

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

MAY TERM

2019 SESSION

John O'Donnell

v.

Allstate Indemnity Company

2018-0706

**RULE 7 MANDATORY APPEAL FROM
HILLSBOROUGH COUNTY SUPERIOR COURT-NORTHERN DISTRICT**

**BRIEF OF APPELLEE
ALLSTATE INDEMNITY COMPANY**

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TABLE OF CONTENTS

Table of Authorities	3
Statement of Case and Facts	17
Summary of Argument.....	19
Standard of Review	20
Argument.....	21
I. The Plaintiff’s September 2011 rejection of uninsured motorist coverage in his umbrella was in full force and effect at the time of his November 2015 accident because he never revoked that rejection in writing.	21
II. RSA 264:15(I) states that an insured’s rejection of uninsured motorist coverage in an umbrella policy “shall remain effective upon policy amendment or renewal” and thus, Mr. O’Donnell’s 2011 written rejection governed his September 2, 2015 -2016 policy which Allstate renewed with amended limits.....	23
A. Mr. O’Donnell amended his Allstate Umbrella Policy effective September 2, 2015 by reducing the liability limits.....	23
B. Mr. O’Donnell’s September 2, 2015-2016 Umbrella policy was a “renewal” of his September 2, 2014-2015 policy.....	
Conclusion.....	36
Certification.....	37
Addendum	38
August 22, 2017 Answers to Requests for Admissions	39

TABLE OF AUTHORITIES

Cases

<i>American Commerce Ins. Co. v. Ensley</i> , 220 P.3d 215 (Ct. App. WA. 2009)	32
<i>Appeal of Alton School Dist.</i> , 140 N.H. 303 (1995)	25
<i>Blood v. Old Guard Ins. Co.</i> , 934 A.2d 1218 (Pa. 2007).....	33
<i>Bouffard v. State Farm Fire & Cas. Co.</i> , 162 N.H. 305 (2011)	22
<i>Colony Ins. Co. v. Dover Indoor Climbing Gym</i> , 158 N.H. 628 (2009).....	36
<i>CNA Insurance Co. v. Hartford Ins. Co.</i> , 129 N.H. 243 (1987)	21
<i>Dempsey v. Automotive Ca. Ins. and Allstate Ins Co.</i> , 680 So.2d 675 (La. App. 1, June 28, 1973)(superseded by statute)	35
<i>Dwire v. Sullivan</i> , 138 N.H. 428 (1994)	20
<i>Ferreira v. Integon Nash Ins. Co.</i> , 809 A.2d 1098 (R.I. 2002)	30,31
<i>In re Appeal Marti</i> , 169 N.H. 185 (2016)	26
<i>International Technologies v. Verint Systems</i> , 157 F. Supp.3d 352 (S.D.N.Y. 2016)	25
<i>Jochim v. State Farm Mut. Auto Ins. Co.</i> , 952 P.2d 630 (Wash. Ct. App. 1998).....	33
<i>Johnson v. Farmers Ins. Co.</i> , 817 P.2d 841 (WA 1991).....	32,33
<i>Kingston v. State Farm Auto. Ins. Co.</i> , 344 P.3d 167 (Ct. App. Utah 2015).....	33
<i>In Petition of Malisos</i> , 166 N.H. 726 (2014)	31
<i>Mitchell v. Liberty Mut. Ins. Co.</i> , 24 P.3d 711 (Kan. 2001)	33,34
<i>Riviera v. Liberty Mut. Ins. Co.</i> , 163 N.H. 603, (2012).....	30
<i>Stickley v. State Farm Fire & Cas. Co.</i> , 65 A.3d 141 (Ct. App. Md. 2013).....	35
<i>Torgerson v. State Farm Mut. Auto. Ins. Co.</i> , 957 P.3d 1283 (Ct. App. WA 1998)	33

Town of Rye Bd. of Selectmen v. Town of Rye Zoning Board of Adjustment,
155 N.H. 622 (2007)20

Twitchell v. Town of Pittsburg, 483 N.Y.S.2d 524 (Supreme Ct., App. Div. 4th Dept.
1984)25

United Services Auto Ass'n v. Wilkinson, 132 N.H. 439 (1989).....21,35

Verizon New England v. City of Rochester, 151 N.H. 263 (2004)27

Other

2 Couch On Insurance.3d, 29:3532

2 Couch On Insurance.3d, 29:3632

9 Couch 3d On Insurance, §122:4428

KSA 40-284(a)35

40-284. Uninsured motorist coverage and underinsured motorist coverage; rejection; antistacking provision; exclusions or limitations of coverage; subrogation rights of underinsured motorist coverage insurer. (a) No automobile liability insurance policy 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 the policy contains or has endorsed thereon, a provision with coverage limits equal to the limits of liability coverage for bodily injury or death in such automobile liability insurance policy sold to the named insured for payment of part or all sums which the insured or the insured's legal representative shall be legally entitled to recover as damages from the uninsured owner or operator of a motor vehicle because of bodily injury, sickness or disease, including death, resulting therefrom, sustained by the insured, caused by accident and arising out of ownership, maintenance or use of such motor vehicle, or providing for such payment irrespective of legal liability of the insured or any other person or organization. No insurer shall be required to offer, provide or make available coverage conforming to this section in connection with any excess policy, umbrella policy or any other policy which does not provide primary motor vehicle insurance for liabilities arising out of the ownership, maintenance, operation or use of a specifically insured motor vehicle.

(b) Any uninsured motorist coverage shall include an underinsured motorist provision which enables the insured or the insured's legal representative to recover from the insurer the amount of damages for bodily injury or death to which the insured is legally entitled

from the owner or operator of another motor vehicle with coverage limits equal to the limits of liability provided by such uninsured motorist coverage to the extent such coverage exceeds the limits of the bodily injury coverage carried by the owner or operator of the other motor vehicle.

(c) The insured named in the policy shall have the right to reject, in writing, the uninsured motorist coverage required by subsections (a) and (b) which is in excess of the limits for bodily injury or death set forth in K.S.A. 40-3107, and amendments thereto. A rejection by an insured named in the policy of the uninsured motorist coverage shall be a rejection on behalf of all parties insured by the policy. Unless the insured named in the policy requests such coverage in writing, such coverage need not be provided in any subsequent policy issued by the same insurer for motor vehicles owned by the named insured, including, but not limited to, supplemental, renewal, reinstated, transferred or substitute policies where the named insured had rejected the coverage in connection with a policy previously issued to the insured by the same insurer.

(d) Coverage under the policy shall be limited to the extent that the total limits available cannot exceed the highest limits of any single applicable policy, regardless of the number of policies involved, persons covered, claims made, vehicles or premiums shown on the policy or premiums paid or vehicles involved in an accident.

(e) Any insurer may provide for the exclusion or limitation of coverage:

(1) When the insured is occupying or struck by an uninsured automobile or trailer owned or provided for the insured's regular use;

(2) when the uninsured automobile is owned by a self-insurer or any governmental entity;

(3) when there is no evidence of physical contact with the uninsured motor vehicle and when there is no reliable competent evidence to prove the facts of the accident from a disinterested witness not making claim under the policy;

(4) to the extent that workers' compensation benefits apply;

(5) when suit is filed against the uninsured motorist without notice to the insurance carrier; and

(6) to the extent that personal injury protection benefits apply.

(f) An underinsured motorist coverage insurer shall have subrogation rights under the provisions of K.S.A. 40-287, and amendments thereto. If a tentative agreement to settle for liability limits has been reached with an underinsured tortfeasor, written notice must be given by certified mail to the underinsured motorist coverage insurer by its insured.

Such written notice shall include written documentation of pecuniary losses incurred, including copies of all medical bills and written authorization or a court order to obtain reports from all employers and medical providers. Within 60 days of receipt of this written notice, the underinsured motorist coverage insurer may substitute its payment to the insured for the tentative settlement amount. The underinsured motorist coverage insurer is then subrogated to the insured's right of recovery to the extent of such payment and any settlement under the underinsured motorist coverage. If the underinsured motorist coverage insurer fails to pay the insured the amount of the tentative tort settlement within 60 days, the underinsured motorist coverage insurer has no right of subrogation for any amount paid under the underinsured motorist coverage.

RCW 48.22.030(2).....33

RCW 48.22.030

Underinsured, hit-and-run, phantom vehicle coverage to be provided—Purpose—Definitions—Exceptions—Conditions—Deductibles—Information on motorcycle or motor-driven cycle coverage—Intended victims.

(1) "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover.

(2) No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy. The coverage required to be offered under this chapter is not applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured.

(3) Except as to property damage, coverage required under subsection (2) of this section shall be in the same amount as the insured's third party liability coverage unless the insured rejects all or part of the coverage as provided in subsection (4) of this section. Coverage for property damage need only be issued in conjunction with coverage for bodily injury or death. Property damage coverage required under subsection (2) of this section shall mean physical damage to the insured motor vehicle unless the policy

specifically provides coverage for the contents thereof or other forms of property damage.

(4) A named insured or spouse may reject, in writing, underinsured coverage for bodily injury or death, or property damage, and the requirements of subsections (2) and (3) of this section shall not apply. If a named insured or spouse has rejected underinsured coverage, such coverage shall not be included in any supplemental or renewal policy unless a named insured or spouse subsequently requests such coverage in writing. The requirement of a written rejection under this subsection shall apply only to the original issuance of policies issued after July 24, 1983, and not to any renewal or replacement policy. When a named insured or spouse chooses a property damage coverage that is less than the insured's third party liability coverage for property damage, a written rejection is not required.

(5) The limit of liability under the policy coverage may be defined as the maximum limits of liability for all damages resulting from any one accident regardless of the number of covered persons, claims made, or vehicles or premiums shown on the policy, or premiums paid, or vehicles involved in an accident.

(6) The policy may provide that if an injured person has other similar insurance available to him or her under other policies, the total limits of liability of all coverages shall not exceed the higher of the applicable limits of the respective coverages.

(7)(a) The policy may provide for a deductible of not more than three hundred dollars for payment for property damage when the damage is caused by a hit-and-run driver or a phantom vehicle.

(b) In all other cases of underinsured property damage coverage, the policy may provide for a deductible of not more than one hundred dollars.

(8) For the purposes of this chapter, a "phantom vehicle" shall mean a motor vehicle which causes bodily injury, death, or property damage to an insured and has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident if:

(a) The facts of the accident can be corroborated by competent evidence other than the testimony of the insured or any person having an underinsured motorist claim resulting from the accident; and

(b) The accident has been reported to the appropriate law enforcement agency within seventy-two hours of the accident.

(9) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide information to prospective insureds about the coverage.

(10) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide an opportunity for named insureds, who have purchased liability coverage for a motorcycle or motor-driven cycle, to reject underinsured coverage for that motorcycle or motor-driven cycle in writing.

(11) If the covered person seeking underinsured motorist coverage under this section was the intended victim of the tortfeasor, the incident must be reported to the appropriate law enforcement agency and the covered person must cooperate with any related law enforcement investigation.

(12) The purpose of this section is to protect innocent victims of motorists of underinsured motor vehicles. Covered persons are entitled to coverage without regard to whether an incident was intentionally caused. However, a person is not entitled to coverage if the insurer can demonstrate that the covered person intended to cause the event for which a claim is made under the coverage described in this section. As used in this section, and in the section of policies providing the underinsured motorist coverage described in this section, "accident" means an occurrence that is unexpected and unintended from the standpoint of the covered person.

(13) The coverage under this section may be excluded as provided for under RCW 48.177.010(6).

(14) "Underinsured coverage," for the purposes of this section, means coverage for "underinsured motor vehicles," as defined in subsection (1) of this section.

RSA 259:6121

259:61 Motor Vehicle Liability Policy. –

"Motor vehicle liability policy" shall mean a policy of liability insurance which provides:

I. Indemnity for or protection to the insured and any person responsible to the insured for the operation of the insured's motor vehicle, trailer, or semi-trailer who has obtained possession or control thereof with the insured's express or implied consent, against loss by reason of the liability to pay damages to others for damage to property, except property of others in charge of the insured or his or her employees, or bodily injuries, including death at any time resulting therefrom, accidentally sustained during the term of said policy by any person other than the insured, or employees of the insured actually operating the motor vehicle or such other persons who are entitled to payments or benefits under the provisions of any workers' compensation act arising out of the ownership, operation, maintenance, control, or use within the limits of the United States of America, its territories or possessions, and the Dominion of Canada of such motor vehicle, trailer, or semi-trailer, to the amount or limit of at least \$25,000 on account of injury to or death of any one person, and subject to such limit as respects injury or death of one person, of at least \$50,000 on account of any one accident resulting in injury to or death of more than one person, and at least \$25,000 for damage to property of others, as herein provided, or a binder pending the issuance of such a policy or an existing policy, as defined in RSA 264:14, RSA 264:18, and RSA 264:19.

II. Which further provides indemnity for or protection to the named insured, any relative of the named insured by marriage, blood, or adoption who is a resident of the same household, or any domestic servant acting within the scope of the employment of any such named or resident insured from liability as a result of accidents which occur within the limits of the United States of America, its territories or possessions, and the Dominion of Canada due to the operation of any motor vehicle, trailer, or semi-trailer not owned in whole or in part by such insured; provided, however, the insurance afforded under this paragraph applies only if no other valid and collectible insurance is available to the insured.

III. The coverages described in paragraphs I and II, except as to the minimum financial responsibility limits, shall not apply to any insured operator whose driver's license has been suspended or revoked if the applicable motor vehicle liability policy so provides. Coverage under RSA 264:15 or RSA 264:16 shall not apply to any insured operator whose driver's license has been suspended or revoked if the applicable motor vehicle liability policy so provides.

IV. The minimum coverage requirements described in paragraphs I and II and in RSA 264:15 and RSA 264:16 shall not apply to any tractor with a farm tractor registration if an insured, at the insured's election, purchases a liability policy other than a motor vehicle policy to cover the tractor.

RSA 264:2(I).....29

264:2 Proof Required Upon Conviction for Motor Vehicle Law Violations. –

I. Upon receipt of an abstract of the record in case of conviction of any person for one of the following offenses, the director may suspend the license of the person so convicted and the registration certificates of any motor vehicle, trailer, or semi-trailer registered in the name of such person and require the surrender of the registration plates of any such vehicle, unless and until such person gives and thereafter maintains proof of his financial responsibility in the future:

- (a) Driving a motor vehicle while under the influence of intoxicating liquor or narcotic drugs;
- (b) Failing to stop and report when involved in an accident;
- (c) Homicide or assault arising out of the driving of a motor vehicle;
- (d) The second time for driving a vehicle at an excessive rate of speed;
- (e) The second time for driving a vehicle in a reckless manner and a violation of such other of the provisions of any state law relative to vehicles as the director shall determine.

II. The department may take action as required in this section upon receiving proper evidence of any such conviction of any person in another state. Notice of suspension and of the requirement of such surrender shall be sent by the department to such driver not less than 10 days prior to the effective date of suspension.

RSA 264:15 *passim*

264:15 Uninsured or Hit-and-Run Motor Vehicle Coverage. –

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. Rejection of such coverage by a named insured shall constitute a rejection of coverage by all insureds, shall apply to all vehicles then or thereafter eligible to be covered under the policy, and shall remain effective upon policy amendment or renewal, unless the named insured requests such coverage in writing.

I-a. No commercial motor vehicle liability policy issued under the provisions of RSA 264:14 shall be required to provide coverage for motor vehicles that are not owned by the policyholder 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.

II. In the event of insolvency on the part of the liability insurer which prevents such insurer from paying the legal liability of its insured within the limits of the coverage provided, if no other insurance applies, uninsured motorist coverage shall provide for no less than \$25,000 coverage for injury to or destruction of property in any one accident.

III. An insurer's extension of coverage, as provided in paragraph II, shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motor vehicle coverage is in effect and where the liability insurer of the tort-feasor has been declared to be insolvent by a court of competent jurisdiction as of the accident date, or has been declared to be insolvent by a court of competent jurisdiction within 3 years after the accident date. Nothing herein contained shall be construed to prevent any insurer from extending coverage under terms and conditions more favorable to its insureds than is provided hereunder.

IV. 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 extension of coverage described in paragraphs II and III, 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.

V. Every document tendered to settle a claim for bodily injury which may be the subject of coverage under this section shall prominently contain the following language, which shall be read and signed by the releasing party or parties:

WARNING

"IF YOU SIGN THIS RELEASE YOU MAY FORFEIT YOUR RIGHT TO UNINSURED MOTORIST INSURANCE BENEFITS FROM YOUR OWN AUTOMOBILE INSURANCE POLICY. CONSULT WITH YOUR INSURANCE AGENT, YOUR AUTOMOBILE INSURANCE COMPANY, OR YOUR ATTORNEY BEFORE SIGNING."

I certify that I have read the above warning and fully understand it.

Signature

RSA 412:6-a.....24,25

412:6-a Changes in Coverage. –

I. In the event that a company or filing or advisory organization eliminates or reduces coverages, conditions, or definitions in its policies issued under this section other than at the request of a policyholder, the company shall attach to the policy at renewal a printed notice in each such policy explaining clearly what coverages, conditions, or definitions have been eliminated or reduced. If explanations of such reduced or eliminated coverages are not contained in the printed notice attached to its policies at renewal, then such coverages, conditions, or definitions shall remain in full force and effect without such reductions or eliminations.

II. Except as provided in paragraph III, no insurance policy renewal shall add any stand-alone, premium bearing coverage unless such coverage is added at the request of the policyholder or is due to a requirement imposed by law.

III. If the policyholder has not requested that new premium bearing coverage be added to a policy upon renewal, but such coverage is added because the company is replacing coverage or a policy that the company no longer offers, the company shall provide a printed notice explaining clearly what coverage has been added and how to obtain information concerning premium impact.

IV. The requirements of this section shall apply to such policies renewed or endorsed with the same company, or a group of companies affiliated by ownership or contractual relationship encompassing joint operations or processes as filed and approved by the commissioner.

RSA 417-A:1.....31

417-A:1 Definitions. –

As used in this chapter the following definitions shall apply:

I. "Policy of automobile insurance" means a policy delivered or issued for delivery in this state insuring a person as named insured or one or more related individuals resident of the same household, and under which the insured vehicles therein designated includes a

private passenger automobile as defined in rules adopted by the commissioner pursuant to RSA 541-A.

II. "Renewal" or "to renew" means the issuance and delivery by an insurer of a policy superseding at the end of the policy period a policy previously issued and delivered by the same insurer, such renewal policy to provide types and limits of coverage at least equal to those contained in the policy being superseded, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term with types and limits of coverage at least equal to those contained in the policy being extended; provided, however, that any policy with a policy period or term of less than 12 months or any period with no fixed expiration date shall for the purpose of this chapter be considered as if written for successive policy periods or terms of 12 months.

III. "Insurer" means any insurance company, association or exchange authorized to issue policies of automobile insurance in the state of New Hampshire.

IV. "Nonpayment of premium" means failure of the named insured to discharge when due any of the named insured's obligations in connection with the payment of premiums on a policy, or any installment of such premium, whether the premium is payable directly to the insurer or its agent or indirectly under any premium finance plan or extension of credit.

RSA 491:8-a.....20

491:8-a Motions for Summary Judgment. –

I. A party seeking to recover upon a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment, may, at any time after the defendant has appeared, move for summary judgment in his favor upon all or any part thereof. A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move for a summary judgment in his favor as to all or any part thereof.

II. Any party seeking summary judgment shall accompany his motion with an affidavit based upon personal knowledge of admissible facts as to which it appears affirmatively that the affiants will be competent to testify. The facts stated in the accompanying affidavits shall be taken to be admitted for the purpose of the motion, unless within 30 days contradictory affidavits based on personal knowledge are filed or the opposing party files an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be presented at a trial but cannot be furnished by affidavits. Copies of all motions and affidavits shall, upon filing, be furnished to opposing counsel or to the opposing party, if the opposing party is not represented by counsel.

III. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

IV. If affidavits are not filed by the party opposing the summary judgment within 30 days, judgment shall be entered on the next judgment day in accordance with the facts. When a motion for summary judgment is made and supported as provided in this section, the adverse party may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial.

V. If it appears to the court at any time that any of the affidavits presented pursuant to this section are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees. Any offending party or attorney may be found guilty of contempt.

LSA-R.S.32.90035

§900. "Motor Vehicle Liability Policy" defined

A. A "Motor Vehicle Liability Policy" as said term is used in this Chapter, shall mean an owner's or an operator's policy of liability insurance, certified as provided in R.S. 32:898 or 32:899 as proof of financial responsibility, and issued except as otherwise provided in R.S. 32:899, by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.

B. Such owner's policy of liability insurance:

(1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; and

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs with respect to each such motor vehicle as follows:

(a) Fifteen thousand dollars because of bodily injury to or death of one person in any one accident, and

(b) Subject to said limit for one person, thirty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and

(c) Twenty-five thousand dollars because of damage to or destruction of property of others in any one accident.

(d) An owner may exclude a named person as an insured under a commercial policy if the owner obtains and maintains in force another policy of motor vehicle insurance which provides coverage for the person so excluded which is equal to that coverage provided in the policy for which the person was excluded. The alternative coverage is required for both primary and excess insurance.

C. Such operator's policy of liability insurance shall insure the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle not owned by him, within the same territorial limits and subject to the same limits of liability as are set forth above with respect to an owner's policy of liability insurance.

D. Such motor vehicle liability policy shall state the name and address of the named insured, the coverage afforded by the policy, the premium charged therefor, the policy period and the limits of liability, and shall contain an agreement or be endorsed that insurance is provided thereunder in accordance with the coverage defined in this Chapter as respects bodily injury and death or property damage, or both, and is subject to all the provisions of this Chapter.

E. Such motor vehicle liability policy need not insure any liability under any worker's compensation law nor any liability on account of bodily injury to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of any such motor vehicle nor any liability for damage to property owned by, rented to, in charge of or transported by the insured.

F. Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

(1) The liability of the insurance carrier with respect to the insurance required by this Chapter shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by an agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy;

(2) The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage;

(3) The insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in paragraph (2) of Sub-section B of this Section:

(4) The policy, the written application therefor, if any, and any rider or endorsement which does not conflict with the provisions of the Chapter shall constitute the entire contract between the parties.

G. Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this Chapter. With respect to a policy which grants such excess or additional coverage the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this Section.

H. Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this Chapter.

I. Any motor vehicle liability policy may provide for the prorating of the insurance thereunder with other valid and collectible insurance.

J. The requirements for a motor vehicle liability policy may be fulfilled by the policies of one or more insurance carriers which policies together meet such requirements.

K. Any binder issued pending the issuance of a motor vehicle liability policy shall be deemed to fulfill the requirements for such a policy.

L.(1) Notwithstanding the provisions of Paragraph (B)(2) of this Section, an insurer and an insured may by written agreement exclude from coverage the named insured and the spouse of the named insured. The insurer and an insured may also exclude from coverage any other named person who is a resident of the same household as the named insured at the time that the written agreement is entered into, and the exclusion shall be effective, regardless of whether the excluded person continues to remain a resident of the same household subsequent to the execution of the written agreement. It shall not be necessary for the person being excluded from coverage to execute or be a party to the written agreement. For the purposes of this Subsection, the term "named insured" means the applicant for the policy of insurance issued by the insurer.

(2) The form signed by the insured or his legal representative which excludes a named person from coverage shall remain valid for the life of the policy and shall not require the completion of a new driver exclusion form when a renewal, reinstatement, substitute, or amended policy is issued to the same named insured by the same insurer or any of its affiliates. Any changes to an existing policy, including but not limited to the addition of vehicles or insured drivers to said policy, regardless of whether these changes create new coverage, do not create a new policy and do not require the completion of a new agreement excluding a named person from coverage. For the purpose of this Subsection,

a new policy shall mean an original contract of insurance which an insured enters into through the completion of an application on the form required by the insurer.

M.(1) Except for those tow trucks carrying liability coverage under the provisions of R.S. 32:1717, for those motor vehicles owned or operated by persons engaged in the business of actual farming and used primarily, but not exclusively, in carrying farm produce from farm to market or returning therefrom carrying goods and merchandise back to the farms, individually or cooperatively, where such carrying is not primarily for hire, or for motor vehicles being used for the transportation of forest products in their natural state, every motor carrier as defined in R.S. 32:1(37) shall be covered by a liability policy. Public liability and property damage insurance on motor carriers operating a vehicle that has a gross vehicle weight or gross combined weight rating in excess of twenty thousand pounds shall have the following liability limits:

(a) Those vehicles with a gross vehicle weight of more than twenty thousand pounds, but not more than fifty thousand pounds shall have:

- (i) Twenty-five thousand dollars because of bodily injury or death of one person in any one accident, and
- (ii) Subject to said limit for one person, fifty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and
- (iii) Twenty-five thousand dollars because of damage to or destruction of property of others in any one accident.

(b) Those vehicles with a gross vehicle weight of more than fifty thousand pounds shall provide a combined minimum single coverage limit of three hundred thousand dollars or the equivalent coverage of one hundred thousand dollars for injury or death to any one person, with a required minimum of not less than three hundred thousand dollars per occurrence, and twenty-five thousand dollars property damage.

(2) If, however, the motor carrier has qualified with the United States Department of Transportation (Interstate Commerce Commission) as a self-insurer, as authorized by 49 U.S.C. 10927, or has qualified for self-insurance under the provisions of R.S. 32:1042, the carrier shall be authorized as a self-insurer in Louisiana.

(3) The department may impose a fee not to exceed one dollar per vehicle to cover the expenses resulting from the administration of the provisions of this Subsection.

(4) In addition, all security providers for motor carriers, beginning June 15, 1995, shall notify the secretary, on a form required by the secretary, within forty-five calendar days from the date when any policy, bond, deposit, or other item of security is terminated, withdrawn, canceled, lapsed, or otherwise made ineffective.

STATEMENT OF CASE AND FACTS

In September of 2011, Mr. O'Donnell purchased an Allstate homeowner, automobile and umbrella policy from his cousin's insurance agency. (Appendix, hereinafter "App" 206-208; 172-177; Plaintiff's brief, p. 19). Following the issuance of his September 1, 2011 binder (App.206-208), Allstate issued personal umbrella policy number 9 25 184881 to O'Donnell on September 6, 2011, for the policy period of September 2, 2011-2012. (App. 210-236). The Declarations that accompanied that umbrella policy stated in bold print: **Uninsured Motorist Insurance Rejected**. (App. 212).

Mr. O'Donnell confirmed his request to reject uninsured motorist coverage under his umbrella policy by executing Allstate's Selection/Rejection form on September 27, 2011. (App. 209). That form advised O'Donnell that he had the option of selecting or rejecting uninsured motorist insurance under his personal umbrella policy. The Selection/Rejection form also explained the purpose of uninsured motorist coverage and it advised O'Donnell that his selection or rejection "will apply now and to all future renewals or continuations of my policy unless I notify you otherwise in writing." (App. 209). The Allstate Umbrella Uninsured Motorist Selection/Rejection form O'Donnell executed on September 27, 2011 was approved for use by the New Hampshire Insurance Department on January 24, 2005. (App. 33-41).

Mr. O'Donnell concedes he executed an Allstate N.H. Personal Umbrella Policy Uninsured Motorist Selection/Rejection form in September of 2011. (Admission 1, Addendum, p. 39). He has also admitted that between September of 2011 and his accident on November 12, 2015 he never revoked his written request that Allstate exclude underinsured motorist coverage from his Allstate Umbrella Policy. (Admissions 2-3, Addendum, p. 39).

Mr. O'Donnell's first Allstate Umbrella policy identified a September 2, 2011 to September 2, 2012 policy period. (App. 212). It insured one operator and one vehicle and bore a policy number of 9 25 184881. (App. 212). In July of 2012, several months

before O'Donnell's September 2012 policy expired, Allstate offered to "renew" O'Donnell's umbrella. (App. 249). Mr. O'Donnell accepted Allstate's renewal offer and an "Amended Personal Umbrella Policy Declarations" was issued with a September 2, 2012-September 2, 2013 policy period, insuring one operator and one vehicle with a policy number of 9 25 184881. The first page of the 2012 Amended Umbrella Policy Declarations warned "**Uninsured Motorists Insurance Rejected.**" (App. 251, bolding in original).

Similarly, in July of 2013, 2014 and 2015 Allstate offered to "renew" O'Donnell's Personal Umbrella policy. (App. 271, 289, 312). After each annual policy, "renewal" offer Allstate issued a new policy Declaration page with the caption "RENEWAL PERSONAL UMBRELLA POLICY DECLARATION" (App. 273, 291) or "AMENDED PERSONAL UMBRELLA POLICY DECLARATIONS." (App. 261, 327).

Each time Mr. O'Donnell renewed or amended umbrella policy number 9 25 184881 Allstate issued him a new Declaration page that disclosed in bold print that uninsured motorist coverage under O'Donnell's umbrella had been rejected. (Affidavit, App. 202-204). Between September of 2011 and the time of his accident in 2015, Mr. O'Donnell received 13 different Allstate Declarations pages, each of which warned him in bold print that Uninsured Motorist coverage had been rejected. (Affidavit, App. 202-204, App. 212, 239, 245, 251, 261, 267, 273, 285, 291, 304, 309, 314, 327, 333).

Likewise, each year O'Donnell received his quote to renew Allstate umbrella policy no. 9 25 184881 he was provided with Allstate's standard policy endorsement (form X67689) that advised O'Donnell of *his option to purchase uninsured motorist coverage under his Allstate umbrella policy.* (Affidavit, App. 202-204, App. 219, 258, 282, 300, 323). Despite Allstate's annual offers to sell Mr. O'Donnell excess underinsured motorist coverage under his umbrella—Mr. O'Donnell never rescinded his September 2011 written rejection of underinsured motorist coverage. Moreover, when Allstate last renewed his umbrella several months before his November 2015 accident, Mr. O'Donnell asked Allstate to reduce his umbrella liability coverage from \$2 million to

\$1 million. (App. 336). Mr. O'Donnell had multiple opportunities to rescind his written umbrella rejection of underinsured motorist benefits, but failed to do so and is not entitled to reform his policy after the fact.

SUMMARY OF ARGUMENT

This Court should affirm the Hillsborough County Superior Court's decision that there is no underinsured motorist coverage available to the plaintiff under his Allstate umbrella policy because he rejected such coverage.

Allstate Indemnity Company is in the business of selling insurance. Allstate offered the plaintiff the opportunity to purchase underinsured motorist coverage when he submitted his application in 2011 and at every annual renewal. Despite multiple opportunities to purchase underinsured motorist coverage, the plaintiff declined the coverage. The plaintiff's request for umbrella based underinsured motorist coverage subsequent to his November 2015 accident seeks to reform his policy without justification.

The selection or rejection of umbrella based underinsured motorist coverage is governed by RSA 264:15. Under that statute, the Legislature has imposed upon insurers selling umbrella policies the obligation to document the insured's rejection and/or purchase of underinsured motorist coverage in writing. The Legislature has imposed upon insureds who purchase an umbrella policy the obligation to execute in writing any change to their selection or rejection of umbrella based underinsured motorist coverage. Once an insured selects or rejects umbrella based underinsured motorist coverage in writing that election is binding upon the named insured until revoked in writing. RSA 264:15. The executed election is binding upon the named insured irrespective of policy amendment or renewal. *Id.* Subsequent to the plaintiff's 2011 written rejection of umbrella based underinsured motorist coverage, Allstate renewed his policy four times. During the course of four years, O'Donnell made various amendments to his policy, including his request to reduce his liability coverage in the fall of 2015. At no time did

O'Donnell rescind his 2011 written rejection of underinsured motorist coverage under his umbrella. Accordingly, the Trial Court properly granted summary judgment in Allstate's favor.

STANDARD OF REVIEW

This appeal concerns the Trial Court's interpretation and application of RSA 264:15 to undisputed facts. This Court should affirm the Trial Court's summary judgment ruling in Allstate's favor as "there [was] no genuine issue of material fact, and ... the moving party [was] entitled to judgment as a matter of law." *Dwire v. Sullivan*, 138 N.H. 428, 430 (1994); RSA 491:8-a. The plaintiff rejected uninsured motorist coverage when he purchased an umbrella policy from Allstate and he never rescinded that written rejection. Pursuant to RSA 264:15 the plaintiff's 2011 uninsured motorist rejection form was properly applied to his 2015 policy renewal.

This Court reviews the Trial Court's interpretation and application of RSA 264:15 de novo. This Court is "the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. We first examine the language of the statute, and, where possible, ascribe the plain and ordinary meanings to the words used. When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we refuse to consider what the legislature might have said or add language that the legislature did not see fit to incorporate in the statute." *Town of Rye Bd. Of Selectmen v. Town of Rye Zoning Bd. Of Adjustment*, 155 N.H. 622, 624 (2007).

ARGUMENT

I. The Plaintiff's September 2011 rejection of uninsured motorist coverage in his umbrella was in full force and effect at the time of his November 2015 accident because he never revoked that rejection in writing.

This Court has long recognized that umbrella policies are different from other liability policies. In *CNA Insurance Co. v. Hartford Ins. Co.*, 129 N.H. 243 (1987), the Court distinguished umbrella-type policies from comprehensive general liability policies noting, “[a]n umbrella excess third-party liability is a unique form of coverage unlike any other form of excess coverage. ...” Several years later, in *United Services Auto Ass’n v. Wilkinson*, 132 N.H. 439 (1989) this Court concluded that umbrella policies were exempt from the motor vehicle liability requirements in RSA 259:61 and 264:15 because they provide “modest cost broad coverage for catastrophic losses, and excess coverage over and above any type of primary coverage.” In *Wilkinson*, this Court distinguished umbrella policies from motor vehicle liability policies in that they do not insure motor vehicles; rather they insure rare catastrophic liability in excess of underlying motor vehicle and/or homeowner policies.

Subsequent to the Court’s decision in *Wilkinson*, the Legislature amended RSA 264:15 to require that umbrella carriers offer uninsured motorist coverage in amounts equal to their excess liability coverage for catastrophic losses, however, the Legislature preserved the insured’s right to reject umbrella based underinsured motorist coverage. (RSA 264:15 (I)(1991)).

In 2007, the Legislature amended RSA 264:15(I) to include a requirement that any insured’s decision to reject umbrella based underinsured motorist coverage be done “in writing” and it added a fourth sentence to the statute. (SB 38). That fourth statement provided “Rejection of such coverage by a named insured shall constitute a rejection of coverage by all insureds, shall apply to all vehicles then or thereafter eligible to be covered under the policy, and shall remain effective upon policy amendment or renewal, unless the named insured requests such coverage in writing. (RSA 264:15(I)(2007)).

The legislative records confirm that Senator D'Allesandro was instrumental in drafting the bill that required umbrella uninsured motorist elections be confirmed in writing. (App. 339, 344-345 Senate Bill 38, 2007 Session). Senator D'Allesandro represented a constituent who orally had elected to purchase umbrella underinsured motorist coverage but without a written acknowledgement was unable to prove their purchase. George Roussos, on behalf of the American Insurance Association, spoke in favor of SB 38's request to put umbrella elections in "writing" subject to three conditions: 1) the written rejection by the named insured would apply to all insureds; 2) the election would be valid for renewals or changes to the policy; and 3) the election would apply until withdrawn in writing. (App. 340-341, January 30, 2007 Senate Committee on Commerce Testimony).

The New Hampshire Insurance Department testified in favor of the insurance industry's amendment to SB 38. (App. 348, April 25, 2007 Public Hearing on SB 38). The Legislature approved Attorney Roussos' amendment to SB 38 and the Governor signed the bill into law in 2007. Pursuant to the 2007 amendment, "*rejection of such coverage [umbrella uninsured motorist coverage] by a named insured shall constitute a rejection of coverage by all insureds, shall apply to all vehicles then or thereafter eligible to be covered under the policy, and shall remain effective upon policy amendment or renewal, unless the named insured requests such coverage in writing.*" (emphasis added). RSA 264:15(I).

In September of 2011, Mr. O'Donnell confirmed in writing his decision to reject underinsured motorist coverage in connection with his purchase of an Allstate umbrella policy. (App. 209). That rejection by O'Donnell as the named insured "*shall constitute a rejection of coverage by all insureds*" unless he, "*the named insured requests such coverage in writing*" which O'Donnell did not do. Because O'Donnell did not submit a written request to purchase excess underinsured motorist coverage after rejecting it in 2011-- his 2011 rejection remained in full force and effect at the time of his November 2015 accident. RSA 264:15(I). *Bouffard v. State Farm Fire & Cas. Co.*, 162 N.H. 305 (2011)(decided under an earlier version of RSA 264:15). The requirement of a written

request to override an initial rejection of excess underinsured motorist coverage applies to all insureds, which in this case includes O'Donnell. Accordingly, this Court does not need to address O'Donnell's alternative arguments that challenge the definition of the statutory terms "policy renewal" or "policy amendment" within RSA 264:15(I).

II. RSA 264:15(I) states that an insured's rejection of uninsured motorist coverage in an umbrella policy "shall remain effective upon policy amendment or renewal" and thus, Mr. O'Donnell's 2011 written rejection governed his September 2, 2015 -2016 policy which Allstate renewed with amended limits.

As noted in the preceding section, Allstate properly relied upon O'Donnell's 2011 Umbrella Uninsured Motorist rejection form when it renewed his policy in 2015 because he never revoked that written rejection. Accordingly, this Court need not reach O'Donnell's assertion that Allstate was required to obtain a second Umbrella Uninsured Motorist Selection/Rejection form in September of 2015 when O'Donnell reduced his Umbrella's liability policy limits. If this Court does reach O'Donnell's statutory construction argument, it should affirm the Trial Court's conclusion that Allstate's September 2015 Policy Declarations reflect O'Donnell's request that Allstate "amend" his policy by reducing his liability limits in conjunction with their annual renewal of his policy.

A. Mr. O'Donnell amended his Allstate Umbrella Policy effective September 2, 2015 by reducing the liability limits.

Mr. O'Donnell characterizes his September 2015 policy as a "new contract" even though it was issued by the same agent under the same policy number as all prior umbrella policies, insuring the same insured at the same address, using the same effective policy period dates, covering the same one vehicle, one operator, based upon the same underlying Allstate Home and/or Auto policy(ies). (App. 333). The Trial Court rejected O'Donnell's argument and concluded the September 2015 policy "was a renewal of his

previous umbrella policies, with amended coverage terms.” (Opinion, Opening brief, p. 54).

In his declaratory judgment action, O’Donnell asserts that his decision to reduce his liability limits at renewal was a material change to his umbrella policy obligating Allstate to request a second Umbrella Uninsured Motorist Selection form. (Complaint ¶7, App. 355-356). This argument ignores the statutory mandate of RSA 264:15(I) and the terms of the Allstate Selection/Rejection form which both impose the written notification obligation upon O’Donnell in the event he decides to purchase underinsured motorist coverage under his Allstate umbrella.

Although O’Donnell acknowledges that, his 2011 Umbrella Uninsured Motorist Rejection form applies to all subsequent policy, renewals and amendments he argues that, the written rescission requirement in RSA 264:15 does not apply to policy amendments that become effective at policy renewal. (Brief, pp. 33-36). As noted by the Trial Court, Mr. O’Donnell provided the Court with no case law support for his claim that “prohibits an amendment form occurring simultaneous with a policy being renewed.” (Order Opening Brief, p. 54, footnote 5).

Mr. O’Donnell was not able to provide the Court with case law support for his assertion that a policy cannot be amended at renewal as the New Hampshire Legislature has expressly recognized that insurers may issue policy amendments at renewal if they notify the insured of the policy amendment(s). RSA 412:6-a. In RSA 412, which governs forms and rates for property and casualty insurance, the Legislature recognized that a carrier could reduce or eliminate various coverages at renewal by amendment provided they “attach to the policy at renewal a printed notice in each such policy explaining clearly what coverages, conditions or definitions have been eliminated or reduced.” RSA 412:6-a. This statutory notice provision applies to all policies renewed or endorsed with the same company or group of companies. *Id.* In other words, by statute, Allstate was allowed to amend O’Donnell’s umbrella policy at renewal provided Allstate notified O’Donnell of those changes. If Allstate can amend O’Donnell’s policy terms at renewal, surely Mr. O’Donnell is also entitled to amend his limits; the autos covered or

family members being insured at renewal without requesting a new policy with a new application and new underwriting review.

The case law cited by O'Donnell in support of his assertion that his September 2, 2014-2015 policy had expired and his September 2, 2015-2016 policy was a new contract involve contracts that were not in full force and effect at the time of loss. For example in *Twitchell v. Town of Pittsburg*, 483 N.Y.S.2d 524 (Supreme Ct., App. Div. 4th Dept. 1984) the plaintiff sought indemnification under a contract that had been expired for 5 years based upon the parties ongoing course of conduct. (Brief, p. 34). In *International Technologies v. Verint Systems*, 157 F.Supp.3d 352 (S.D. N.Y. 2016) the plaintiff sought to enforce terms under an implied contract theory under a contract that had been expired four years. (Brief, p. 34-36). Finally in *Appeal of Alton School Dist.*, 140 N.H. 303 (1995) this Court acknowledged a Town has no obligation to increase teacher pay for the school year after a collective bargaining agreement has ended.

Contrary to these cases, the plaintiff's Allstate umbrella policy remained in full force and effect, year after year, without a gap in coverage up to the time of the plaintiff's November 2015 accident. The plaintiff's assertion that each renewal policy reflected a new policy that could not be amended is not supported by the case law he cites and it is expressly rebutted by state statute. See RSA 412:6-a.

Pursuant to the statutory mandate in RSA 264:15, an insured's Umbrella Uninsured Motorist Rejection form "shall" remain effective "upon policy amendment." The plaintiff concedes the term amendment "means an alteration of or addition to." (App. 48, ¶12). The plaintiff also concedes that had he reduced his umbrella liability limits, "*mid-term or late in the term of an earlier contractual agreement, then such a change could be construed as an 'amendment'*" and his policy would be governed by his 2011 uninsured motorist rejection. (App. 15-16, ¶7). The plaintiff asserts that his "alteration" requesting lower umbrella liability limit was not an "amendment" because it took effect on the first day of his September 2, 2015 renewal as opposed to during his policy period.

The fortuitous timing of O'Donnell's request to amend his umbrella policy should not control whether the policy change qualifies as an "amendment" controlled by his earlier Umbrella Policy Uninsured Motorist Selection/Rejection certification. O'Donnell has not provided this Court with any public policy argument that support excluding the binding impact of a written Umbrella Rejection form to policy amendments made on the day of policy renewal but include them upon any changes the insured made during the remaining 364 days of the year. Under O'Donnell's reasoning, if he had requested lower liability limits 24 hours later on September 3, 2015, "mid-term or late in the term of an earlier contractual agreement, then such a change could be construed as an 'amendment'" and his policy would be governed by his 2011 uninsured motorist rejection. (App. 15-16, ¶7). Because, however, O'Donnell requested the very same policy change 24 hours earlier, at policy renewal, suddenly the same policy change no longer constitutes an "amendment" and suddenly Allstate is required to request a second uninsured motorist rejection form. (App. 79-80). The plaintiff's characterization of the term "amendment" within RSA 264:15(I) would lead to illogical results contrary to this Court's recognition that it is a "'fundamental principle' of statutory construction 'that whenever possible, a statute will not be construed so as to lead to absurd consequences.'" *In re Appeal of Marti*, 169 N.H. 185, 190 (2016).

Consistent with O'Donnell's admission that umbrella policy amendments "*made late in the term of an earlier contractual agreement*" would be governed by any earlier Umbrella Uninsured Motorist Selection/Rejection form, his liability reduction is an "amendment" subject to his 2011 Umbrella Uninsured Motorist Selection/Rejection form. (App. 15-16, ¶7). It is undisputed that O'Donnell reduced his umbrella liability limits from \$2,000,000 to \$1,000,000. in response to Allstate's July 14, 2015 renewal offer. (App. 312). Following O'Donnell's request that Allstate amend his liability limits "late in the term of an earlier contractual agreement," Allstate mailed confirmation of O'Donnell's "amendment", his reduced liability limits, on August 5, 2015 a full month before O'Donnell's prior policy expired. (App. 327, 333). The plaintiff's decision to amend his excess liability limits between July 14, 2015 when Allstate issued

its renewal offer (App. 312) and August 5, 2015 (App. 325) is the very type of policy change O'Donnell recognized as an "amendment" within RSA 264:15 as it was requested "*mid-term or late in the term of an earlier contractual agreement,*" O'Donnell's September 2014-2015 policy period. (App. 15-16, ¶7). This policy change is also the type of policy "amendment" recognized by the Legislature in RSA 264:15 that is governed by O'Donnell's initial written Uninsured Motorist Umbrella rejection form.

The plaintiff's attempt to limit the application of the "amendment" term in RSA 264:15 to policy amendments that are effective during the policy period, but not at renewal, would lead to illogical results. Under this interpretation, insurers would be required to obtain a new Umbrella Uninsured Motorist Selection/Rejection form for any policy changes made effective at policy renewal—one day during the year, but the insured could make changes during the policy's remaining 364 days and those would be governed by the insured's original Uninsured Motorists Selection/Rejection. The plaintiff has articulated no reason to differentiate between amendments that are effective at renewal versus other times of the year. Moreover, the binding effect of an insured's written rejection/selection of umbrella based uninsured motorist coverage under RSA 264:15 by its terms applies to all policy amendments not those made on specified days during the policy period. The plaintiff's argument relies upon restrictive language the Legislature did not enact. Under well-settled law, this Court will "neither consider what the legislature might have said nor add words that it did not see fit to include." *Verizon New England v. City of Rochester*, 151 N.H. 263, 266 (2004).

Mr. O'Donnell's assertion that Allstate was required to request a second Underinsured Motorists Election form in connection with any *material* policy amendment is inconsistent with the statutory requirements of RSA 264:15(I). The statute by its terms enforces the Named Insured's policy inception Umbrella Uninsured Motorist Selection form to all policy amendments, not just immaterial policy amendments. RSA 264:15(I). The argument is also inconsistent with the policy selection form Mr. O'Donnell executed. The September 2011 umbrella underinsured motorist rejection form executed by

O'Donnell specifically informed him that his rejection would apply “now and to all future renewals or continuations of my policy unless I notify you otherwise in writing.” (Add. 42). At renewal, absent a written directive from O'Donnell to the contrary, Allstate continued to renew his umbrella policy (no. 9 25 184881) without underinsured motorist coverage consistent with O'Donnell's written directive. Finally, the argument is also inconsistent with well-settled law. As noted in Couch's Treatise on Insurance, “[b]y statute, the insured's initial rejection or reduction of underinsured motorist coverage is usually effective for subsequent policy renewals, replacements or substitutions unless the insured requests underinsured motorist coverage from their insurer in writing.” 9 Couch 3d on Insurance, §122:44.

On its merits, O'Donnell's assertion that his liability reduction was not an “amendment” under RSA 264:15(I) fails as the Allstate Policy Declarations preceding his November 2015 accident disclosed in the caption that it was an “**AMENDED PERSONAL UMBRELLA POLICY DECLARATIONS.**” (App. 327, 333)(emphasis added). On July 14, 2014 Allstate sent O'Donnell an umbrella **renewal** quote for the September 2015-2016 policy period. (App. 312). The proposed premium for an additional year of \$2 million in excess liability coverage to cover O'Donnell's home and auto related risks was \$277.53. (App. 314). The Allstate July 14, 2015 renewal offer reminded O'Donnell of his right to purchase excess underinsured motorist coverage. (App. 323).

Mr. O'Donnell did not exercise his right to purchase excess underinsured motorist coverage in conjunction with his September 2015 renewal. Instead, he requested that Allstate reduce his excess liability coverage from \$2 million to \$1 million. (App. 325. 331). In response to O'Donnell's request, Allstate sent him a letter confirming the amended policy limits he requested that would take effect on September 2, 2015. Allstate sent this notice letter to O'Donnell twice, first on August 5, 2015 (App. 325) and then again on August 6, 2015. (App. 331) In each of its August 2015 Policy Declaration Pages amending O'Donnell's umbrella liability limits Allstate reminded O'Donnell that “**Uninsured Motorist Insurance Rejected.**” (App. 327, 333).

If Mr. O'Donnell had wanted to purchase excess underinsured motorist coverage simultaneous with his decision to decrease his excess liability limits he could have contacted his agent to withdraw his 2011 Umbrella Uninsured Motorist Selection/Rejection form in writing. Allstate's July 2015 renewal offer contained language reminding O'Donnell of his right to amend his umbrella policy (App. 322), as well as his right to purchase umbrella underinsured motorist coverage. (App. 323). Despite notice from Allstate in July of 2015 about his ability to purchase excess underinsured motorist coverage Mr. O'Donnell took no such action and thus, his November 2015 policy like all earlier umbrella policies contained no underinsured motorist coverage as O'Donnell chose to reject such coverage.

Mr. O'Donnell's claim that his 2015 policy was a "new" policy that required a new Umbrella Rejection/Selection form is factually incorrect as the lower limits were an amendment to policy number 9 25 184881. (App. 336). Mr. O'Donnell was never issued an umbrella policy with a different policy number during the tenure of his various renewals with Allstate. (See App. 210-336).

This Court should affirm the Trial Court order in Allstate's favor as Allstate reminded O'Donnell of his option to purchase umbrella underinsured motorist benefits at each policy renewal. Allstate Underinsured Motorist Notice Bulletin X67689 disclosed the availability of excess umbrella underinsured motorist coverage (App. 219). Allstate sent this bulletin to O'Donnell with his first umbrella policy on September 6, 2011 (Id); on his first renewal in July of 2012 (App. 258); on his second renewal in July of 2013 (App. 282); on his third renewal in July of 2014 (App. 300); and finally on his fourth renewal in July of 2015, several months before his accident (App. 323). Despite his receipt of the Allstate bulletin, informing him of his right to purchase excess underinsured motorist coverage on five separate occasions, at no time did Mr. O'Donnell elect to rescind his umbrella underinsured motorist rejection.

The plaintiff also challenges the Court's statutory construction of the term "amendment," in RSA 264:2(I) claiming it should be interpreted to effectuate liberal availability of excess underinsured motorist coverage and thus override the insureds'

written rejection of such coverage. (Brief, pp. 25-29). In support thereof, he cites *Riviera v. Liberty Mut. Ins. Co.*, 163 NH 603 (2012). *Riviera*, however, involved uninsured motorist coverage under a primary automobile policy where uninsured motorist coverage cannot be rejected. RSA 264:15 This Court's analysis in *Riviera*, does not apply to an umbrella based underinsured motorist coverage as the coverage can be rejected and the plaintiff exercised his statutory right to reject umbrella based underinsured motorist coverage. RSA 264:15 (I) (1991); (App. 209). The plaintiff's brief seeks more than a liberal interpretation of RSA 264:15(I) it asks this Court to reform the plaintiff's policy to add coverage he specifically rejected, coverage he did not purchase.

Although case law from foreign jurisdictions is of limited value, given each state's differing financial responsibility statutes, the Rhode Island Supreme Court rejected an argument similar to O'Donnell's in *Ferreira v. Integon Nash Ins. Co.*, 809 A.2d 1098 (R.I. 2002). In *Ferreira*, the named insured rejected primary underinsured motorist benefits on his policy in 1995. The named insured married and added his spouse to the policy in 1996. The insurer notified the insured of his right to purchase underinsured motorist coverage at each annual renewal, as did Allstate in this case. In 1999, the named insured's spouse was involved in a motor vehicle accident and sought underinsured motorist coverage. The insured argued that the carrier's failure to obtain a subsequent underinsured motorist rejection from his spouse mandated that the policy be reformed to include coverage the insured did not purchase. The Rhode Island Court rejected that argument and affirmed the trial court's finding that "a written rejection is required only at the time a policy is originally issued or delivered." 809 A.2d at 1100.

Like the insureds in *Ferreira*, Mr. O'Donnell rejected umbrella based uninsured motorist coverage despite being advised annually on five separate occasions of his right to purchase such coverage. In addition to the five annual notices reminding Mr. O'Donnell of his option to purchase umbrella underinsured motorist coverage, Allstate issued thirteen policy declarations each of which reminded O'Donnell in bold lettering, that he had rejected this coverage. If Mr. O'Donnell at any time had expressed an intent

to purchase uninsured motorist coverage for an additional premium, it would have been in the agent and carrier's best interests to sell him such coverage. Unfortunately, Mr. O'Donnell failed to take advantage of that opportunity despite multiple opportunities to do so. Thus, as in *Ferreira* it was proper for the Trial Court to conclude that Allstate had no obligation to obtain a second Uninsured Motorist Selection/Rejection form from O'Donnell in the fall of 2015.

B. Mr. O'Donnell's September 2, 2015-2016 Umbrella policy was a "renewal" of his September 2, 2014-2015 policy.

Mr. O'Donnell asserts the umbrella policy Allstate issued in September of 2015 was not a "renewal" policy because it contained the reduced liability limits he requested. (Complaint ¶ 7-18, App. 355-359). In support of that argument he relies upon the definition of "renewal" in RSA 417-A:1 (II), which states a renewal policy within the context of RSA 417-A is a policy providing the same types and limits of coverage previously provided. The definition of "renewal" in RSA 417-A:1 specifically states it applies to "this chapter," **the Refusal to Issue, Cancellation and Refusal to Renew Automobile Insurance chapter**. RSA 417-A:1. The definition imposed by the Legislature for "renewal policies" in the context of when a carrier may cancel or refuse to renew a primary auto policy does not apply to RSA 264:15(I) where the Legislature chose not to define the term. The Legislative decision not to include RSA 417-A:1's definition of the term "renewal policy" in RSA 264:15(I) is, itself, evidence the definition from RSA 417-A:1 does not apply as the Legislature clearly knew how to define the term in the context of one statute but intentionally did not implement that definition in a different statutory scheme. *See generally In Petition of Malisos*, 166 N.H. 726 (2014)(Definition for separated spouses used in RSA 458 did not apply in RSA 100-A:52).

Mr. O'Donnell's brief references numerous dictionary definitions of the term "renew" including Couch on Insurance. (Brief, pp. 27-33). These definitions include "to begin or take up again, resume, or to make effective for an additional period.

(App. 28). Although O'Donnell asserts his 2015 Umbrella was not a "renewal" it was the resumption of his same policy for an additional period. The only substantive change in O'Donnell's 2015 renewal was the lower liability limits and that amendment was dictated by Mr. O'Donnell.

Contrary to the argument advanced by O'Donnell, Couch's Treatise on Insurance states, "a change in policy limits does not preclude a finding that the new policy is a renewal policy...where the parties have agreed that the renewal is a continuation." 2 Couch on Insurance .3d 29:35. In contrast it describes a "new" non-renewal policy as one which has not been identified or designated as a renewal and a policy with both different terms and a lapse of time between the expiration of the first policy and renewal. 2 Couch on Insurance.3d 29:36 (emphasis added). Allstate expressly described each of O'Donnell's consecutive, annual policy offers as Renewal Policy Offers and it issued either a Renewal or Amended Policy Declaration with each annual policy. Furthermore, there was no lapse in time between the issuance of O'Donnell's 2014 and 2015 policy. Finally, O'Donnell's 2015 policy like his 2014 policy, included the same policy period, it covered the same insured, the same auto and bore the same policy number. Mr. O'Donnell's 2015 Allstate Umbrella policy was a renewal of his 2014 policy with amended policy limits and it is governed by his 2011 written Uninsured Motorist rejection form. (App. 327, 333).

Mr. O'Donnell asserts his 2015 policy was not a "renewal" policy governed by his 2011 Uninsured Motorist Rejection based on case law from foreign jurisdictions which have statutory mandates governing underinsured motorist coverage that are different than RSA 264:15. Each of the cases cited by O'Donnell, however, involves a primary auto policy—not an umbrella policy and thus the cases have limited value in this setting.

For example, O'Donnell cites to several cases from the State of Washington where Courts have adopted a materiality standard to determine whether a primary auto policy constitutes a "new" or "renewal" policy, as all "new" primary policies must provide underinsured motorist coverage absent a current rejection notice. *See American Commerce Ins. Co. v. Ensley*, 220 P.3d 215 (Ct. App. WA. 2009); *Johnson v. Farmers*

Ins. Co., 817 P.2d 841 (WA 1991); *Torgerson v. State Farm Mut. Auto. Ins. Co.*, 957 P.2d 1283 (Ct. App. Wa. 1998). By statute, if these Washington Courts had been reviewing an umbrella policy, as opposed to primary auto policies, the outcome would have been different as the Washington uninsured motorist notice statute “is not applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured.” *RCW* 48.22.030(2).¹

Mr. O’Donnell’s reliance upon Utah case law faces the same flaw. As explained by the Appellate Court in *Kingston v. State Farm Auto Ins. Co.*, 344 P.3d 167 (Ct. App. Utah 2015), Utah’s underinsured motorist notice requirements do not apply to umbrella policies. The Court stated “the Kingstons have not shown that the full panoply of protections found in the UIM statute apply to an umbrella policy . . .” “Such a showing would require an analysis of the text of Section 31:A-22-305.3 and of the specific provisions of the umbrella policy.” The Court further noted, “a review of the law of other states suggests that umbrella policies differ from the automobile insurance policies referenced in UM/UIM statutes.”

Mr. O’Donnell also relies upon the Kansas Supreme Court’s decision in *Mitchell v. Liberty Mut. Ins. Co.*, 24 P.3d 711 (Kan. 2001). Under Kansas law, an insured may

¹ In *Jochim v. State Farm Mut. Auto Ins. Co.*, 952 P.2d 630, 634 (Wash. Ct. App. 1998), a Washington Court of Appeals observed that courts which have found the insurer must obtain an separate waiver of underinsured motorist benefits when the insured amends his liability limits, do so “*only* where there is an attendant or concomitant increase in liability coverage limits.” (emphasis in original) The Court noted that “[e]ssentially, . . . an increase in liability limits entitles the insured to increased UIM coverage because the respective insurance statutes require insurers to offer UIM insurance to the extent of liability coverage. . . . For the initial rejection or waiver of UIM coverage to remain effective against a subsequent increase in liability coverage, . . . the insured must have expressly waived eligibility for the additional UIM coverage.” *Id.* Here, in addition to a statutory mandate that imposes O’Donnell’s original written underinsured motorist selection until a subsequent written election is made, Mr. O’Donnell did not increase his liability limits—he decreased them and thus, a second UIM Selection/Rejection form was not required. *Accord Blood v. Old Guard Ins. Co.*, 934 A.2d 1218 (Pa. 2007).

reject primary uninsured motorist coverage in excess of the mandatory state limits. A written rejection by one insured constitutes a waiver by all insureds and the waiver applies to any subsequent policy issued by the same insurer for motor vehicles owned by the named insured including but not limited to supplemental renewal, reinstated, transferred or substitute policies. *Id.*

In *Mitchell*, 24 P.3d 711 (Kan. 2001), the plaintiff challenged whether his employer's policy was a "renewal policy" governed by the employer's original waiver. The policy did not indicate, "whether it is a new policy or a renewal policy" rather, the policy stated it was a cancel re-write. The Court cited to Black's Law Dictionary, which defined "renewal" as "the act of restoring or re-establishing. 2. The recreation of a legal relationship or the replacement of an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract." The Court concluded "allowing a rejection in a previous policy between the same parties to remain in effect absent another written request by the insured where the new coverage is virtually identical and re-establishes the relationship between the parties or where the new policy replaces the old policy with a new contract that is consistent with the intent of the Legislature."

If this Court were to apply the Kansas Court's analysis in *Mitchell* to this case, O'Donnell's 2015 Allstate Umbrella policy would qualify as a "renewal" policy as it restored and re-established O'Donnell's umbrella policy with policy limits he designated. As noted by the Court in *Mitchell*, enforcing the insured's own written rejection from a prior policy absent another written request by that insured is consistent with legislative intent. O'Donnell's 2015 Umbrella followed a "renewal" quote as opposed to a cancel-re-write.

Finally, it should be noted that the insurance policy interpreted by the Kansas Supreme Court in *Mitchell* was a primary policy, not an umbrella policy. The Kansas legislature exempts umbrella policies from the rejection notices it imposes upon a primary auto insurer. The Kansas statute describing the notice required for the rejection of uninsured motorist coverage in "new" primary policies states "no insurer shall be required to offer, provide or make available coverage confirming to this section in

connection with any excess policy, umbrella policy or any other policy which does not provide primary motor vehicle insurance for liabilities arising out of the ownership, maintenance, operation or use of a specifically insured motor vehicle.” KSA 40-284(a).

O’Donnell also refers this Court to Maryland case law and yet an Appellate Court interpreting Maryland’s underinsured motorist notice statutes confirmed that Maryland’s “General Assembly did not intend ‘private passenger motor vehicle liability insurance’ [requirements] to include umbrella policies.” *Stickley v. State Farm Fire & Cas. Co.*, 65 A.3d 141, 150 (Ct. App. Md. 2013). The *Stickley* Court, like this Court in *CNA Insurance Co. v. Hartford Ins. Co.*, 129 N.H. 243 (1987) and *United Services Auto Ass’n v. Wilkinson*, 132 N.H. 439 (1989) exempted umbrella policies from the statutory requirements applicable to a “private passenger motor vehicle policy” after describing the different functions served by an umbrella policy and the significantly reduced policy premiums. 64 A.3d at 152.

Finally, O’Donnell references an appellate decision from the First Circuit Appeals Court in Louisiana, *Dempsey v. Automotive Ca. Ins and Allstate Ins. Co.*, 680 So.2d 675 (La. App. 1, June 28, 1973). (Brief, p. 37-38). The Court’s decision in *Dempsey* has been superseded by statute. LSA-R.S.32.900. After *Dempsey* the Legislature exempted insurance policies providing excess or additional coverage beyond that mandated by the motor vehicle policy statute. 32.900 (G). Accordingly, the Court’s decision in *Dempsey* construing what constitutes a “new policy” for purposes of a primary underinsured motorist rejection form has no bearing upon an umbrella policy.

The Allstate “New Hampshire Personal Umbrella Policy Uninsured Motorists Selection/Rejection Form” approved by the New Hampshire Insurance Department and signed by Mr. O’Donnell specifically warned O’Donnell that his 2011 rejection would apply to all “continuations of my policy unless I notify you otherwise in writing.” (App. 209). Merriam-Webster defines the term “continuation” as the act or fact of continuing in or the prolongation of a state or activity....” The last Allstate umbrella policy issued to O’Donnell before his November 2015 accident was sent in early August of 2015—with an effective date of September 2, 2015, his policy renewal date. (App. 325, 331). The

September 2, 2015 policy obligated Allstate to provide O'Donnell with continued excess liability limits at the rate requested by him and thus this renewal constituted a "continuation" of his policy governed by the express terms of his 2011 "Umbrella Policy Uninsured Motorist Selection/Rejection." (App. 209). Mr. O'Donnell's failure to notify Allstate in "writing" that he wanted to rescind his Umbrella Uninsured Motorist Rejection under policy 9 25 184881 precludes his request that this Court reform his policy to include coverage he expressly rejected. RSA 264:15; *Colony Ins. Co. v. Dover Indoor Climbing Gym*, 158 N.H. 628, 630-631 (2009).

CONCLUSION

This Court should affirm the Trial Court's decision that the Allstate Umbrella policy issued to O'Donnell in effect at the time of his November 2015 accident does not contain excess underinsured motorist coverage because he rejected that coverage in writing in 2011 and never rescinded his rejection.

Respectfully submitted,

Allstate Indemnity Company
By its attorneys,

Primmer Piper Eggleston & Cramer PC

Date: 05/14/2019

By: /s/ Doreen F. Connor
Doreen F. Connor, #421
P.O. Box 3600
Manchester, NH 03105
(603) 626-3300

REQUEST FOR ORAL ARGUMENT

The Trial Court's decision should be affirmed on the briefs as the statutory mandate in RSA 264:15(I) which allows insureds to reject umbrella based underinsured motorist coverage and allows insurers to rely upon that written rejection unless revoked in writing was properly interpreted and enforced by the Trial Court. There are no disputed issues of material fact that preclude summary judgment.

In the event the Court decides that oral argument would be of assistance to it, Allstate Indemnity Company designates Attorney Connor to represent its interests.

/s/ Doreen F. Connor
Doreen F. Connor, #421

CERTIFICATION OF WORD LIMIT

I hereby certify that the total words in this Brief do not exceed the maximum of 9,500 words.

/s/ Doreen F. Connor
Doreen F. Connor, #421

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within was this day served via electronic submission through the Court's electronic filing system upon Attorney Mark D. Morrissette.

/s/ Doreen F. Connor
Doreen F. Connor, #421

ADDENDUM

TABLE OF CONTENTS

Plaintiff's August 22, 2017 Answers to Requests for Admissions.....39

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT

DOCKET #: 216-2017-CV-00463

JOHN O'DONNELL

v.

ALLSTATE INDEMNITY COMPANY

LIMITED OBJECTION TO REQUEST FOR ADMISSIONS

NOW COMES the plaintiff, John O'Donnell, by and through his attorneys, McDowell & Osburn, P.A., and respectfully files this limited objection to the Request for Admissions filed by Allstate Indemnity Company. The plaintiff files this limited objection pursuant to Superior Court Rule 28(b). The plaintiff provides as follows:

1. The plaintiff admits that it is his signature on the document attached to the Request for Admissions, dated August 8, 2017. The plaintiff has no memory of signing the referenced document and he points out that the purported selection rejection form was signed by Mr. O'Donnell on September 27, 2011 where the insurance policy at issue took effect on September 1, 2011.

2. With respect to request for admission #2 set out in the Request for Admissions dated August 8, 2017, the plaintiff did not take any action with regard to the document attached to the Request for Admissions at any point in time during the policy period beginning on September 1, 2011 for the entirety of the term of the policy that was then in effect.

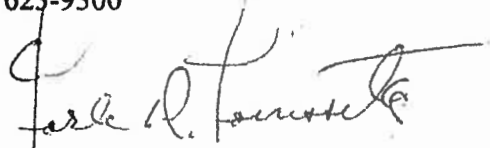
3. Counsel for the plaintiff presented the request for admissions to the plaintiff and the plaintiff responds to the request for admissions as described in paragraphs 1 and 2 above.

Respectfully submitted,

JOHN O'DONNELL

By his Attorneys
McDOWELL & OSBURN, P.A.
282 River Road
P.O. Box 3360
Manchester, NH 03105-3360
(603) 623-9300

Date: August 22, 2017

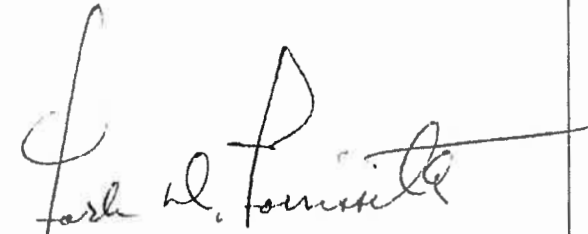
By: 
Mark D. Morrissette, Bar #10033

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed this 22nd day of August, 2017, via first class mail, postage prepaid to:

Doreen Connor, Esquire
Primmer Piper Eggleston & Cramer, PC
P.O. Box 3600
Manchester, NH 03105

Date: August 22, 2017


Mark D. Morrissette

COPY

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

John O'Donnell

v.

Allstate Indemnity Company

216-2017-CV-00463

REQUEST FOR ADMISSIONS

NOW COMES Allstate Indemnity Company (hereinafter "Allstate") by its attorneys, Primmer Piper Eggleston & Cramer, PC and submits the following Request for Admissions upon John O'Donnell:


1. I signed the attached September 27, 2011 Allstate uninsured motorist selection rejection form.
2. Subsequent to executing the attached uninsured motorist rejection form I did not rescind that rejection in writing.

Respectfully submitted,

Allstate Indemnity Company
By Its Attorneys,
Primmer Piper Eggleston & Cramer, PC

Dated: 2/2/17

By:



Doreen F. Connor, #421
PO Box 3600
Manchester, NH 03105
(603) 626-3300
dconnor@primmer.com

#

#



**NEW HAMPSHIRE PERSONAL UMBRELLA POLICY
UNINSURED MOTORIST SELECTION/REJECTION**

Uninsured Motorists Insurance is available on your Personal Umbrella Policy. You have the option of rejecting this coverage below.

Uninsured Motorists Insurance (Coverage SS) pays you, subject to the terms and conditions of your policy, for bodily injury caused by legally liable uninsured motorists who are:

- Drivers with no bodily injury liability or self-insurance in effect;
- Drivers with bodily injury liability protection in effect and applicable at the time of the accident, but doesn't provide at least the minimum financial security requirements of the state in which your insured auto is principally garaged;
- Drivers insured by insurance companies which deny coverage or become insolvent;
- Hit-and-run drivers; or
- Drivers with bodily injury liability protection in effect and applicable at the time of the accident, but in an amount less than the applicable limit of liability for this coverage shown on the policy declarations.

The following selection or rejection will apply now and to all future renewals or continuations of my policy unless I notify you otherwise in writing.

I wish to select Uninsured Motorists Insurance (Coverage SS) equal to the excess liability limit of my Personal Umbrella Policy.

I wish to reject Uninsured Motorists Insurance (Coverage SS) for my Personal Umbrella Policy.

Applicant's Signature

Date

Agent's Signature

Date

100038124449000

Policy/Application Number

Allstate Indemnity Company
Home Office: Northbrook, IL
WWW.allstate.com

2004 Allstate Insurance Company
AUR261

+

10003812444900061969AUR261NH1

+

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was this day forwarded to Mark Morrissette, Esquire.



Doreen F. Connor, #421