fire Ins. Co. v. Colonial Life & Acc. Ins. Co.</u> , 124 F.Supp.2d 1243 (M.D.Ala. 2000)	15
<u>Union Elec. Co. v. Director of Revenue</u> , 799 S.W.2d 78, 79 (Mo. banc 1990)	25
<u>U.S. Fire Ins. Co. v. Coleman</u> , 745 S.W. 2d9431 (Mo.Ct.App. 1988).	22
<u>Voorhees v. Preferred Mut. Ins. Co.</u> , 128 N.J. 165, 607 A.2d 1255 (1992)	16, 17
<u>Ward v. American Family Insurance Company</u> , 873 S.W.2d 883 (Mo .App 1994)	18, 19
<u>W. Cas. & Sur. Co. v. Waisanen</u> , 653 F. Supp. 825 (D.S.D. 1987)	15
<u>Webb v. State Farm Mut. Auto. Ins. Co.</u> , 479 S.W.2d 148 (Mo. App. 1972)	25, 26
<u>Williams v. State Farm Mutual Automobile Insurance Co.</u> , (No. 07CA1667, September 18, 2008)	20

<u>Zerr v. Erie Ins. Exch.</u> , 446 Pa. Super. 451, 667 A.2d 237, 240 (1995), appeal denied, 674 A.2d 1075 (1996)	17
Statutes	
379.203, R.S.Mo.	24, 25, 27, 28
Rule	
Rule 74.04(c).	13, 21, 22, 25
Law Review	
Keri Farrell-Kolb, General Liability Coverage for Claims of Emotional Distress - An Insurance Nightmare, 45 Drake L. Rev. 981, 993-94 (1997)	17
Other Sources	
Black's Law Dictionary Sixth Edition	27

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JURISDICTIONAL STATEMENT

Plaintiff Debra Derosse appeals from a judgment of the trial court that was entered against her and in favor of defendant, State Farm Mutual Automobile Insurance. The court entered judgment in favor of defendant as a result of a motion for summary judgment based on the interpretation and application of language contained in an uninsured motor vehicle insurance policy. Plaintiff timely filed her Notice of Appeal with respect to the judgment.

The issues on appeal concern the propriety of the summary judgment as a matter of law and whether genuine issues of material fact are in dispute. As a result, this appeal is within the general appellate jurisdiction of the Missouri Court of Appeals, Article V, Section 3, Constitution of Missouri, as amended 1982.

STATEMENT OF FACTS

The Underlying Accident

While traveling northbound on Highway 61 in Jefferson County, Missouri, Plaintiff/ Appellant Debra Derosse (“Plaintiff”) encountered a vehicle proceeding southbound in the northbound shoulder toward her. L.F. 87. The vehicle then traveled across both lanes of the two lane road and struck a bluff, causing the vehicle to spin into the air and ejected a body from the back hatch of the vehicle. L.F. 87. The ejected body landed on the hood of Plaintiff’s vehicle, its head hitting the windshield. L.F. 87. The ejected body then rolled off of the hood of Plaintiff’s vehicle as Plaintiff applied her brakes. L.F. 87. Her vehicle then continued over the ejected body which exited beneath the driver’s side of Plaintiff’s vehicle. L.F. 87. Upon impact, the plaintiff slammed on her brakes. L.F. 89. When she exited her vehicle, the plaintiff learned that she knew the person that landed on her car. L.F. 89. At the time of the accident, Plaintiff was wearing her seatbelt and could not recall that any parts of her head or body coming into contact with the inside of her vehicle. L.F. 89. Plaintiff’s airbag did not deploy. L.F. 89. After exiting her vehicle on her own, plaintiff did not immediately notice any cuts, bruises or other physical symptoms. L.F. 89. When the emergency responders arrived at the scene of the accident, Plaintiff indicated that she was not physically injured. L.F. 91. After being checked at the scene for broken bones and cuts and was found to have none, Plaintiff refused medical care at the scene of the accident. L.F. 91. Plaintiff informed the police that she would take herself to the hospital if she found anything wrong. L.F. 91. Upon arriving home, Plaintiff threw up. L.F. 92. Later, she contacted her primary care

doctor, Dr. Snigel, for treatment related to the accident. L.F. 48, 54. She only spoke to Dr. Snigel over the phone and was prescribed Valium and Lexapro. L.F. 37. She declined the need for an x-ray or stitches and she told him no. L.F. 34. In the following weeks Plaintiff contacted her primary care doctor for refills and she was given them without an examination. L.F. 57. She also suffered nightmares, migraines, nausea, diarrhea, anxiety disorders and headaches. L.F. 93-4. Dr. Snigel believed that the nightmares caused the nausea and the vomiting would have caused her head and back to hurt. L.F. 94.

Eventually, Plaintiff treated with three therapists: Amy Merz, Jennifer Abel, and Phyllis Mast. L.F. 50, 52, and 60. After being released from their care in October 2006, she has not sought any care from a medical doctor, therapist, psychologist, chiropractor or any other care provider. L.F. 63. She does continue to have backaches. L.F. 49.

The Uninsured Motorist Claim

Defendant issued to Plaintiff a policy of automobile insurance, policy #0549-898-25, which was in effect at the time of the accident. L.F. 41. Plaintiff made a claim for uninsured motor vehicle claim under her policy with Defendant. L.F. 4

The uninsured motor vehicle section of Defendant's policy provides in relevant part:

UNINSURED MOTOR VEHICLE COVERAGE- COVERAGE U

You have thus coverage if "U" appears in the "Coverages" space on the declarations page.

We will pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle. The bodily injury must be sustained by an insured and caused by an accident arising out of the operation, maintenance or use of an uninsured motor vehicle.

L.F. 51

Further, Defendant's policy defines "bodily injury" as "bodily injury to a person and sickness, disease or death which results from it." L.F. 42. After the plaintiff's deposition, Defendant filed its Motion for Summary Judgment. L.F. 10. Plaintiff filed a timely response and Defendant filed its reply. L.F. 75 and 107. After oral argument on the motion, the parties submitted supplemental briefs on whether Defendant's policy conformed with Section 379.203, R.S.Mo. L.F. 117, 119 and 124. The trial court entered its order and judgment in favor of the defendant. L.F. 132. Plaintiff timely filed her Notice of Appeal and this appeal followed. L.F. 134.

POINTS RELIED ON

- I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF IN THAT THERE ARE GENUINUE ISSUES OF MATERIAL FACT IN DISPUTE AND DEFENDANT IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE PLAINTIFF SUSTAINED INJURIES COVERED UNDER HER POLICY, SUSTAINED PHYSICAL INJURIES TO HER PERSON AND/OR SUSTAINED EMOTIONAL INJURIES WITH PHYSICAL MANIFESTATIONS.**
- II. THE TRIAL COURT THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF IN THAT THERE ARE GENUINUE ISSUES OF MATERIAL FACT IN DISPUTE AND DEFENDANT IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE POLICY IS AMBIGUOUS BY USING THE TERM TO DEFINE ITSELF, BY USING IT TO REFER TO BODILY INJURY OR ACCIDENT, BY NOT EXCLUDING EMOTIONAL DISTRESS AND BY EMPLOYING BODILY INJURY TO A PERSON.**
- III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF IN THAT THERE ARE GENUINUE ISSUES OF MATERIAL FACT IN DISPUTE AND DEFENDANT IS NOT ENTITLED TO JUDGMENT AS A**

**MATTER OF LAW BECAUSE IF THE STATE FARM POLICY
LIMITS ITS APPLICATION TO PHYSICAL INJURIES THEN IT
FAILS TO COMPLY WITH THE MISSOURI FINANCIAL
RESPONSIBILITY ACT.**

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF IN THAT THERE ARE GENUINUE ISSUES OF MATERIAL FACT IN DISPUTE AND DEFENDANT IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE PLAINTIFF SUSTAINED INJURIES COVERED UNDER HER POLICY, SUSTAINED PHYSICAL INJURIES TO HER PERSON AND/OR SUSTAINED EMOTIONAL INJURIES WITH PHYSICAL MANIFESTATIONS.

Lanigan v. Snowden, 938 S.W.2d 330, 332 (Mo.App.W.D. 1997).

State Farm Mut. Auto Ins. Co. v. Jakupko, 881 N.E.2d 654, 658 (Ind. 2008)

Crabtree v. State Farm Insurance Co., 632 So.2d 736 (La. 1994).

Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 74.04(c). On appeal of a summary judgment, this court should review the record in the light most favorable to the party against whom judgment was entered. ITT Commercial Finance v. Mid-America Marine, 854 S.W.2d 371, 376 (Mo. banc 1993). A genuine issue of fact exists where the record contains competent evidence that two plausible but contradictory accounts of essential facts exist. Id., at 382. The propriety of summary judgment is purely an issue of law which this court should review de novo on the record submitted and the law. Id. at 376.

Plaintiff sustained injuries that fall within the majority view of bodily injuries.

When construing an insurance contract, the courts must give the contract's language its plain meaning. Lanigan v. Snowden, 938 S.W.2d 330, 332 (Mo.App.W.D. 1997).

Here, there is no dispute plaintiff had uninsured motorist coverage under the policy. The fundamental question is whether she sustained a bodily injury as a result of her accident. The only guidance provided the policy is the definition itself, i.e., "bodily injury is bodily injury to a person and sickness, disease or death which results from it." L.F. 51. The policy does not limit its coverage to physical injuries, define "bodily", require that these injuries be treated by a medical doctor or otherwise exclude "emotional injuries." The Plaintiff testified that, as a result of the accident, she has or had backaches, headaches, migraines, nausea and general anxieties including but not limited to post-traumatic stress disorder. L.F. 90, 93-4, 96. After a review of the policy as written, these injuries fall within the coverage, or at minimum, demonstrate that genuine issues of material fact exist to preclude summary judgment.

In contrast, State Farm (and the trial court thereafter) read the definition to exclude the Plaintiff's injuries because they were not physical in nature and are merely emotional. L.F. 10, 132. The basis for this exclusion is not policy language, but rather the decision of the Eastern District Court of Appeals in Citizens Ins. Co. of America v. Leiendecker, 962 S.W.2d 446 (Mo.App.E.D. 1998) (holding that a bodily injury definition under a homeowner's policy that distinguished bodily and personal injuries was not inclusive of emotional distress claims). While attempting to side with the (at the time) majority of

jurisdictions, the court's specific holding bears notice: "[w]e conclude that the common meaning of the phrase 'bodily harm, sickness or disease' . . . refers to physical conditions of the body and excludes mental suffering or emotional distress." The court continues, stating that it adopts the majority view. *Id.* 454. However, the majority of courts generally hold bodily injury definitions include emotional losses if physical manifestations are present.¹

¹ In *Trinh v. Allstate Insurance Co.*, 109 Wash.App. 927 (WACA. 2002), the Washington Court of Appeals in holding that summary judgment was improper where the claimant sustained PTSD collected a number of cases providing insight into the majority rule – emotional claims with physical manifestations are covered bodily injuries. The court notes, "many courts have held that allegations of physically-manifested emotional distress fall within 'bodily injury' coverage in the insurance context. See, e.g., *Twin City Fire Ins. Co. v. Colonial Life & Acc. Ins. Co.*, 124 F. Supp. 2d 1243, 1247 (M.D. Ala. 2000) (Under South Carolina law, emotional trauma can constitute 'bodily injury' under an insurance policy unless the complaint contains no allegations of physical damages.); *Am. Motorists Ins. Co. v. S. Sec. Life Ins. Co.*, 80 F. Supp. 2d 1280, 1283 (M.D. Ala. 2000) (Under Florida law, allegation of physically manifested mental anguish met insurance policy's definition of bodily injury.); *Gen. Star Indem. Co. v. Sch. Excess Liability Fund*, 888 F. Supp. 1022, 1027 (N.D. Cal. 1995) (Under California law, '{p}hysical injury resulting from emotional distress . . . constitutes 'bodily injury.'"); *W. Cas. & Sur. Co. v. Waisanen*, 653 F. Supp. 825, 832 (D.S.D. 1987) (Emotional distress

accompanied by allegation of high blood pressure was 'an allegation of physical harm.');

Kufalk v. Hart, 636 F. Supp. 309, 311-12 (N.D. Ill. 1986) (Emotional distress resulting in high blood pressure, headaches, stomach pains, and diarrhea constituted 'bodily injury' under general liability insurance policy.); Employers Cas. Ins. Co. v. Foust, 29 Cal. App. 3d 382, 386, 105 Cal. Rptr. 505 (1972) (Emotional distress suffered by parents after watching an accident involving their child constituted 'bodily injury.');

State Farm Fire & Cas. Co. v. Nikitow, 924 P.2d 1084, 1089 (Colo. App. 1995) (Although the term 'bodily injury' in insurance contract did not encompass purely emotional harm, coverage was available if injury was accompanied by physical manifestations.); McGuire v. Am. States Ins. Co., 491 So. 2d 606, 608 (Fla. Dist. Ct. App. 1986) (finding a genuine issue of fact about whether mental distress accompanied by headaches and muscle spasms, requiring treatment and medication, could be construed as 'bodily injury' under insurance policy); Crabtree v. State Farm Ins. Co., 632 So. 2d 736, 744 (La. 1994) ('Bodily injury' includes mental anguish that is 'severe and debilitating.');

Holcomb v. Kincaid, 406 So. 2d 646, 649 (La. Ct. App. 1981) (Emotional distress resulting in rash, hair loss, weight loss, and symptoms of stroke fell within homeowners insurance policy's definition of 'bodily injury.');

Garvis v. Employers Mut. Cas. Co., 497 N.W.2d 254, 257 (Minn. 1993) ('{E}motional distress with appreciable physical manifestations can qualify as a 'bodily injury' within the meaning of the insurance policy.');

Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 607 A.2d 1255 (1992) (Emotional distress resulting in headaches, stomach pains, nausea, and body pains constituted 'bodily injury' under homeowner's insurance

policy.). Moore v. Continental Cas. Co., 252 Conn. 405, 746 A.2d 1252, 1257 (2000) (Physically manifested emotional distress was not 'bodily injury' under insurance policy when the distress resulted from economic loss that was outside the scope of the policy.); Dahlke v. State Farm Mut. Auto. Ins. Co., 451 N.W.2d 813, 815 (Iowa 1990) (In loss of consortium claim, 'bodily injury' did not include physical manifestations of emotional distress.); Zerr v. Erie Ins. Exch., 446 Pa. Super. 451, 667 A.2d 237, 240 (1995), appeal denied, 674 A.2d 1075 (1996) (The term 'bodily injury' in an insurance policy did not include mental illnesses manifested by physical symptoms.).

A law review article observes that 'even courts that have concluded that nonphysical harm does not constitute bodily injury have held otherwise when the emotional distress produces discernible physical symptoms. 'Keri Farrell-Kolb, General Liability Coverage for Claims of Emotional Distress - An Insurance Nightmare, 45 Drake L. Rev. 981, 993-94 (1997). And, many jurisdictions that deny 'bodily injury' coverage for purely emotional injuries have indicated that there would be coverage if an emotional injury were accompanied by physical manifestations. See Voorhees, 607 A.2d at 1261 (citing Aim Ins. Co. v. Culcasi, 229 Cal. App. 3d 209, 280 Cal. Rptr. 766, 773-74 (1991); Albin v. State Farm Mut. Auto. Ins. Co., 498 So. 2d 171, 174 (La. Ct. App. 1986), writ denied, 498 So.2d 1088 (1986); Greenman v. Mich. Mut. Ins. Co., 173 Mich. App. 88, 433 N.W.2d 346, 349 (1988); Farm Bureau Mut. Ins. Co. v. Hoag, 136 Mich. App. 326, 356 N.W.2d 630, 633 (1984); Artcraft v. Lumberman's Mut. Cas. Co., 126 N.H. 844, 497 A.2d 1195, 1196 (1985)); see also State Farm Fire & Cas. Co. v. Basham, 206 Mich.

The other cases relied upon by Defendant, Ward v. American Family Insurance Company, 873 S.W.2d 883 (Mo .App 1994) and Fildes v. State Farm Mutual Automobile Insurance Company, 873.S.W. 833 (Mo.App.1984), fail to provide additional guidance. In both Ward and Fildes, this court concluded that damages for loss of consortium did not fall within the definition of bodily injury because the claimants did not suffer physical harm. In Ward, the policy defined “bodily injury” as “bodily injury to or sickness, disease or death of any person”. 783 S.W.3d at 923. The court held that the definition required some physical harm to the person claiming bodily injury”. Id. In Fildes, the policy defined bodily injury as “bodily injury to a person or sickness, disease or death which results from it.” 873 S.W.2d at 886. The Fildes court, relying on the Ward decision, concluded. “this court has interpreted similar language to require some physical harm to the person claiming a bodily injury. Id.

App. 240, 520 N.W.2d 713, 715 (1994) ('At a minimum, there must be allegations of physical manifestations supported by sufficient documented evidence in order for {bodily injury} insurance coverage to be triggered.');

Garvis, 497 N.W.2d at 257 ('emotional distress with appreciable physical manifestations can qualify as a 'bodily injury' within the meaning of the insurance policy');

Trinity Universal Ins. Co. v. Cowan, 40 Tex. Sup. Ct. J. 583, 945 S.W.2d 819, 826 (1997) ('because Cowan did not plead any physical manifestations of her alleged mental injuries, she did not plead a 'bodily injury' such that Trinity's duty to defend was triggered').

These cases are not persuasive, and, in fact, direct a contrary result in this case. First, one Missouri case has reasoned that loss of consortium does not equate to bodily injury, sickness or disease unless the policy defines bodily injury to include the loss of services and because the policy did not do so, “the courts did not need to analyze the definitions any further, therefore, to the extent that they concluded that the definitions required physical harm to recover damages for sickness or disease, their conclusions were mere dicta.” Lanigan, 938 S.W.2d at 333.

Second, a common element appears in Leiendecker, Ward and Fildes – the physical harm requirement. The courts’ expression of the apparent need for quantification raises the question whether headaches, back pain, nausea and anxiety are physical conditions of the body sufficient to meet that requirement or mere symptoms of emotional distress.

In the absence of such explanation by the policy, other jurisdictions provide additional insight into the analysis.

In Doyle v. Engelke, 580 N.E.2d 245 (Wis. 1998), the Supreme Court of Wisconsin, persuaded that emotional conditions would be inclusive under a bodily injury definition employing sickness or disease, notes, “[w]e are unable to separate a person’s nerves and tensions from his [or her] body. It is common knowledge that worry and anxiety can and often do have a direct effect on other bodily functions.” *Id.* at 250, (citing Levy v. Duclaux, 324 So.2d 1, 10 (La.Ct.App.1975)). Under such a reasoning, if her conditions are not separate bodily injuries, then Derausse’s injuries would still be covered under the policy definition.

Additionally, in Evans v. Farmers Insurance Exchange, 34 P.3d 284 (Wy. 2001), the Wyoming Supreme Court declines to require a physical component to a similar bodily injury definition, noting, “the insurance company could itself have specified such limitations in drafting its policy, but it did not do so.” Id. at [34].

Further, at least three courts have had the occasion to analyze this question under the same or similar State Farm policy language as appears in the present policy. The Court of Appeals of Indiana, in a first impression, held that emotional distress accompanied by physical manifestations of the distress constituted bodily injury under a underinsured motorist policy. State Farm Mutual Automobile Insurance Co v. Jakupko, 856 N.E.2d 778 (Ind.Ct.App. 2006). The policy definition of bodily injury was the same as the definition at issue in this present case. In affirming, the Supreme Court of Indiana held, “that ‘bodily injury’ as defined in the policy at issue in this case includes the emotional distress.” State Farm Mut. Auto Ins. Co. v. Jakupko, 881 N.E.2d 654, 658 (Ind. 2008). See also Crabtree v. State Farm Insurance Co., 632 So.2d 736 (La. 1994). C.f. Hebert v. Webre, 982 So.2d 770, 779 (La.2008) (holding policy language that contained an added requirement of “physical” bodily injury not present in Crabtree did not encompass emotional losses.)

Recently, the Colorado Court of Appeals, in Williams v. State Farm Mutual Automobile Insurance Co., (No. 07CA1667, September 18, 2008) took a slightly different approach with similar policy language and held that “bodily injury, sickness, or disease” does not include emotional distress absent a physical manifestation of the injury. Unlike the plaintiffs in Williams (passengers in a vehicle who witnessed a co-passenger

being shot), DeRousse has, if not physical injuries, undisputed manifestations of emotional distress.

In conclusion, a review of the policy definition, Missouri case law adopting the view that some physical condition be present, and reasoning from other jurisdictions demonstrate that an insured under this policy definition may have sustained bodily injury when she was prescribed medications by a physician, was anxious, experienced nausea, headaches, vomiting and backaches. L.F. 91-94. As such, the record exhibits that genuine issues of material fact remain in dispute and summary judgment is not proper as a matter of law.

II. THE TRIAL COURT THE TRIAL COURT ERRED IN GRANTING

SUMMARY JUDGMENT IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF IN THAT THERE ARE GENUINUE ISSUES OF MATERIAL FACT IN DISPUTE AND DEFENDANT IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE POLICY IS AMBIGUOUS BY USING THE TERM TO DEFINE ITSELF, BY USING IT TO REFER TO BODILY INJURY OR ACCIDENT, BY NOT EXCLUDING EMOTIONAL DISTRESS AND BY EMPLOYING BODILY INJURY TO A PERSON.

Lanigan v. Snowden, 938 S.W.2d 330,332 (Mo App. W.D. 1997)

Lavanant v. General Acc. Ins. Co. of America, 584 N.Y.S.2d 744, 79 N.Y.2d 623 (N.Y. 1992)

Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 74.04(c). On appeal of a summary judgment, this court should review the record in the light most favorable to the party against whom judgment was entered. ITT Commercial Finance v. Mid-America Marine, 854 S.W.2d 371, 376 (Mo. banc 1993). A genuine issue of fact exists where the record contains competent evidence that two plausible but contradictory accounts of essential facts exist. Id., at 382. The propriety of summary judgment is purely an issue of law which this court should review de novo on the record submitted and the law. Id. at 376.

The State Farm Policy Employs an Ambiguous Definition to Define Bodily Injuries and should therefore be construed to provide coverage to plaintiff.

Since insurance policies are designed to provide protection, they are interpreted liberally so as to grant and not deny coverage. Centermark Properties, Inc. v. Home Indem. Co. 897 S.W.2d 98, 100-01 (Mo.Ct.App 1995). If the Court finds policy language to be ambiguous, it must construe that language against the insurer. Chase Resorts, Inc. v. Safety Mut. Cas. Corp., 869 S.W.2d 145, 150 (Mo.Ct.App. 1993) (citing U.S. Fire Ins. Co. v. Coleman, 745 S.W. 2d9431, 944 (Mo.Ct.App. 1988)). An insurance policy is ambiguous if its meaning is obscure or uncertain, and if it is ambiguous, its construction should favor the insured. Peters v. Employers Mutual Casualty Company, 853 S.W.2d 300, 302 (Mo. Banc 1993). Lanigan v. Snowden, 938 S.W.2d 330,332 (Mo App. W.D.

1997). When the provisions of the policy are in fact ambiguous, they are construed against the insurer. Peters, 853 S.W.2d 300, 302 (Mo. Banc 1993).

In the present case, the definition of bodily injury is ambiguous because the term is uncertain from the perspective of a lay reader in at least four ways. First, the term bodily injury is used to define itself. L.F. 51. Second, the definition may include injuries to the person and the sickness, disease or death which results from [it], meaning that the sickness, disease or death from the injuries. *Id.* Alternatively, the definition may be read to include payment for an accident that causes bodily injury to a person, and sickness, diseases or death which results from [it], referring to the accident. A lay reader would be unable to ascertain which event the definition modifies, so its ambiguity is immediately apparent.

Further demonstrating these ambiguities, in Lanigan, *supra*, the insurance policy defined bodily injury as “bodily injury, sickness or disease sustained by a person including death resulting from any of these at any time. *Id.* At 332. The Western District found this definition ambiguous and construed the policy in favor of the plaintiff because the terms sickness and disease may encompass mental injuries as well as physical injuries. *Id.* at 332.

The court in Lanigan relied in large part on the holding of Lavanant v. General Acc. Ins. Co. of America, 584 N.Y.S.2d 744, 79 N.Y.2d 623 (N.Y. 1992). In explaining the rationale of its holding, the court stated “the reasonable expectation of [insured’s] would be that their liability for purely mental injury would fall within their insurance coverage.” *Id.* at 748. Not unlike the New York court, Missouri courts have trended

toward the acceptance of emotional loss claims. *See Jarrett v. Jones*, No. SC88700 (Mo. 2008).

Third, the policy, which is full of exclusions, is absent a definition or exclusion concerning emotional distress. The absence of such an exclusion confirms that from a perspective of a lay reader, the term bodily injuries would be inclusive of mental or emotional injuries.

Finally, the inclusion of the term “person” in the definition of bodily injury injects a certain ambiguity. L.F. 51. The policy defines person as a “human being.” A human being consists of both the physical and mental person. In fact, the mental faculties of humans are used as a justification for great number of actions. To disregard the mental capacity of “human being” and determine that bodily injuries to a human being are only physical in nature would strain the common meaning of the words. In short, if the defendant intended to limit bodily injuries to physical injuries and, assuming the conditions suffered by plaintiff are not physical injuries, it could have simply defined the policy in such a way.

Therefore, summary judgment is improper because the policy is ambiguous and should be construed against the drafter.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF IN THAT THERE ARE GENUINUE ISSUES OF MATERIAL FACT IN DISPUTE AND DEFENDANT IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE IF THE STATE FARM POLICY

**LIMITS ITS APPLICATION TO PHYSICAL INJURIES THEN IT
FAILS TO COMPLY WITH THE MISSOURI FINANCIAL
RESPONSIBILITY ACT.**

Section 379.203, RSMo

Billings v. State Farm Mut. Ins. Co., 741 S.W.2d 886, 888 (Mo.App.1987)

Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 74.04(c). On appeal of a summary judgment, this court should review the record in the light most favorable to the party against whom judgment was entered. ITT Commercial Finance v. Mid-America Marine, 854 S.W.2d 371, 376 (Mo. banc 1993). A genuine issue of fact exists where the record contains competent evidence that two plausible but contradictory accounts of essential facts exist. Id., at 382. The propriety of summary judgment is purely an issue of law which this court should review de novo on the record submitted and the law. Id. at 376.

The plain and ordinary meaning of the Missouri Financial Responsibility Act is to mandate uninsured motorist coverage for bodily injury, sickness or disease; If defendant's policy covers only physical injuries, it must conform to the Act.

The primary rule of statutory construction requires this Court to ascertain the intent of the legislature by considering the plain and ordinary meaning of the words used in the statute. Union Elec. Co. v. Director of Revenue, 799 S.W.2d 78, 79 (Mo. banc 1990).

Missouri law requires mandatory uninsured motorist coverage as part of any motor vehicle liability policy *See Section 379.203, RSMo*. This coverage “is designed to close a gap in the protection afforded the public under existing financial responsibility law and, within fixed limits, to provide recompense to innocent persons injured by motorists who lack financial responsibility.” Webb v. State Farm Mut. Auto. Ins. Co., 479 S.W.2d 148, 151 (Mo. App. 1972) (internal citations omitted). From its inception, Missouri’s uninsured motorist law expressed a public policy that each insured under such coverage have available the full statutory minimum coverage without diminishing by contractual limitation unless express statutory authority is provided. Douthet v. State Farm Mut. Auto. Ins. Co., 546 S.W.2d 156, 159 (Mo banc 1977). Uninsured motor vehicle statutes are highly remedial in purpose. Webb, 479 S.W.2d at 151. Missouri courts have “been liberal in applying the uninsured motorist statute too invalidate attempts by insurers to reduce benefits under applicable coverage, [but] [un]willing to use the statute to create coverage.” Harrison v. MFA Mut. Ins. Co., 607 S.W.2d 137,147 (Mo.banc 1980). Examples include finding that a motorist with policy limits less than the requirements of the safety responsibility laws is “uninsured” to the extent of the difference. Ragsdale v. Armstrong, 916S.W.2d 783,785 (Mo.banc 1996). Another court found that, where the owner had a policy of insurance but did not have coverage for a negligent entrustment claim brought against the owner, the vehicle was “uninsured”. Arnold v. Am. Family Mut. Ins. Co., 987 S.W.2d 537, 541 (Mo.App. 1999). It has been held that the provisions of uninsured motor vehicle coverage are triggered when the tortfeasor’s insurer denies

coverage, even when the denial was legally invalid. Omaha Indem. Co. v. Pall, Inc., 817 S.W.2d 491, 498-99 (Mo.App 1991).

These rulings evidence the public policy in favor of coverage and a resistance to contractual provisions that do not comply with the legislature's intent. Uninsured motor vehicle coverage is mandated by statute and the statutory directives "enter into and form a part of the... insurance contracts to which they are pertinent as fully as if such provisions were written into the policies." Billings v. State Farm Mut. Ins. Co., 741 S.W.2d 886, 888 (Mo.App.1987). See also Kramer v. Ins. Co. of North America, 54 S.W.3d 613.

Section 379.203.1, R.S.Mo, mandates coverage to insured's who are legally entitled to recover damages from operators of uninsured vehicles because of "bodily injury, sickness or disease, including death, resulting therefrom." Section 379.203, R.S.Mo. Appendix 2. Stated another way, a policy such as Defendant's, must contain coverage for damages related to bodily injury, sickness or disease. *Blacks Law Dictionary* defines bodily injury as "generally refers only to injury to the body, or to sickness or disease contracted by the injured as a result of injury; including illness caused by nervous shock..." This source also defines "disease" as a "deviation from the healthy or normal condition of any of the functions or tissues of the body. An alteration in the state of the body or of some its organs, interrupting or disturbing the performance of the vital functions, and causing or threatening pain and weakness..." Additionally, *Black's* defines sickness as "an ailment of such a character as to affect the general soundness and

health; not a mere temporary indisposition, which does not end to undermine and weaken the constitution.” Plaintiff’s injuries fall squarely within these definitions. L.F. 91, 94.

The defendant’s policy defines bodily injury as “bodily injury to a person and sickness, disease or death which results from it.” L.F. 51. If as State Farm contends, the policy only provides coverage for physical bodily injuries and the sickness or disease of such physical bodily injuries, then this provision would contradict the language of section 379.203 in that the statute mandates coverage for bodily injury, sickness or disease. As the policy is absent the statutory directives, under Missouri Law, the policy is treated as containing the correct statement of law. *See Billings, supra.*

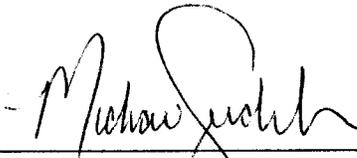
Therefore, the efforts by State Farm to thwart the mandated coverage must fail as a matter of law because there is no statutory authority for the attempted change.

In conclusion, section 379.203 mandates that an automobile policy contain coverage for damages sustained as a result of an uninsured motorist. These damages include “bodily injury, sickness or disease.” If the legislature wanted to include sickness or disease to be inclusive within “bodily injury” or to be related to physical injuries only, it could have done so. Instead, the legislature chose to include three disjunctive options. The inclusion of these options provides coverage for plaintiff’s injuries.

CONCLUSION

In conclusion, the trial court’s entry of summary judgment is favor of defendant and against plaintiff was improper because there are genuine issues of material fact in dispute and summary judgment is not proper as a matter of law (a) whether the Plaintiff sustained bodily injuries as defined by the policy; (b) the policy definition of bodily

injury is ambiguous and should be construed against the drafter; and (c) the policy as interpreted by the defendant and trial court is counter to the express requirements of the financial responsibility act. Therefore, Plaintiff respectfully requests that this Honorable Court reverse the trial court's judgment in favor of Defendant and against Plaintiff and remand this matter for further proceedings.

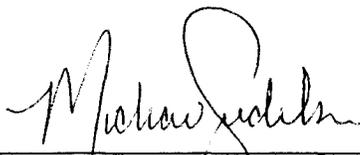
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CERTIFICATE OF COMPLIANCE

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 23 pages, 5,265 words and 476 lines.

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

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APPENDIX

TABLE OF CONTENTS

Order and Judgment	_____	A1
Section 379.203, R.S.Mo.	_____	A2

IN THE CIRCUIT COURT OF THE TWENTY-THIRD JUDICIAL CIRCUIT
JEFFERSON COUNTY, MISSOURI
DIVISION THREE

DEBRA DEROUSSE,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

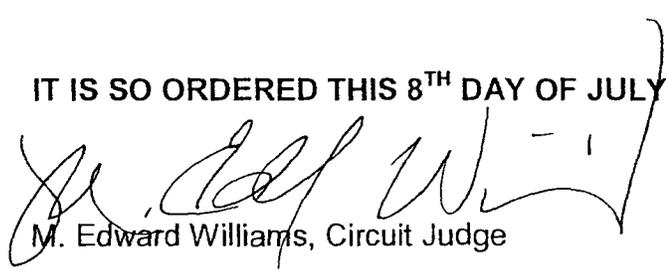
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SUMMARY JUDGMENT

Plaintiff has filed suit for damages under her uninsured motorist coverage. Plaintiff's injury are not of a purely physical nature but rather are alleged to be emotional and mental distress. Defendant has moved for summary judgment on the grounds that injuries of a non-physical nature are covered by its uninsured motorist coverage, unless they result from a physical injury. Plaintiff concedes that she has suffered no physical injury.

It is the opinion of the Court that defendant's motion for summary judgment must be granted. The holding in *Citizens Insurance Company of America v. Leiendecker*, 962 S.W.2d 446 (Mo. App. E.D. 1998), appears to be controlling, and held that bodily injury did not encompass injuries solely of an emotional nature. The Court is not unmindful that the Western District has held otherwise, nor that *Leiendecker* is not an uninsured motorist case. Defendant's motion for summary judgment is granted. Costs taxed against plaintiff.

IT IS SO ORDERED THIS 8TH DAY OF JULY 2008


M. Edward Williams, Circuit Judge

cc: Counsel of Record

Section 203 Automobile liability policy, required provisions--uninsured motorist coverage required--recovery against tort-feasor, how limited.

379.203. 1. No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, or in the case of any commercial motor vehicle, as defined in section 301.010, RSMo, any employer having a fleet of five or more passenger vehicles, such coverage is offered therein or supplemental thereto, in not less than the limits for bodily injury or death set forth in section 303.030, RSMo, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. Such legal entitlement exists although the identity of the owner or operator of the motor vehicle cannot be established because such owner or operator and the motor vehicle departed the scene of the occurrence occasioning such bodily injury, sickness or disease, including death, before identification. It also exists whether or not physical contact was made between the uninsured motor vehicle and the insured or the insured's motor vehicle. Provisions affording such insurance protection against uninsured motorists issued in this state prior to October 13, 1967, shall, when afforded by any authorized insurer, be deemed, subject to the limits prescribed in this section, to satisfy the requirements of this section.

2. For the purpose of this coverage, the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified herein because of insolvency.

3. An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within two years after such an accident. Nothing herein contained shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to its insureds than is provided hereunder.

4. In the event of payment to any person under the coverage required by this section, and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer; provided, however, with respect to payments made by reason of the coverage described in subsections 2 and 3 above, the insurer making such payment shall not be entitled to any right of recovery against such tort-feasor in excess of the proceeds recovered from the assets of the insolvent insurer of said tort-feasor.

5. In any action on a policy of automobile liability insurance coverage providing for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles, the fact that the owner or operator of such uninsured motor vehicle whether known or unknown failed to file the report required by section 303.040, RSMo, shall be prima facie evidence of uninsured status, and such failure to file may be established by a statement of the absence of such a report on file with the office of the director of revenue, certified by the director, which statement shall be received in evidence in any of the courts of this state. In any such action, the report required by section 303.040, RSMo, when filed by the owner or operator of an uninsured motor vehicle, shall be prima facie evidence of lack of insurance coverage and the report, or a copy thereof, certified by the director of revenue, may be introduced into evidence in accordance with section 303.310, RSMo.

(L. 1967 p. 516, A.L. 1971 H.B. 85, A.L. 1972 S.B. 458, A.L. 1982 S.B. 480, A.L. 1991 H.B. 385, et al.)

(1974) Held that where vehicle was run off road without actual contact uninsured motorist coverage would apply if vehicle which ran plaintiff off the road could be positively identified and was in fact an uninsured motorist. *Ward v. Allstate Insurance Co.* (Mo.), 514 S.W.2d 576.

(1975) Where insured was passenger in his car and car was being driven by insured's brother who carried no insurance, insured was denied recovery under the uninsured motorist provisions of his policy after single automobile accident. Term "uninsured motor vehicle" requires insurers to protect their insureds only from collisions with other vehicles lacking liability coverage. *Miles v. State Farm Mutual Automobile Insurance Co.* (A.), 519 S.W.2d 378.

(1975) Insurer is entitled to reimbursement, up to the amount it has paid under uninsured motorist coverage, from recovery had against uninsured motorist. *State Farm ex. rel. Manchester Insurance and Indemnity Co. v. Moss* (Mo.), 522 S.W.2d 772.

(1975) Holder of two policies on two different vehicles is entitled to "stack" uninsured motorist coverage of both policies if necessary to satisfy judgment. *Galloway v. Farmers Insurance Company, Inc.* (A.), 523 S.W.2d 339.

(1975) "Uninsured motor vehicle" does not mean underinsured vehicle. Mere fact that multiple claims greatly reduced coverage available to claimant does not allow him to come under uninsured motorist provision of his own policy. *Brake v. MFA Mutual Insurance Company* (A.), 525 S.W.2d 109.

(1975) Passenger in automobile is not a user within the policy provisions covering person "using" the insured automobile and is not covered under uninsured motorist coverage. *Waltz v. Cameron Mutual Insurance Co.* (A.), 526 S.W.2d 340.

(1976) Public policy expressed in this section prohibited insurer from limiting recovery by insured to only one of two separate uninsured motorist coverages, included in one policy and for which separate premiums were charged, one for each of two cars of which only one car was involved in the accident. *Cameron Mutual Insurance Co. v. Madden* (Mo.), 533 S.W.2d 538.

(1980) Employee eligible for payment under employer's uninsured motorist coverage was not entitled to "stacking" of the uninsured motorist coverage provided by the fleet policy for each vehicle insured by it. *Linderer v. Royal Globe Insurance Co.* (A.), 597 S.W.2d 656.

(1980) Person injured in accident involving his employer's vehicle and an uninsured motorist not entitled to a "stacking" of the uninsured motorist coverage provided for each of employer's 1,420 vehicles, but was entitled to a "stacking" of such coverage on his own vehicles. *Linderer v. Royal Globe Insurance Co.* (A.), 597 S.W.2d 656.

(1980) The term "uninsured motor vehicle" must be construed as referring to a vehicle being operated by a person whose legal responsibility for damages is not caused by any liability insurance provision. *Dairyland Ins. Co. v. Hogan* (Mo.), 605 S.W.2d 798.

(1980) Use of term "uninsured motorist" in statute requiring inclusion of uninsured motorist insurance within automobile liability policies, is shorthand expression for "owners and operators of uninsured motor vehicles"; therefore, focus of statute is on uninsured vehicle and not whether owner or operator is "uninsured motorist" under circumstances of accident. *Harrison v. MFA Mutual Insurance Co.* (Mo.), 607 S.W.2d 137.

(1980) Term "uninsured motor vehicle" as used in statutes providing that uninsured motorist insurance shall be included within automobile liability policy for protection of persons insured thereunder refers to vehicle whose operator or owner did not have in effect at time of accident an automobile liability policy with respect to motor vehicle involved in accident. *Harrison v. MFA Mutual Insurance Co.* (Mo.), 607 S.W.2d 137.

(1980) Uninsured motorist statute has no application in cases where tort-feasor did have automobile liability policy which complied with requirements of Motor Vehicle Safety Responsibility Law. *Harrison v. MFA Mutual Insurance Co.* (Mo.), 607 S.W.2d 137.

(1980) Provision of uninsured motorist statute which states that "uninsured motor vehicle" includes an insured motor vehicle where liability insurer thereof is unable to make payment with respect to legal liability of its insured because of insolvency applies only where automobile insured under policy is hit by another vehicle and insurer of record vehicle becomes insolvent. *Harrison v. MFA Mutual Insurance Co.* (Mo.), 607 S.W.2d 137.

(1980) Provision in statute requiring that uninsured motorist insurance be included within automobile liability policies allowing recovery under uninsured motorist provision when insurer of other vehicle involved is insolvent, by use of language "subject to the terms and conditions of such coverage," recognizes insurer's right to define uninsured automobile. *Harrison v. MFA Mutual Insurance Co.* (Mo.), 607 S.W.2d 137.

(1985) The public policy as declared in this section mandates that when an insured has two separate policies containing uninsured motorist clauses, effect shall be given to both coverages without reduction or limitation by policy provisions, and that both coverages are available to those insured thereby. *Bergtholdt v. Farmers Ins. Co., Inc.*, (A.), 691 S.W.2d 357.

(1986) The term "uninsured motorist" as used in section 379.203, RSMo, includes a motorist who is underinsured by the standards of section 303.030, RSMo. *Cook v. Pedigo*, 714 S.W.2d 949 (Mo. App. 1986).

(1989) Insurer's prohibition of stacking by the policyholder's minor children is contrary to statute and invalid. Where plaintiff was a pedestrian and was injured by a hit and run driver, he was entitled to stack the uninsured motorist coverage on each of his father's autos. (Mo.App. E.D.) *Husch by Husch v. Nationwide Mutual Fire Insurance Co.*, 772 S.W.2d 692.

(1993) Insurance company's limit of uninsured motorist coverage to injuries which were result of an accident is against public policy and is void because it attempts to narrow mandated uninsured motorist coverage required by section for every automobile liability policy. *Thornburg v. Farmers Insurance Co.*, 859 S.W.2d 847 (Mo. App. W.D.).

(1995) Where plaintiff was otherwise qualified as an insured for liability purposes, insurance policy exclusions limiting uninsured motorist protection in insurance policy limiting coverage to owned vehicles was void as against Missouri law and public policy. *Bernardo v. Northland Insurance Co.*, 45 F.3d 272 (8th Cir.).

(1996) Uninsured motorist coverage is not based on the vehicle in which the insured is operating or riding, but is personal coverage which follows the insured. *Schmidt v. City of Gladstone*, 913 S.W.2d 937 (Mo.App. W.D.).