THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0717

JOSEPH A. SANTOS
Plaintiff, Appellee

v.

METROPOLITAN PROPERTY AND
CASUALTY INSURANCE COMPANY
Defendant, Appellant

APPEAL FROM ROCKINGHAM COUNTY SUPERIOR COURT DECISION ON SUMMARY JUDGMENT MOTIONS

BRIEF OF THE PLAINTIFF/APPELLEE JOSEPH A. SANTOS

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STATEMENT OF THE CASE

Plaintiff-Appellee, Joseph A. Santos, (hereinafter "Santos"), filed a Petition for Declaratory Relief against the Defendant-Appellant, Metropolitan Property and Casualty Insurance Company, (hereinafter "MetLife") in relation to a motor vehicle accident that occurred on September 22, 2014. (SEE: Appendix of Defendant/Appellant "D. App.", p. 1-6). Santos' Petition for Declaratory Relief indicated that the limits of the tortfeasor's policy of two hundred and fifty thousand dollars ($250,000.00) were insufficient to compensate Santos for his damages. Id at 2. Santos sought underinsured motorist coverage from MetLife who issued an insurance policy to Santos. Id. MetLife improperly denied the claim, and argued Santos did not comply with the policy terms. Id. The parties filed cross-motions for summary judgment. Id at 16-108. The trial court, in an extensive order, correctly found that MetLife was liable to Santos for underinsured motorist benefits for bodily injury resulting from the September 22, 2014 motor vehicle collision. Id at 109. MetLife disagreed with the trial court's decision, and filed this appeal.

STATEMENT OF FACTS

Petitioner, Joseph Santos, ("Santos") was operating his custom motorcycle on September 22, 2014 in Exeter, New Hampshire when he was struck by an SUV driven by a Mr. John Beauregard. D. App. at 2. Santos sustained serious and debilitating injuries as a result of this collision. Id.

Santos placed his uninsured carrier, Metropolitan Property and Casualty Insurance Company (MetLife), on notice of the fact Mr. Beauregard's insurance policy would not be sufficient to cover Mr. Santos' damages from the collision. Id. at 45. Mr. Beauregard was insured by Electric Insurance Company for $250,000 per person, and $500,000.00 per accident. Id. The Met-Life policy carried underinsured or uninsured (UIM) coverage with limits of $1,000,000 per person that applied to Mr. Santos' injuries. Id. at 28.

At the time of the collision, Santos carried insurance on his custom motorcycle in the amount of $25,000 per person and $50,000 per accident. Id. at 45. Petitioner also had insurance coverage on his regular motor vehicles through Mt. Washington Assurance in the amount of $250,000 per person and $500,000 per accident. Id. The Mt. Washington Assurance policy did not afford coverage for Santos' custom motorcycle. Id.

Accordingly, Petitioner sought coverage under Section III, Condition 7 of the MetLife policy, which stated:

> This policy requires you to have the types and amounts of insurance shown on the Declarations page. If you fail to maintain the required underlying policies for any reason, or if no insurance is available because an insured has breached a term or condition of any underlying policy, **we will be liable only for the amount that we would have been liable for the amount that we would have been liable for had you maintained the required insurance.** Id at 34. (emphasis added).

MetLife denied the claim, stating Petitioner failed to maintain the amount of underlying coverage they believed was required under the policy. Id. at 46. In support of this denial, MetLife pointed to Endorsement M155 of Petitioner's policy, which stated: "As a precondition to receiving the benefits under this endorsement, you shall maintain the underlying policy of automobile insurance having uninsured/underinsured motorist coverage with split limits equal to or greater than $100,000/$300,000 bodily injury or with a single limit of $300,000 bodily injury". Id. at 42.

The policy includes several additional endorsements. Endorsements M159, M190-00-0300, and M180-28-0300[1] included specific language regarding whether they replaced or deleted prior language or sections in the policy:

1. Endorsement M159 is titled "Amendatory Endorsement Removal of Exclusion K. It states, "**We** agree with **you** that in Section II Exclusions paragraph (K) is *deleted.* Id. at 37 (emphasis added)

2. Endorsement M190-00-0300 states in pertinent part, "Under **Section III – Conditions**, item 6, **Cancellation**, the second paragraph is *deleted and replaced by*…." (full quotation omitted). Id. at 38. (emphasis added).

3. Endorsement M180-28-0300 contains four (4) changes to the policy. D. App. at 40. The first under Section A, states "**Section II – Exclusions**, item A. is *deleted and replaced* by….". Id. at 40. (full quotation omitted)(emphasis added). The next under Section B states, "Under **Section III - Conditions**: 1. Item 4. **Changes** is *deleted and replaced* by…". Id. (full quotation omitted)(emphasis added). The next endorsement states, "2. Item 9, **Premium** is *deleted and replaced* by…"Id. (full quotation

[1] Endorsement C116NH is a New Hampshire Civil Union specification stating that insurance policies shall provide the same benefits and protection as granted to married spouses and is not relevant to this analysis. Id. at 39.

omitted)(emphasis added) Finally, under "**Section IV – Definitions, "Insured**" the policy states this section is *deleted and replaced by*....Id. at 40-41. (full quotation omitted) (emphasis added).

Compare the language used in the preceding Endorsements to the language in Endorsement M155. Endorsement M155 contains no such definitive language to "replace" or "delete" the definition contained in **Section III – Conditions** – Paragraph 7, **Maintenance of Underlying Insurance**. Id. at 44. There is no language that Endorsement M155 deletes any section in the body of the policy. Id. There is no language that states this endorsement modifies another section of the policy. Id. There is no language that states this endorsement changes the policy. Id. In fact, there is no reference to Section III, Condition 7 anywhere in endorsement M155, nor is there any indication whatsoever that endorsement M155 changes anything in the policy. Id.

After review of Section III, Condition 7 of the policy, Petitioner believed he had uninsured coverage after application of the Beauregard policy to his loss. Id. at 73. Further, if Beauregard did not have any liability insurance applicable to this loss, Petitioner's reasonable understanding of the policy was that the limits of $1,000,000 were offset by the $100,000 underlying policy requirement, reflecting the intent of the parties in limiting the exposure to MetLife under the terms of Section III, Condition 7. Id.

SUMMARY OF ARGUMENTS

The MetLife policy issued included underinsured and uninsured motorist coverage. In the body of the policy under Section III (Conditions), and Condition 7 (titled "Maintenance of Underlying Insurance"), MetLife defined their liability should Santos not maintain a proper underlying policy. This section stated that if Santos "failed to maintain the required underlying policies for any reason, or if no insurance is available because an insured has breached a term or condition of any underlying policy, [MetLife] will be liable only for the amount that [MetLife] would have been liable for had [Santos] maintained the required insurance." Plainly, this language states that of the $1,000,000 in coverage available, this amount would be offset by the amount of the underlying policy limits that this section required.

The policy itself and the endorsement must be read with any endorsements and riders as a whole. The reasonable expectations of both parties were that Santos would be afforded underinsured coverage under the policy as a whole. The usage of the endorsement language in the policy in other sections was consistent with this reasonable expectation of coverage when read with the policy as a whole. Moreover, forfeiture of coverage is disfavored absent a clear and unambiguous explanation in the language of the policy. Additionally, with the backdrop of RSA 264:15, MetLife should have drafted clear policy language to avoid implication of the statute. Finally, the policy, read together as a whole, is at the very least ambiguous as to the consequences for maintaining less than the required amount of primary underinsured coverage.

Standard for Interpreting Policy Language and Burden of Proof

In a declaratory judgment action to determine the coverage of an insurance policy, the burden of proof is always on the insurer, regardless of which party brings the petition. *Cogswell Farm Condo. Ass'n v. Tower Group, Inc.*, 167 N.H. 245, 248 (2015) (quotation omitted); see RSA 491:22-a (2010). The interpretation of insurance policy language is a question of law for this court to decide. *Bartlett v. Commerce Ins. Co*, 167 N.H 521, 531 (2015). The fundamental goal of interpreting an insurance policy, as in all contracts, is to carry out the intent of the contracting parties. *Id.* An insurance company is free to limit its liability through clear and unambiguous policy language. *Ross v. Home Ins. Co*, 146 N.H. 468, 471 (2001).

The Court's analysis "begins with an examination of the insurance policy language rather than upon the general purposes of a certain type of insurance policy". *Cogswell Farm Condo. Ass'n*, 167 N.H. at 251. (quotation and citation omitted). The Court looks to the plain and ordinary meaning of the policy's words in context, "and will construe the terms of the policy as would a reasonable person in the position of the insured based upon more than a casual reading of the policy as a whole". *Id* at 248 (quotation omitted). Policy terms are construed objectively, and where the terms of a policy are clear and unambiguous, we need not examine the parties' reasonable expectations of coverage; absent ambiguity, our search for the parties' intent is limited to the words of the policy. *Bartlett*, 167 N.H. at 531. The fact that the parties may disagree on the interpretation of a term or clause in an insurance policy does not necessarily create an ambiguity. *Id.* For an ambiguity to exist, the disagreement must be reasonable. *Id.*

In determining whether an ambiguity exists, we will look to the claimed ambiguity, consider it in its appropriate context, and construe the words used according to their plain,

ordinary and popular definitions. *Id,* at 531. If one of the reasonable meanings of the language favors the policy holder, the ambiguity will be construed against the insurer in order to honor the insured's reasonable expectations. *Id.* (quotation and citation omitted). Unlike an exclusion limited to a particular section within the policy, an endorsement attached to a policy must be read together with the entire policy. *Preferred Nat'l Ins. Co. v. Docusearch, Inc.*, 149 N.H. 759, 766 (2003).

ARGUMENT

I. Santos' Reasonable Understanding of the insurance policy is that Underinsured Motorist coverage is Afforded through the MetLife policy.

The MetLife policy includes two sections that are at issue relative to what MetLife is required to pay under the above loss to Santos. First, in the body of the policy under Section III, Paragraph 7, the policy states:

> This policy requires you to have the types and amounts of insurance shown on the Declarations page. If you fail to maintain the required underlying policies for any reason, or if no insurance is available because an insured has breached a term or condition of any underlying policy, **we will be liable only for the amount that we would have been liable for had you maintained the required insurance.** D. App. at 34. (emphasis added).

Under this language, Petitioner reasonably understood that MetLife is liable for the "amount that [they] would have been liable for had you maintained the required insurance". Id. at 73. The policy states Santos was to obtain an underlying insurance policy for all his vehicles. Santos did obtain such policies. Santos maintained a $250,000/$500,000 underlying policy through Mt. Washington Assurance. Santos also had insurance on his custom motorcycle in the amount of $25,000 per person and $50,000 per accident through All-State Insurance. Santos was injured while operating his custom motorcycle, and the triggered underlying policy was through All-

State Insurance. There was no coverage under Mt. Washington Assurance applicable to this claim.

The plain language of this section states what is to happen should Santos fail to carry the appropriate underlying policy limits. To wit, the language is clear: "we will be liable only for the amount that we would have been liable for had you maintained the required insurance". Id. at 34. The inquiry should end here. MetLife intended to limit their liability under the policy to that would be owed had Santos maintained the correct limits.

MetLife argues that endorsement M155 changed this section. There is no language anywhere in endorsement M155 that states it deletes, replaces, or even modifies Section III, Condition 7 of the policy. There is no language anywhere in endorsement M155 that this endorsement even changes the terms of the policy. In fact, the specific language used was "As a precondition to receiving the benefits under this endorsement, you shall maintain the underlying policy of automobile insurance having uninsured/underinsured motorist coverage with split limits equal to or greater than $100,000/$300,000 bodily injury or with a single limit of $300,000 bodily injury". When read with Section III, Condition 7 of the policy, it is apparent that the "precondition" MetLife is describing is the ability to obtain full UIM benefits. By failing to maintain the required limits, MetLife, through both sections, has limited their liability to that which would have been paid if Santos had maintained the amounts of $100,000/$300,000. Moreover, this section does not state anywhere that failure to maintain these limits will result in a forfeiture of benefits.

Accordingly, the policy as a whole reflects the intent of the parties to limit MetLife's liability to that which they would have paid if Santos had underlying limits of $100,000/$300,000 on the motorcycle.

A. The Presumption of Consistent Usage Demonstrates MetLife Intended to Cover Santos through their UIM Coverage

The presumption of consistent usage instructs that a word or phrase is presumed to bear the same meaning throughout a text and that a material variation in terms suggests a variation in meaning. *In re Falia*, 838 F. 3d 1170, 1176 (11th Cir. 2016). Further, presumptions of consistent usage and meaningful variation are "settled principles of contract construction.... which follow from the duty to construe the contract as a whole rather than in isolated provisions." *GPIF-I Eq. Co. Ltd. V. HDG Mansur Investment Services, Inc*, 2013 WL 3989041, at *3 (S.D.N.Y., Aug 1, 2013). "Policy terms are construed objectively, and where the terms of a policy are clear and unambiguous, we need not examine the parties' reasonable expectations of coverage; absent ambiguity, our search for the parties' intent is limited to the words of the policy." *Bartlett*, 167 N.H. at 531.

It is evident when reading the policy, including all endorsements, that MetLife intended to provide UIM coverage to Santos in the case at bar. Endorsements M159, M190-00-0300, and M180-28-0300 all included language that each section those endorsements intended to modify was either "deleted" or "deleted and replaced" by changes in language. MetLife utilized clear and unambiguous language in endorsements M159, M190-00-0300, and M180-28-0300 to identify that those endorsements deleted and/or replaced the paragraphs they intended to modify. Endorsement M155 does not contain any such language. Moreover, if MetLife truly intended to

interpret M155 as they claim, the company's considerable legal team demonstrated its ability to draft such language in other sections of the policy. No such language is included in M155. The express language of Section III, Condition 7 of the policy reflects the clear intent of the parties: Santos would be provided UIM coverage that is offset by the intended limits of the underlying policy.

MetLife's argument that the Endorsement M155 superseded the language of Section III, Paragraph 7 is belied by the fact they failed to use the language they used in the other endorsements under the same policy. If MetLife truly intended to exclude coverage, they would have made that explicitly clear by utilizing the same "delete" and "replace" language as they did in the other endorsements on the policy. Moreover, they could have specifically referenced that Section III, Condition 7 was changed or modified, and they did not. Thus, Petitioner's read of the policy is consistent with the language of the policy and intent of the parties.

B. MetLife did not clearly state that the Failure to Maintain the Underlying Policy Limits would Result in a Forfeiture of Coverage

"Courts will enforce a forfeiture where there has been a plain violation of a condition of the policy and it is the *clearly expressed intent of the parties* that forfeiture be the consequence of the violation." (emphasis added) *See*, e.g. Couch, §22:34. Moreover, even if the forfeiture clause in an insurance policy is so plain and definite (unlike in the present case)… "it may still be subject to the rule that when strict enforcement of a provision of a policy will result in unreasonable and unjust forfeitures of an absurd result, the courts will refuse to enforce the strict meaning of the language of the policy." *Id.* (footnotes omitted); *see also*, *James v. Pennsylvania Gen. Ins. Co*, 306 S.E.2d 422, 425, (Ga. Ct. App. 1983) ("A crucial principle is that insurance

policies are construed so as to avoid forfeitures and to provide coverage (internal quotation marks, bracketing and citations omitted)); *AVEMCO Ins. Co. v. Chung*, 288 F. Supp. 142, 147 (D. Haw. 1975)("Forfeiture of insurance coverage is so disfavored that the courts are always prompt to seize hold of any circumstance to uphold the validity of a policy" (internal quotation marks and citation omitted)); *Axis Surplus Insurance Company v. Caribbean Beach Club Association, Inc*, 164 So. 3d 684, 687 (Fla. Ct. App. 2014) (noting that forfeitures of coverage are abhorred); *Hakim v. Massachusetts Insurers' Insolvency Fund*, 675 N.E. 2d 1161, 1165 (Mass. 1997) ("[E]xclusions from coverage are to be strictly construed").

Section III, Condition 7 of the MetLife policy provides that MetLife gets a credit for the policy limit that Santos should have had under the policy. D. App., at 34. This is clearly expressed in Section III, Conditions 7, where it is stated they are liable only for that which they would have been had Mr. Santos maintained their definition of the underlying policy. The analysis can, and should, end there. MetLife, as the insurance company, drafted their policy to include that they would be responsible for paying the difference between what they believe Santos should have had under the definition of underlying policy. In reading the policy as a whole, MetLife did not clearly and unambiguously state that forfeiture of Santos' UIM rights would occur should he not maintain the limits on the underlying policy.

Moreover, it is telling that MetLife does not indicate in Endorsement M155, or Section III, Condition 7 of the body of the policy, that the failure to carry the underlying policy limits of $100,000/$300,000 would result in a forfeiture of the UIM benefits. Nowhere in M155 does it indicate it is modifying any portion of the policy. Nowhere in M155 does it state any change to the policy is being made. Nowhere in M155 does it state the endorsement modifies or deletes any other portion of the policy. However, MetLife clearly used such language in the other

endorsements of the policy, where they expressly stated those sections of the policy were being deleted and/or replaced by other terms. Id. at 37-42. MetLife did not do so with M155, and when read together, it is apparent that the parties' expectations were that MetLife would get a credit for the coverage, not forfeiture.

However, if this Court disregards the intent of the parties, and the ambiguity created by MetLife in this case, forfeiture is still not appropriate. As the trial court found, forfeiture would result "even when (a) the insured actually maintains the primary UIM coverage, (b) that primary UIM coverage applies to the collision, and (c) the UIM damages stemming from the collision are not otherwise excluded from MetLife's excess UIM coverage, so long as (d) the primary coverage falls one dollar short of the required amount." Id, at 122-23. Moreover, an "alternative construction of the endorsement avoids forfeiture by (a) recognizing the insured's obligation to maintain sufficient primary UIM coverage, but (b) imposing as a remedy for a violation of that obligation that MetLife's coverage will be limited to the amount it would be required to pay if the insured actually had the required amount of primary UIM coverage." Id. Such an interpretation that results in such forfeiture, considering the language in the body of the policy, would create an unjust, unreasonable and absurd result.

C. RSA 264:15 Supports the Parties' Reasonable Expectations that there was UIM Coverage

RSA 264:15 states:

> I. Except as provided in paragraph I-a, **no policy shall be issued under the provisions of RSA 264:14**, with respect to a vehicle registered or principally garaged in this state, **unless coverage is provided therein or supplemental thereto at least in amounts and limits prescribed for bodily injury or death for a liability policy under this chapter,** for the protection of persons insured thereunder who are legally entitled to recover damages from owners or drivers of uninsured motor vehicles, and hit-and-run vehicles

> because of bodily injury, sickness, or disease, including death resulting therefrom. When an insured elects to purchase liability insurance in an amount greater than the minimum coverage required by RSA 259:61, the insured's uninsured motorist coverage shall automatically be equal in amounts and limits to the liability coverage elected. **For the purposes of this paragraph umbrella or excess policies that provide excess limits to policies described in RSA 259:61 shall also provide uninsured motorist coverage equal to the limits of liability purchased, unless the named insured rejects such coverage in writing.** (emphasis added).

As the trial court noted, in light of *Swain v. Employers Mutual Casualty Company*, it is unclear if MetLife can offer excess liability coverage with different exclusions than the underinsured coverage. D. App. at 128. (*See also*: *Swain v. Employers Mutual Casualty Company*, 150 N.H. 574, 580 (2004)). The legislature amended the statute in 2015 to provide "optional" UIM coverage in the same "amounts and limits" as "optional" liability coverage. 2015 N.H. Laws 237;*See* House Record, March 6, 2015 at p. 93 (committee report noting that the amendment):

> [A]ddress[es] an issue created when the NH Supreme Court delivered its 2004 opinion in Swain. The opinion states that the liability limits and the uninsured motorist limits only have to be *equal in scope of coverage* when an insured selects minimum coverage limits when purchasing a policy. But if an insured selects coverage above the minimum limits then the liability limits and the uninsured motorist limits have to be *equal in dollar amounts. HB 479 clarifies that equality in scope of coverage and dollar amounts applies whether the insured elects minimum limits or higher limits.* (emphasis added).

With this backdrop, it is reasonable to expect an insurer who wished to avoid this potential pitfall to clearly and unambiguously spell out the difference in the language of their policy. They did not, which demonstrates the intent of the parties to provide UIM coverage.

II. At the very least, the Policy is Ambiguous about the Consequences if Santos Failed to Maintain the Required Amount of Underlying Insurance Policy Coverage.

Preferred Nat'l Ins. Co. stands for the proposition that the endorsement and the policy must be construed together as a whole. *Preferred Nat'l Ins. Co.,* 146 N.H. at 766. Where two

sections of sections of a policy conflict, they must be read together and all ambiguities construed in favor of coverage. *U.S. Automobile Assoc. v. Wilkinson*, 132 N.H. 439, 442-43 (1989). In *U.S. Automobile Assoc.*, the Court had to make an initial determination as to whether $300,000 or $330,000 in coverage applied under the policy. *Id.* As the Court noted, an ambiguity includes "all terms about the meaning or application which reasonable disagreement between contracting parties is possible". *Id.* (quoting *Smith v. Liberty Mut. Ins. Co.*, 130 N.H. 117, 122 (1987)). The Court stated that The Hartford policy contained two different per person liability figures, one specifying $300,000, and the other specifying $330,000. *Id.* The Court construed the policy in favor of the $330,000, as the contradiction in the policy and the ambiguity created therefrom was construed against the insurer. *Id.*

Moreover, this Court recently decided an issue of ambiguity in a contract under the case *Exeter Hospital Inc. v. Steadfast Insurance Company*, 170 N.H. 170 (2017). In *Exeter Hospital*, this Court found that "the doctrine that ambiguities in an insurance policy must be construed against the insurer is rooted in the fact that insurers have superior understanding of the terms they employ". *Id* at 174 (quoting *State Farm Mut. Ins. Co. v. Pitman*, 148 N.H. 499, 501 (2002)). The Court in *Exeter Hospital* determined that the arguments of the parties "demonstrate a reasonable disagreement between the contracting parties leading to at least two interpretations of the policy's language". *Id.* at 179 (quoting *Newell v. Markel Corp.*, 169 N.H. 193, 197 (2016)). Further, the concurring opinion stated in pertinent part that, "When an ambiguity arises from conflicting provisions of a policy, we resolve the inconsistency in favor of the insured". *Id.* (quoting *Kelly v. Prudential Prop. & Cas. Ins. Co*, 147 N.H. 642, 643 (2002)).

Additionally, in *Bartlett II*, the matter involved construction of the terms "minimum retained limit" and "retained limit". *Terry Ann Bartlett v. The Commerce Ins. Co.*, 3JX order,

N.H. Supreme Court Case No. 2015. This was a 3JX Order governed by N.H. Supreme Court Rule 12-D:3 and has no precedential value, but does provide the Court further guidance on this issue. D. App. at 76-83. In *Bartlett II*, the policy involved two (2) phrases in the policy: "retained limit" contained in the body of the homeowner's policy, and "minimum retained limit" contained in the liability endorsement. Id. The insured argued that there were two reasonable interpretations of this conflicting language between the policy and the liability endorsement, and as a result coverage should be afforded. Id. Commerce argued that the language was unambiguous, and coverage should not be afforded. Id. The Court, agreeing with the insured, found that because "there are two reasonable interpretations; we hold the term 'retained limit' as used in the UIM Umbrella Policy as ambiguous." Id. Thus, in view of the ambiguity, the Court "read the policy against the insurer in order to honor the reasonable expectations of the policyholder." Id. (see also *Great Am. Ins. Co. v. Christy*, 164 N.H. 196, 203 (2012)).

Finally, the trial court was guided "at least by some extent", by the Connecticut Supreme Court's decision in *Israel v. State Farm Mutual Auto Insurance Company*, 789 A.2d 974, 977 (Conn. 2002). (*See Also*: D. App, at 125-28, J. Schulman's order). This case arose out of similar facts to the instant case. The insurer had two sections of the policy at issue. The first stated that if the "underlying limits are not maintained, you will be responsible for the underlying limit amount of a loss", and the second stated that the underlying limits must be maintained, and it they are not, then the coverage will not apply. *Id.* at 976. The Connecticut Court noted these conflicting positions, and found:

> The language of the policy does not resolve this conflict in any manner that is comprehensible to a lay-insured. It simply is unclear from the language of the policy whether the provision of the umbrella booklet or the section of the uninsured addendum is controlling in the event of an insured's failure to maintain the necessary underlying coverage. Thus, it is not possible to give effect to both of these provisions in a manner that resolves the ambiguity created by the policy language. Leaving a layperson to sort

> out the ambiguities and misleading inconsistencies in the present policy is precisely the problem that the rules of insurance policy construction were designed to avoid. *Id.*

The Connecticut Supreme Court then resolved the ambiguity in the insured's favor and found the insured was entitled to the excess UIM coverage. *Id.*

Interestingly, Appellant's brief spends significant time discussing the amendment versus endorsement part of the *Israel* decision. App. Brief, p. 13-15. However, this argument was expressly addressed in footnote 6 in the trial court's order where the Court discussed how the two cases are similar, despite the labels of endorsement and addendum. D. App. at 128. The trial court noted that the UIM coverage was established via an addendum rather than an endorsement. Id. The trial court noted that the distinction between "addendums" and "endorsements" to be unhelpful in determining the intent of the parties. Id. Instead, the Court focused on how the addendum in *Israel* was an "(a) add-on to the policy form and (b) part of the parties' contract." Id. The trial court then noted that the "court had given thoughtful consideration to the cannon of construction favoring endorsement language, but concluded that the wooden application of this cannon to this case would subvert, rather than enforce the intent of the parties". Id.

Moreover, Appellant misapplies the *Ellis* holding. *Ellis* involved an insurer, Concord Group, attempting to argue that ambiguity should be construed in their favor against another insurer. *Ellis v. Royal Insurance Companies*, 129 N.H. 326, 338 (1987). While the Court called this a "clever" argument, it nonetheless failed as the ambiguity rule was not to be applied in another insurer's favor. *Id.* Moreover, this ignores the holding of *Preferred Nat'l Ins. Co*, which states that the endorsement must be read with the policy as a whole. *Preferred Nat'l Ins. Co.*, 149 N.H. at 766. The Appellant also cites *National Grange Mutual Insurance Company* in support of this proposition as well, but Appellant completely ignores the factual findings in that case.

The Court in *National Grange* specifically found that the language used in the endorsements "clearly and unambiguously indicate to the reader that their terms supersede other terms in the policy". *National Grange Mutual Insurance Company v. Santaniello*, 961 A.2nd 387, 397 (Conn. 2009). The Court then specifically identified the facts that made this change unambiguous. *Id* at 395. First, the premium amount decreased from $14,171.00 by $7,317.00 to $6,854 because the policy was changed by deleting the three sets of dealers' plates from coverage. *Id.* Second, the change in policy included an accompanying note that specifically said, "This endorsement changes the policy. Please read it carefully." *Id.* Third, the insurer sent a letter to the insured stating that "Confirming your recent request, we have deleted [three] sets of dealer plates from your policy. Attached is the endorsement." *Id.* Finally, the court stated that "the deletion endorsement herein makes absolutely clear and unambiguous that it is deleting both the dealer plate endorsement… *and* the three sets of dealer plates, as well as crediting back the relevant portion of the premium." *Id* at 397.

The specific facts that led to the decision in *National Grange* are not remotely present here. Unlike in *National Grange*, the M155 endorsement did not include any deletion or replacement language. In contrasting this to the other endorsements in sections M159, M190-00-0300, and M180-28-0300, this is a telling omission by MetLife. As the trial court properly concluded, if MetLife intended to require a forfeiture of the policy, they could have easily used the words "delete", "modify" or "replace" as they did in those sections. They did not use such language, which confirms the reasonable expectation of both parties was that MetLife would receive a credit on the coverage based on what Santos should have had consistent with Section III, Condition 7.

III. MetLife's Argument Concerning Amendatory Endorsements was not Properly Preserved, and is Not Supported by any Legal Authority

MetLife argues the proposition that "endorsements" are legally different from "amendatory endorsements" for the first time on appeal. This was not argued at the trial court level, and was not properly preserved for appellate review. There is a general procedural requirement that all issues must be presented to the trial court to adequately preserve them for appellate review. *State v. Johnson*, 130 N.H. 578, 587 (1988). This argument is not mentioned in MetLife's Notice of Appeal. Accordingly, when issues are not raised in the notice of appeal, they are not properly preserved and are deemed waived. *Dupont v. N.H. Real Estate Comm'n*, 157 N.H. 658, 662 (2008). Therefore, MetLife's argument has been waived.

Even if this Court allows MetLife to proceed on this theory despite not preserving it at the trial court or notice of intent to appeal, MetLife offers no legal support for this proposition, and in fact no authority is cited. *See:* App. Brief, p. 10-11. Moreover, MetLife ignores the fact that the endorsements must be read with the policy as a whole and the plain language of each endorsement. MetLife, with its team of lawyers and contract drafters, were able to specifically include language in the endorsements under M159, M190-00-0300, and M180-28-0300 that the body of the policy is replaced or deleted by the endorsements. No such "deleted", "replaced", or "modified" language is used anywhere in M155.

Conclusion

For the foregoing reasons, the trial court decision should be affirmed.

WHEREFORE, the Appellee Santos respectfully requests this Honorable Court:

A. Affirm the lower court's decision on the cross motions for summary judgment in favor of Santos;

B. Grant such other further relief as may be fair and just.

Respectfully Submitted,
Joseph Santos
By and through its attorneys,
Parnell, Michels & McKay, PLLC

3/30/18
Date

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Pursuant to New Hampshire Supreme Court Rule 16(10), the undersigned certifies that two copies of this Brief have been sent by first class mail to Debra Mayotte, Esquire, counsel of record for MetLife.

The undersigned further certifies that pursuant to New Hampshire Supreme Court Rule 16(7), that the original copy of the Brief and eight copies of this Brief have been filed with the Clerk of the New Hampshire Supreme Court. In addition, the Plaintiff-Appellee has submitted a C.D. with an electronic copy of the Plaintiff-Appellee's Brief in Portable Document Format (PDF) to this Court.

Pursuant to New Hampshire Supreme Court Rule 16(3)(h), the undersigned states that Oral Argument should not be necessary and this matter can be decided on the briefs. However, if Oral Argument is granted, Mr. Santos requests that Attorney Rory J. Parnell be given fifteen (15) minutes for oral argument because the issues in this case should be decisively determined in this jurisdiction.

I hereby certify a copy of the foregoing has been sent via first class mail, postage prepaid, to Debra Mayotte, Esquire, counsel for the Appellant/Defendant, MetLife.

3/30/18
Date

Rory J. Parnell