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EASTERN DISTRICT

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**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

DEBRA DEROUSSE,)
)
 Appellant,)
)
 vs.)
)
 STATE FARM MUTUAL)
 AUTOMOBILE INSURANCE COMPANY,)
)
 Respondent.)

Appeal No. ED91614

90093

FILED

MAY 14 2009

Thomas F. Simon
CLERK, SUPREME COURT

Appeal from the Circuit Court of Jefferson County
The Honorable M. Edward Williams, Judge

BRIEF OF RESPONDENT
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

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Gary P. Paul, #27655
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SCANNED

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IN THE MISSOURI COURT OF APPEALS
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DEBRA DEROUSSE,)
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 Appellant,)
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 vs.) Appeal No. ED91614
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 STATE FARM MUTUAL)
 AUTOMOBILE INSURANCE COMPANY,)
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 Respondent.)

Appeal from the Circuit Court of Jefferson County
The Honorable M. Edward Williams, Judge

BRIEF OF RESPONDENT
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

JURISDICTIONAL STATEMENT

The present appeal arises from a judgment entered against Debra Derosse (“Appellant” or “Derosse”) by the trial court in favor of State Farm Mutual Automobile Insurance Company (“Respondent” or “State Farm”). The court entered judgment in favor of State Farm 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. (L.F. at 132.)¹ This appeal followed.

¹Throughout this brief, the legal file shall be referred to as “L.F.” For purposes of

The subject matter of this appeal does not involve the validity of a treaty or statute of the United States or of a statute or provision of the Constitution of this State, the construction of the revenue laws of this State, the title to any State office, or where the punishment imposed is death. Jurisdiction is vested in the Missouri Court of Appeals. Article 5, § 3, of the Constitution of the State of Missouri, 1945, as amended. The judgment was entered in the Circuit Court of Jefferson County, which is within the territorial jurisdiction of the Missouri Court of Appeals, Eastern District. Section 477.050 R.S.Mo. (2000).

consistency, Respondent shall use Appellant's manner of designation for the transcript.

STATEMENT OF FACTS

In setting forth a complete statement of facts with respect to the incident in question, Appellant has failed to accurately cite the testimony of both Appellant and Dr. Snigel. Appellant indicates in her statement of facts that “She also suffered nightmares, migraines, nausea, diarrhea, anxiety disorders and headaches.” In support of this assertion, Appellant cites her deposition testimony, L.F. 93-4. Respondent objects to the aforementioned quote as the statement does not accurately reflect Appellant’s testimony. (L.F. 93-4). Although Appellant stated that she suffered from “anxieties”, Appellant did not state she suffered anxiety disorders, in fact, Appellant specifically stated that she did not suffer from post-traumatic stress disorder. (L.F. 93).

In citing the testimony of Dr. Snigel, Appellant incorrectly generalizes Appellant’s discussions with Dr. Snigel, stating “Dr. Snigel believed that the nightmares caused the nausea and the vomiting would have caused her head and back to hurt.” In support of this assertion, Appellant cites her deposition testimony, L.F. 94. Respondent objects to the aforementioned quote as the statement does not accurately reflect Appellant’s testimony. (L.F. 94). When Appellant was asked whether Dr. Snigel thought the headaches were related to the accident, Appellant stated the following: “He said he believed they were because of the nightmares that I was having and it literally made me sick to my stomach. It still does. So, the throwing up probably would have caused my head to hurt and back.” (L.F. 94).

In supplementing Appellant’s statement of facts for purposes of completeness, Respondent supplies the following facts with respect to Appellant’s petition. Appellant

alleged in her petition she was operating a motor vehicle on Northbound HWY 61 when the vehicle was struck by a human body which had been ejected from an uninsured motorist. (L.F. 4). As a result of the incident, she was caused to suffer injuries to her head, anxiety attacks, including nightmares, and severe emotional and mental distress. (L.F. 5).

POINTS RELIED ON

I

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF STATE FARM AND AGAINST APPELLANT AND THE TRIAL COURT PROPERLY APPLIED THE LAW TO THE FACTS BECAUSE:

A.

APPELLANT'S POLICY OF UNINSURED MOTOR VEHICLE INSURANCE DID NOT PROVIDE COVERAGE FOR APPELLANT'S CLAIMS OF EMOTIONAL DISTRESS DAMAGES AND/OR PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS DAMAGES IN THAT THE POLICY ONLY PROVIDED COVERAGE FOR "BODILY INJURY" AND "BODILY INJURY" DOES NOT INCLUDE EMOTIONAL DISTRESS AND/OR PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS;

B.

THE QUESTION OF WHETHER APPELLANT'S POLICY OF UNINSURED MOTOR VEHICLE INSURANCE COVERED PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS AS "BODILY INJURY" HAS NOT BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW IN THAT APPELLANT FAILED TO PLEAD IN HER PETITION THAT SHE SUSTAINED PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS.

Citizens Insurance Co. of America v. Leiendecker, 962 S.W.2d 446 (Mo.App. 1998)

Ward v. American Family Insurance Co., 783 S.W.2d 921 (Mo.App. 1989)

Fildes v. State Farm Mutual Automobile Insurance Co., 873 S.W.2d 883 (Mo.App. 1994)

State Farm Mutual Automobile Insurance Company v. D.L.B., 881 N.E.2d 665 (Ind. 2008)

II

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF STATE FARM AND AGAINST APPELLANT AND THE TRIAL COURT PROPERLY APPLIED THE LAW TO THE FACTS BECAUSE:

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APPELLANT’S POLICY OF UNINSURED MOTOR VEHICLE INSURANCE DID NOT PROVIDE COVERAGE FOR APPELLANT’S CLAIMS OF EMOTIONAL DISTRESS DAMAGES AND/OR PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS DAMAGES IN THAT THE POLICY ONLY PROVIDED COVERAGE FOR “BODILY INJURY” AND THE TERM “BODILY INJURY” CLEARLY AND UNAMBIGUOUSLY DOES NOT INCLUDE EMOTIONAL DISTRESS AND/OR PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS;

B.

THE QUESTION OF WHETHER APPELLANT’S POLICY OF UNINSURED MOTOR VEHICLE INSURANCE COVERED PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS AS “BODILY INJURY” HAS NOT BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW IN THAT APPELLANT FAILED TO PLEAD IN HER PETITION THAT SHE SUSTAINED PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS.

Citizens Insurance Co. of America v. Leiendecker, 962 S.W.2d 446 (Mo.App. 1998)

Ward v. American Family Insurance Co., 783 S.W.2d 921 (Mo.App. 1989)

Fildes v. State Farm Mutual Automobile Insurance Co., 873 S.W.2d 883 (Mo.App. 1994)

III

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF STATE FARM AND AGAINST APPELLANT AND THE TRIAL COURT PROPERLY APPLIED THE LAW TO THE FACTS BECAUSE:

A.

THE UNINSURED MOTORIST STATUTE, §379.203 R.S.Mo (2000), DOES NOT MANDATE COVERAGE FOR APPELLANT’S CLAIMS OF EMOTIONAL DISTRESS DAMAGES AND/OR PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS DAMAGES IN THAT THE UNINSURED MOTORIST STATUTE, §379.203 R.S.Mo (2000), ONLY MANDATES COVERAGE FOR “BODILY INJURY” AND THE TERM “BODILY INJURY” CLEARLY AND UNAMBIGUOUSLY DOES NOT INCLUDE EMOTIONAL DISTRESS AND/OR PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS;

B.

THE QUESTION OF WHETHER APPELLANT’S POLICY OF UNINSURED MOTOR VEHICLE INSURANCE COVERED PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS AS “BODILY INJURY” HAS NOT BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW IN THAT APPELLANT FAILED TO

**PLEAD IN HER PETITION THAT SHE SUSTAINED PHYSICAL MANIFESTATIONS
OF EMOTIONAL DISTRESS.**

Citizens Insurance Co. of America v. Leindecker, 962 S.W.2d 446 (Mo.App. 1998)

§379.203 R.S.Mo (2000)

ARGUMENT

I

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF STATE FARM AND AGAINST APPELLANT AND THE TRIAL COURT PROPERLY APPLIED THE LAW TO THE FACTS BECAUSE:

A.

APPELLANT'S POLICY OF UNINSURED MOTOR VEHICLE INSURANCE DID NOT PROVIDE COVERAGE FOR APPELLANT'S CLAIMS OF EMOTIONAL DISTRESS DAMAGES AND/OR PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS DAMAGES IN THAT THE POLICY ONLY PROVIDED COVERAGE FOR "BODILY INJURY" AND "BODILY INJURY" DOES NOT INCLUDE EMOTIONAL DISTRESS AND/OR PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS;

B.

THE QUESTION OF WHETHER APPELLANT'S POLICY OF UNINSURED MOTOR VEHICLE INSURANCE COVERED PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS AS "BODILY INJURY" HAS NOT BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW IN THAT APPELLANT FAILED TO PLEAD IN HER PETITION THAT SHE SUSTAINED PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS.

A. STANDARD OF REVIEW

Missouri Rule of Civil Procedure 74.04(c) directs the entry of summary judgment in favor of a party that demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. When considering appeals from summary judgments, an appellate court reviews the record in the light most favorable to the party against whom judgment was entered. *ITT Financial Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993). The review of an order of summary judgment is essentially de novo as an issue of law. *Id.* When a motion for summary judgment is filed and supported, an adverse party may not simply rest upon allegations made in the pleadings and must set forth specific facts showing a genuine issue for trial. *Id.* at 381. For purposes of summary judgment, a genuine issue exists when the record contains competent materials that evidence two plausible but contradictory accounts of the essential facts. *Id.* at 382. A genuine issue is a dispute that is real, not merely argumentative, imaginary, or frivolous. *Id.*

B. INSURANCE POLICY INTERPRETATION

The interpretation of the meaning of an insurance policy is a question of law. *Goza v. Hartford Underwriters Insurance Company*, 972 S.W.2d. 371, 373 (Mo.App. 1998). Under Missouri law, unless an ambiguity exists, the policy must be enforced as written, giving the language of the policy its ordinary meaning. *American States Insurance Company v. Mathis*, 974 S.W.2d 647, 649 (Mo.App. 1998). An ambiguity occurs when language of an insurance policy is open to different constructions, or results in duplicity, indistinctness or uncertainty

of meaning. *Id.* Language in an insurance policy is ambiguous if it is reasonably open to different constructions and the language used will be viewed in the light of the meaning that would ordinarily be understood by a layman who bought and paid for the policy. *Hobbs v. Farm Bureau Town & Country Insurance Company of Missouri*, 965 S.W.2d 194, 197-198 (Mo.App. 1998). If an insurance policy is open to different constructions, the one most favorable to the insured must be adopted. *Id.* Absent an ambiguity, an insurance policy must be enforced according to its terms. *Lang v. Nationwide Mutual Fire Insurance Company*, 970 S.W.2d 828, 830 (Mo.App. 1998). A court may not use its inventive powers to create an ambiguity where none exists or rewrite a policy to provide coverage for which the parties never contracted, absent a statute or public policy requiring coverage. *Rodriquez v. General Acc. Ins. Co. of America*, 808 S.W.2d 379, 382 (Mo. banc 1991).

C. DISCUSSION

a. Policy Interpretation

In her first point on appeal, Appellant argues that the injuries she sustained fall within the “majority view” of what constitutes “bodily injury” under the terms of the insurance policy. Appellant argues that while there is no dispute that Appellant had uninsured motorist coverage under the policy, a fundamental question exists as to whether she sustained bodily injury as a result of the incident. Appellant accurately quotes State Farm’s policy which defines “bodily injury” as “bodily injury to a person and sickness, disease or death which results from it.” (L.F. 42). In making her argument, however, Appellant inaccurately argues

that the majority of jurisdictions read the term to include emotional distress. *Citizens Insurance Co. of America v. Leiendecker*, 962 S.W.2d 446 (Mo.App. 1998).

State Farm's definition of "bodily injury" follows the holding in the Eastern District case, *Leiendecker*, where the Court followed the majority rule in finding that "bodily injury" does not encompass claims for emotional distress. *Id.* at 452. In support of its holding, and citing numerous cases, the Court indicated that the "overwhelming majority of jurisdictions have held that "bodily injury" standing alone or defined in a policy as "bodily injury [or harm], sickness or disease" is unambiguous and encompasses only physical harm. *Id.* In *Leiendecker*, the Court held that homeowners who claimed their emotional distress from being duped by their agent was "bodily injury" could not recover, concluding "that the common meaning of the phrase 'bodily harm, sickness or disease' as used to define 'bodily injury' is not ambiguous and that it refers to physical conditions of the body and excludes mental suffering or emotional distress." *Id.* at 454.

Further supporting Respondent's position, and similar to the Court in *Leiendecker*, are additional Eastern District cases of *Ward v. American Family Insurance Co.*, 783 S.W.2d 921 (Mo.App. 1989), and *Fildes v. State Farm Mutual Automobile Insurance Co.*, 873 S.W.2d 883 (Mo.App. 1994). In *Ward*, the policy at issue defined "bodily injury" as "bodily injury to or sickness, disease, or death of any person." 783 S.W.2d at 923. The *Ward* Court concluded: "So defined, we understand the clause to require some *physical* harm to the person claiming a bodily injury." *Id.* In *Fildes*, the policy contained language identical to the policy in this matter, which 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 Court, relying on *Ward’s* interpretation, determined that physical harm was a requirement for a person claiming a bodily injury. *Id.*

Other jurisdictions have held that emotional distress does not constitute bodily injury. An Arizona court addressed the issue of whether persons who assisted an HIV-positive individual after a motor vehicle accident and came into contact with the HIV-infected blood and later tested negative for the disease sustained bodily injury per the language of the insurer’s underinsured motorist provision, which read in part, “We will pay damages which a covered person is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of *bodily injury* sustained by a covered person and caused by an accident.” *Transamerica Insurance Company v. John and Jane Doe*, 173 Ariz. 112, 840 P.2d 288, 289 (Az.App. 1992). In rejecting the argument that emotional distress and anxiety were, in fact, bodily injuries, the Court reiterated that in insurance law the term “bodily injury” is narrower and more restrictive than personal injury, and that “bodily injury” only encompassed physical injuries, impairment of physical condition, sickness, disease, or substantial pain. *Id.* at 291. The Court held that the emotional effects of exposure to HIV-positive blood were not compensable within the meaning of the policy. *Id.*

In *Moore v. Continental Casualty Company*, 252 Conn. 405, 746 A.2d 1252 (Conn. 1999), the Plaintiff brought a claim for emotional distress arising out of economic loss and argued that emotional distress is within the insurance policy definition of bodily injury because modern medical science teaches that emotional distress is accompanied by some

physical manifestations. *Id.* at 414. The Court stated that it was true that emotional distress might be accompanied by physical manifestations, that does not mean, however, that the term “bodily harm, sickness or disease,” necessarily includes emotional distress caused by economic loss. *Id.* at 415. In denying Plaintiff’s claim that her emotional distress was a “bodily injury” under the policy, the Court concluded that the question in the case was the legal meaning of “bodily injury”, not the medical or scientific question of the degree to which the mind and the body affect each other. *Id.*

Appellant further argues that the Missouri cases are no longer persuasive. However, the only Missouri case Appellant cites in support of her contention is the Western District decision of *Lanigan v. Snowden*, 938 S.W.2d 330 (Mo.App. 1997). In *Lanigan*, the Court held that it was uncertain whether “sickness” and “disease” were modified by “bodily” in the definition. *Id.* at 332. The Court held that “sickness” and “disease” could include mental injury. *Id.*

A reading of *Lanigan* suggests that the reason the Court did not find *Ward* and *Fildes* persuasive was because both *Ward* and *Fildes* dealt with loss of consortium and not the right of sepulcher, which was the issue in *Lanigan*. It is of note that *Ward* and *Fildes* both stand for the proposition that, as a general rule, and not just as it relates to loss of consortium, physical harm is a requirement for a person claiming a bodily injury. *Ward* at 923; *Fildes* at 886. Appellants argument is further misguided as the Court in *Leiendecker*, reviewed the holding in *Lanigan*, and stated that the Western District’s holding was in the minority. *Leiendecker*, 962 S.W.2d at 452.

Appellant next argues that a need exists for the courts to quantify whether Appellants symptoms of emotional distress meet the requirement of bodily injury and that other jurisdictions provide insight into this analysis. Appellant cites the recent decision discussed in *State Farm Mutual Automobile Insurance Co. v. Jakupko*, 881 N.E.2d 654 (Ind. 2008), correctly stating that the “bodily injury” policy definition reviewed by the Supreme Court of Indiana was the same as the definition at issue in this case. In *Jakupko*, the Court held that “bodily injury,” as defined in the policy at issue in that case, includes emotional distress. *Id.* at 658. However, the Court did note in its holding that the term “bodily injury” does not include emotional damage unless it arises from a bodily touching. *Id.* at 659. In *Jakupko*, the individuals claiming coverage for emotional distress were passengers in the vehicle involved in the automobile accident and in addition to suffering emotional distress, each individual suffered bodily injuries. *Id.* at 654.

The Supreme Court of Indiana recently distinguished *Jakupko* with its subsequent holding in *State Farm Mutual Automobile Insurance Company v. D.L.B.*, 881 N.E.2d 665 (Ind. 2008). In *D.L.B.*, the Court reviewed the same policy definition of “bodily injury” and reviewed facts in which the Plaintiff D.L.B. was not himself physically injured but suffered from post-traumatic stress disorder as a result of witnessing his cousin’s fatal injuries. *Id.* at 665. D.L.B. argued that although he did not suffer a direct impact, his emotional distress was accompanied by physical manifestations. *Id.* at 667. The Court concluded however that as the physical manifestations were not the result of an impact, force, or harm to D.L.B.’s body, D.L.B. did not suffer “bodily injury” within the meaning of the policy. *Id.*

This distinction is of particular note as Appellant admits that she could not recall any parts of her head or body coming into contact with the inside of her vehicle. (L.F. 89). Furthermore, Appellant did not sustain any cuts, bruises or other physical symptoms and when emergency responders arrived at the scene, Appellant indicated that she was not physically injured. (L.F. 89, 91). Given that Appellants emotional distress did not result from an impact, force, or harm to her body, pursuant to the Court's holding in *D.L.B.*, it is apparent that the Appellant did not suffer "bodily injury" within the meaning of the policy.

Appellant's assertion that the views expressed by the Court in *Leindecker* are in the minority is without merit. This year, the Supreme Court of Connecticut stated in *Taylor v. Mucci*, 288 Conn. 379, 952 A.2d 776 (Conn. 2008), that "the 'overwhelming majority of jurisdictions' has found that the term 'bodily injury' in a liability policy does not include emotional distress unaccompanied by physical harm." *Id.* at 389. (quoting *Moore v. Continental Casualty Co.*, *supra*) (rejecting plaintiff's claim that emotional distress fell within the policy's definition of "bodily harm" because it was accompanied by physical manifestations).

Despite *Taylor*, in a footnote, Appellant references various cases alleging that the majority of courts generally hold bodily injury to include emotional distress if physical manifestations are present. However, as the substantial majority of the cases listed by Appellant pre-date the Court's holding in *Leindecker*, wherein the Court listed numerous cases supporting its contention that the holding in *Lanigan* was in the minority, Respondent

refrains from listing the cases referenced by the Eastern District Court, or those of other jurisdictions.

In reviewing the cases cited in Appellant's footnote, it is of note that although the Court in the lead case cited in Appellant's footnote, *Trinh v. Allstate Insurance Co.*, 109 Wash.App. 927, 37 P.3d 1259 (Wash.App. 2002), held that post-traumatic stress disorder accompanied by physical manifestations is bodily injury, this case is distinguishable from the case at bar as Appellant specifically stated that she does not suffer from post-traumatic stress disorder. (L.F. 93). It is of note that Appellant failed to discuss any of the cases cited above, or cited in the footnote of her brief, with the trial court in responding to Respondent's motion for summary judgment. (L.F. 77).

In responding to Respondent's motion for summary judgment, Appellant further did not attach any medical records or other testimony showing that she had a physical injury as opposed to an emotional or mental injury and its manifestations. (L.F. 75-106). Appellant did testify that her significant treatment was with therapists. (L.F. 93-96). Appellant treated with Dr. Jennifer Abel, a psychologist. (L.F. 94). According to the Missouri Revised Statutes, the practice of psychology is "the observation, description, evaluation, interpretation, treatment, and modification of human behavior by the application of psychological principles, methods, and procedures, for the purpose of preventing, treating, or eliminating symptomatic, maladaptive or undesired behavior and of enhancing interpersonal relationships, work and life adjustment, personal effectiveness, behavioral health, and mental health" and includes the "diagnosis and treatment of mental and emotional disorder[s] or

disabilit[ies].” R.S.Mo. 337.015(3). A psychologist is also prohibited from practicing medicine. R.S.Mo. 337.060.

Appellant also treated with two other therapists. (L.F. 93, 96). At the time of Appellant’s treatment, Amie Merz was a licensed professional counselor, whose practice includes assisting the client “in achieving more effective intrapersonal, marital, decisional, social, education, vocational, developmental, or rehabilitative adjustments.” R.S.Mo. 337.500(6). Phyllis Mast was a licensed clinical social worker with whom Plaintiff treated, and her work is defined as “the application of social work theory, knowledge, values, principles, and techniques of case work, group work, client-centered advocacy, administration, consultation, research, psychotherapy and counseling methods and techniques to persons, families and groups in assessment, diagnosis, treatment, prevention and amelioration of mental and emotional conditions.” R.S.Mo. 337.600(2). It is clear from Appellant’s testimony that the treatment she received was for emotional distress rather than physical injuries and as the Court’s holdings in *Leiendecker*, *Ward* and *Fildes* are persuasive, and other jurisdictions support the majority view expressed in those cases, Appellant’s argument must fail.

b. Failure to Plead Physical Manifestations

As discussed above, Appellant argues in her brief that she sustained physical manifestations of emotional injuries. However, it is important to note that Appellant failed to allege said physical manifestations in her petition. Appellant alleged in her petition that as a result of the incident, she was “caused to suffer injuries to her head, anxiety attacks,

including nightmares, and severe emotional and mental distress.” (L.F. 5). Contrary to Appellant’s brief, Appellant’s petition made no reference to nausea, diarrhea, and backaches. Furthermore, Appellant testified that she that she could not recall any parts of her head or body coming into contact with the inside of her vehicle. (L.F. 89). Appellant also indicated to emergency responders at the scene that she was not physically injured. (L.F. 89, 91). Appellant failed to present any evidence that she suffered a “head” injury as alleged.² This is of particular importance as the Court in *Leiendecker* stated the following: “Whether the underlying petitions have alleged a claim which is covered by the term “bodily injury” as defined in the policy is a legal question which is not dependent on a factual determination of the causes and physical manifestations of claimants’ alleged emotional distress.” *Leiendecker*, 962 S.W.2d at 450.

Per the Court in *Leiendecker*, as Appellant failed to allege physical manifestations of emotional distress in her petition, Appellant did not sufficiently preserve for appellate review the issue of whether physical manifestations of emotional distress are covered by the term “bodily injury”. §512.160-1 R.S.Mo (2000); *Mayor v. Mayor*, 349 S.W.2d 60, 62 (Mo. 1961). As such, Appellant’s argument must fail.

² Appellant did testify that she had headaches but did not provide any other information as to a specific head injury (L.F. 90-93).

II.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF STATE FARM AND AGAINST APPELLANT AND THE TRIAL COURT PROPERLY APPLIED THE LAW TO THE FACTS BECAUSE:

A.

APPELLANT’S POLICY OF UNINSURED MOTOR VEHICLE INSURANCE DID NOT PROVIDE COVERAGE FOR APPELLANT’S CLAIMS OF EMOTIONAL DISTRESS DAMAGES AND/OR PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS DAMAGES IN THAT THE POLICY ONLY PROVIDED COVERAGE FOR “BODILY INJURY” AND THE TERM “BODILY INJURY” CLEARLY AND UNAMBIGUOUSLY DOES NOT INCLUDE EMOTIONAL DISTRESS AND/OR PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS;

B.

THE QUESTION OF WHETHER APPELLANT’S POLICY OF UNINSURED MOTOR VEHICLE INSURANCE COVERED PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS AS “BODILY INJURY” HAS NOT BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW IN THAT APPELLANT FAILED TO PLEAD IN HER PETITION THAT SHE SUSTAINED PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS.

A. STANDARD OF REVIEW

Missouri Rule of Civil Procedure 74.04(c) directs the entry of summary judgment in favor of a party that demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. When considering appeals from summary judgments, an appellate court reviews the record in the light most favorable to the party against whom judgment was entered. *ITT Financial Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993). The review of an order of summary judgment is essentially de novo as an issue of law. *Id.* When a motion for summary judgment is filed and supported, an adverse party may not simply rest upon allegations made in the pleadings and must set forth specific facts showing a genuine issue for trial. *Id.* at 381. For purposes of summary judgment, a genuine issue exists when the record contains competent materials that evidence two plausible but contradictory accounts of the essential facts. *Id.* at 382. A genuine issue is a dispute that is real, not merely argumentative, imaginary, or frivolous. *Id.*

B. INSURANCE POLICY INTERPRETATION

The interpretation of the meaning of an insurance policy is a question of law. *Goza v. Hartford Underwriters Insurance Company*, 972 S.W.2d. 371, 373 (Mo.App. 1998). Under Missouri law, unless an ambiguity exists, the policy must be enforced as written, giving the language of the policy its ordinary meaning. *American States Insurance Company v. Mathis*, 974 S.W.2d 647, 649 (Mo.App. 1998). An ambiguity occurs when language of an insurance policy is open to different constructions, or results in duplicity, indistinctness or uncertainty

of meaning. *Id.* Language in an insurance policy is ambiguous if it is reasonably open to different constructions and the language used will be viewed in the light of the meaning that would ordinarily be understood by a layman who bought and paid for the policy. *Hobbs v. Farm Bureau Town & Country Insurance Company of Missouri*, 965 S.W.2d 194, 197-198 (Mo.App. 1998). If an insurance policy is open to different constructions, the one most favorable to the insured must be adopted. *Id.* Absent an ambiguity, an insurance policy must be enforced according to its terms. *Lang v. Nationwide Mutual Fire Insurance Company*, 970 S.W.2d 828, 830 (Mo.App. 1998). A court may not use its inventive powers to create an ambiguity where none exists or rewrite a policy to provide coverage for which the parties never contracted, absent a statute or public policy requiring coverage. *Rodriquez v. General Acc. Ins. Co. of America*, 808 S.W.2d 379, 382 (Mo. banc 1991).

C. DISCUSSION

a. Policy Interpretation

In her second point on appeal, Appellant argues that State Farm’s policy definition of “bodily injury” is ambiguous and should therefore be construed to provide coverage to Appellant. Appellant asserts that State Farm’s policy definition of “bodily injury” is ambiguous because its meaning is “uncertain from the perspective of a lay reader in at least four ways.”

Appellant’s first argument is that “the term bodily injury is used to define itself.” This argument was not presented to the trial court by Appellant and therefore is not properly before this Court for review. §512.160-1 R.S.Mo (2000); *Mayor v. Mayor*, 349 S.W.2d 60,

62 (Mo. 1961). Furthermore, Appellant has not provided the Court with further discussion or explanation of her assertion and therefore should be disregarded.

In terms of Appellant's second argument that State Farm's definition of "bodily injury" is ambiguous, it is of note that the Eastern District, in *Leiendecker*, has already determined that "bodily injury" standing alone or defined in a policy as "bodily injury [or harm], sickness or disease" is unambiguous and encompasses only physical harm. *Leiendecker*, 962 S.W.2d at 452. However, in support of her argument that State Farm's definition of "bodily injury" is ambiguous, Appellant again relies on the minority view of the Western District case, *Lanigan*. In *Lanigan*, Plaintiff's sister had died in a hotel and Plaintiff had obtained a judgment against the hotel owners for interfering with the right of sepulcher. *Id.* at 332. The Plaintiff sought coverage and the Court held that it was uncertain whether "sickness" and "disease" were modified by "bodily" in the definition. *Id.* The Court held that "sickness" and "disease" could include mental injury. *Id.*

State Farm's policy language is like those examined by the Eastern District in *Leiendecker*, *Ward* and *Fildes*. Appellant apparently uses *Lanigan*, as she did in Appellant's first argument, for its proposition that the conclusions reached by the Eastern District in *Ward* and *Fildes* are merely dicta. First, since the instant matter is controlled by the Eastern District, the holdings in *Ward* and *Fildes* are persuasive. Second, a reading of *Lanigan* suggests that the reason the Court does not find *Ward* and *Fildes* persuasive is not because of any ambiguity found in their definitions, but because they deal with loss of consortium and not sepulcher, which was the issue in *Lanigan*. Third, it should be revisited that *Ward* and

Fildes both stand for the proposition that, as a general rule, and not just as it relates to loss of consortium, physical harm is a requirement for a person claiming a bodily injury. *Ward* at 923; *Fildes* at 886. *Fildes*' policy language is identical to that of State Farm and *Ward*'s is the same State Farm's definition, with the exception of State Farm's use of "and" instead of "or." *Id.*

Appellant's third argument states that because State Farm's policy fails to include a definition or exclusion of "emotional distress" or a definition of "physical injury," it must fail for ambiguity. Appellant does not cite any case law in support of this proposition. State Farm refers the Court to *Ward* and *Fildes*, both of which conclude that "bodily injury" requires some sort of physical harm and based this conclusion solely on the policies' "bodily injury" definitions and without any further examination of whether the policies required the exclusions or definitions suggested by Appellant. *Id.* Based on these Eastern District cases, it is clear that State Farm's policy does not require further exclusions or definitions to forward a clear and unambiguous definition of "bodily injury."

Finally, Appellant argues that because State Farm's policy defines "person" to include a "human being," there is ambiguity because, according to Appellant "a human being consists of the physical and mental person." Again, Appellant provides no legal support for her argument. State Farm relies on *Leiendecker*, *supra*, which analyzed the definition of "bodily" and concluded that:

In dictionary definitions, "bodily" is equated with "physical" or "corporeal" as contrasted with "mental" or "spiritual." Webster defines "bodily" as "having a

body or a material form: physical, corporeal. . . . Bodily contrasts with *mental* or *spiritual*.” WEBSTER’S NEW INTERNATIONAL DICTIONARY 245 (3d ed. 1976)). THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 232 (2d ed. 1987) defines “bodily” as ‘1. of or pertaining to, the body. 2. corporeal or material, as contrasted with spiritual or mental. *Leiendecker* at 453.

Leiendecker concludes that “mental” contrasts with “physical,” which is in direct opposition to Appellant’s contention that the two be considered halves of a whole. Because the Eastern District has determined that “mental” and “physical” are contrastable for purposes of insurance law, then it would follow that State Farm’s definition of “person” does not become ambiguous simply because it includes the word “human being” in its definition. As State Farm’s policy definition of “bodily injury” is not ambiguous, Appellant’s argument must fail.

b. Failure to Plead Physical Manifestations

As discussed above, Appellant argues in her brief that she sustained physical manifestations of emotional injuries. However, it is important to note that Appellant failed to allege said physical manifestations in her petition. Appellant alleged in her petition that as a result of the incident, she was “caused to suffer injuries to her head, anxiety attacks, including nightmares, and severe emotional and mental distress.” (L.F. 5). Contrary to Appellant’s brief, Appellant’s petition made no reference to nausea, diarrhea, and backaches. Furthermore, Appellant testified that she that she could not recall any parts of her head or

body coming into contact with the inside of her vehicle. (L.F. 89). Appellant also indicated to emergency responders at the scene that she was not physically injured. (L.F. 89, 91). Appellant failed to present any evidence that she suffered a “head” injury as alleged.³ This is of particular importance as the Court in *Leiendecker* stated the following: “Whether the underlying petitions have alleged a claim which is covered by the term “bodily injury” as defined in the policy is a legal question which is not dependent on a factual determination of the causes and physical manifestations of claimants’ alleged emotional distress.” *Leiendecker*, 962 S.W.2d at 450.

Per the Court in *Leiendecker*, as Appellant failed to allege physical manifestations of emotional distress in her petition, Appellant did not sufficiently preserve for appellate review the issue of whether physical manifestations of emotional distress are covered by the term “bodily injury”. §512.160-1 R.S.Mo (2000); *Mayor v. Mayor*, 349 S.W.2d 60, 62 (Mo. 1961). As such, Appellant’s argument must fail.

³ Appellant did testify that she had headaches but did not provide any other information as to a specific head injury (L.F. 90-93).

III.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF STATE FARM AND AGAINST APPELLANT AND THE TRIAL COURT PROPERLY APPLIED THE LAW TO THE FACTS BECAUSE:

A.

THE UNINSURED MOTORIST STATUTE, §379.203 R.S.Mo (2000), DOES NOT MANDATE COVERAGE FOR APPELLANT’S CLAIMS OF EMOTIONAL DISTRESS DAMAGES AND/OR PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS DAMAGES IN THAT THE UNINSURED MOTORIST STATUTE, §379.203 R.S.Mo (2000), ONLY MANDATES COVERAGE FOR “BODILY INJURY” AND THE TERM “BODILY INJURY” CLEARLY AND UNAMBIGUOUSLY DOES NOT INCLUDE EMOTIONAL DISTRESS AND/OR PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS;

B.

THE QUESTION OF WHETHER APPELLANT’S POLICY OF UNINSURED MOTOR VEHICLE INSURANCE COVERED PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS AS “BODILY INJURY” HAS NOT BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW IN THAT APPELLANT FAILED TO PLEAD IN HER PETITION THAT SHE SUSTAINED PHYSICAL MANIFESTATIONS OF EMOTIONAL DISTRESS.

A. STANDARD OF REVIEW

Missouri Rule of Civil Procedure 74.04(c) directs the entry of summary judgment in favor of a party that demonstrates that there is no genuine issue as to any material fact and

that the moving party is entitled to judgment as a matter of law. When considering appeals from summary judgments, an appellate court reviews the record in the light most favorable to the party against whom judgment was entered. *ITT Financial Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo.banc 1993). The review of an order of summary judgment is essentially de novo as an issue of law. *Id.* When a motion for summary judgment is filed and supported, an adverse party may not simply rest upon allegations made in the pleadings and must set forth specific facts showing a genuine issue for trial. *Id.* at 381. For purposes of summary judgment, a genuine issue exists when the record contains competent materials that evidence two plausible but contradictory accounts of the essential facts. *Id.* at 382. A genuine issue is a dispute that is real, not merely argumentative, imaginary, or frivolous. *Id.*

B. DISCUSSION

a. Policy Interpretation

In her third point on appeal, Appellant argues that State Farm's policy fails to comply with the Missouri Financial Responsibility Act. The issue is the statutory interpretation of Missouri's Uninsured Motorist Statute, §379.203 R.S.Mo (2000).⁴ According to the

⁴ Appellant initially advances the argument that State Farm's policy was contrary to the Missouri Financial Responsibility Act, §303.010 R.S.Mo. (2000), which has language similar, if not identical, to the Missouri Uninsured Motor Vehicle Statute, §379.203 R.S.Mo. (2000), but it appears from Appellant's discussion, and citations therein, that the Missouri Uninsured Motor Vehicle Statute is the statute at issue in this matter.

Missouri Revised Statutes, “words and phrases shall be taken in their plain or ordinary and usual sense.” §1.090 R.S.Mo. (2000). For purposes of determining whether State Farm’s policy comports with the Missouri Uninsured Motorist Statute, then, one must look to the plain and ordinary meaning of the phrase “bodily injury, sickness, or disease.”

The Missouri Uninsured Motorist Statute requires automobile insurance policies to provide certain minimum levels of uninsured motor vehicle coverage “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 (emphasis added).” §379.203 R.S.Mo. (2000). State Farm’s uninsured motor vehicle coverage provision specifically states: “We will pay damages for *bodily injury* an *insured* is legally entitled to collect from the owner or driver of an *uninsured motor vehicle*. (L.F. 51). 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). State Farm’s policy defines “bodily injury” as “bodily injury to a person and sickness, disease or death which results from it.” (L.F. 42). It is apparent from a reading of both the Missouri Uninsured Motorist Statute and the State Farm uninsured motorist coverage provision that their language is nearly identical with respect to “bodily injury.”

The plain and ordinary meaning of the phrase “bodily injury, sickness or disease” has already been decided by the Eastern District Court in *Leiendecker*. *Leiendecker* dealt with this phrase in the context of a homeowner’s policy and concluded that the phrase

encompassed only physical injuries and not emotional distress. 962 S.W.2d at 452-454. In interpreting the plain and ordinary meaning of this phrase, the Court looked at dictionary definitions:

Courts may look to dictionary definitions to determine the common meaning of terms. In dictionary definitions, “bodily” is equated with “physical” or “corporeal” as contrasted with “mental” or “spiritual.” Webster defines “bodily” as “having a body or a material form: physical, corporeal....Bodily contrasts with *mental* or *spiritual*.” WEBSTER’S NEW INTERNATIONAL DICTIONARY 245 (3d ed. 1976). THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 232 (2d ed. 1987) defines “bodily” as “1. of or pertaining to, the body. 2. corporeal or material, as contrasted with spiritual or mental.” *Id.* at 453.

The Court also noted:

Similarly, BLACK’S LAW DICTIONARY 175 (6th ed. 1990) defines “bodily” as “Pertaining to or concerning the body; of or belonging to the body or the physical constitution; not mental but corporeal.” It defines “bodily injury” as: “Generally refers only to injury of the body, or to sickness or disease contracted by the injured as a result of injury.” It defines “body” as: “The main part of the human body; the trunk. The term however has also been held to embrace all members of the person, including the head and limbs.” *Id.*

Further, in insurance law, “bodily injury” is considered to be a narrower concept than “personal injury” which covers mental or emotional injury. *Id.*

It is well settled in insurance law that “bodily injury” and “personal injury” are not synonyms and that these phrases have two distinct definitions. *See* 7A Appleman, Insurance Law and Practice Section 451.14 (Berdal ed. 1979). The term “personal injury” is broader and includes not only physical injury but also any affront or insult to the reputation or sensibilities of a person. “Bodily injury,” by comparison, is a narrow term and encompasses only physical injuries to the body and the consequences thereof. *Id.*

The Court also looked to how other jurisdictions had interpreted the plain and ordinary meaning of “bodily injury, sickness or disease.” *Id.* at 452. As indicated earlier, the Court noted that the vast majority of states determined that the plain and ordinary meaning of “bodily injury” did not encompass claims for emotional distress and, accordingly, its holding fell into the majority opinion. *Id.*

The Court in *Leiendecker* has interpreted the plain and ordinary meaning of the phrase “bodily injury, sickness or disease” to cover only physical injuries and exclude claims for emotional distress. The interpretation of the *Leiendecker* Court extends to both the uninsured motor vehicle provision of State Farm’s policy in this matter and the Missouri Uninsured Motorist Statute, §379.203 R.S.Mo (2000). Per *Leiendecker*, the plain and ordinary meaning of the Missouri Uninsured Motorist Statute’s phrase “bodily

injury, sickness or disease,” and State Farm’s uninsured motor vehicle coverage provision, covers only physical injuries, not Appellant’s claims for emotional distress. Therefore, Appellant’s argument must fail.

b. Failure to Plead Physical Manifestations

As discussed above, Appellant argues in her brief that she sustained physical manifestations of emotional injuries. However, it is important to note that Appellant failed to allege said physical manifestations in her petition. Appellant alleged in her petition that as a result of the incident, she was “caused to suffer injuries to her head, anxiety attacks, including nightmares, and severe emotional and mental distress.” (L.F. 5). Contrary to Appellant’s brief, Appellant’s petition made no reference to nausea, diarrhea, and backaches. Furthermore, Appellant testified that she that she could not recall any parts of her head or body coming into contact with the inside of her vehicle. (L.F. 89). Appellant also indicated to emergency responders at the scene that she was not physically injured. (L.F. 89, 91). Appellant failed to present any evidence that she suffered a “head” injury as alleged.⁵ This is of particular importance as the Court in *Leiendecker* stated the following: “Whether the underlying petitions have alleged a claim which is covered by the term “bodily injury” as defined in the policy is a legal question which is not dependent on a factual determination of the causes and physical manifestations of claimants’ alleged emotional distress.” *Leiendecker*, 962 S.W.2d at 450.

⁵ Appellant did testify that she had headaches but did not provide any other information as to a specific head injury (L.F. 90-93).

Per the Court in *Leiendecker*, as Appellant failed to allege physical manifestations of emotional distress in her petition, Appellant did not sufficiently preserve for appellate review the issue of whether physical manifestations of emotional distress are covered by the term “bodily injury”. §512.160-1 R.S.Mo (2000); *Mayor v. Mayor*, 349 S.W.2d 60, 62 (Mo. 1961). As such, Appellant’s argument must fail

CONCLUSION

Based upon the above, the judgment of the trial court should be affirmed.

AFFIDAVIT OF SERVICE

STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS)

Comes now Gary P. Paul, and after being duly sworn upon his oath states that he did on the 22nd day of December, place in the United States mail in Clayton, Missouri an envelope containing two copies and an electronic copy on diskette of the Brief of Respondent State Farm Mutual Automobile Insurance Company and that proper postage was affixed on said envelope and that it was plainly addressed to:

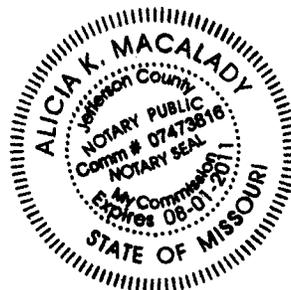
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Gary P. Paul

Subscribed and sworn to before me this 22nd day of December, 2008.

Alicia K. Macalady
Notary Public

My commission expires:
8-01-2011



CERTIFICATE OF COMPLIANCE

I, one of the attorneys for Respondent, certify that the number of words in the Brief of Respondent is 7,626 as directed by MRCP 84.06(c) which is based on a word count of the word processing system (excluding the cover). The name and version of the word processing software used to prepare the brief is Microsoft Word 2003. The undersigned further certifies that the disk filed with the court and the disk served on the party have been scanned for virus using Norton Antivirus, and has been found free of virus.

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Subscribed and sworn to before me, a Notary Public, this 22nd day of December, 2008.

Alicia K. Macalady
NOTARY PUBLIC

My Commission Expires:

8-01-2011

