THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2019 TERM

APRIL SESSION

2018-0706

JOHN O'DONNELL

V.

ALLSTATE INDEMNITY COMPANY

BRIEF FOR THE PETITIONER

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TEXT OF RELEVANT AUTHORITIES

New Hampshire R.S.A. 264:15:

I. Except as provided in paragraph 1-a, no policy shall be issued under the provisions of R.S.A. 264:15, 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 R.S.A. 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 R.S.A. 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 insured, 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.

New Hampshire R.S.A. 417-A:

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 R.S.A. 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such renewal policy to provide types and limits of coverage at least equal to those contained in the policy being superseded, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term with types and limits of coverage at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.

New Hampshire R.S.A. 417-A:2

This chapter shall apply to that portion of policies of automobile insurance providing bodily injury and property damage liability, comprehensive, and collision coverages and to the provisions therein, if any, relating to medical payments and uninsured motorists coverage, which take effect subsequent to September 1, 1969.

New Hampshire R.S.A. 491:8-a

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.

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.

New Hampshire R.S.A. 491:22-a

In any petition under R.S.A. 491:22 to determine the coverage of a liability insurance policy, the burden of proof concerning the coverage shall be upon the insurer whether he institutes the petition or whether the claimant asserting the coverage institutes the petition.

New Hampshire Insurance Department Regulations:

Ins. 1402.02 Definitions Applicable to the Voluntary Market:

(p) "Renewal" or "to renew" means the issuance and delivery by an insurer of a policy superceding at the end of the policy period a policy previously issued and delivered by the same insurer and having the types and limits of coverage at least equal to those contained in the policy being superceded.

QUESTIONS PRESENTED

I. WHETHER A PERSONAL UMBRELLA INSURANCE POLICY WHICH CONTAINS A $1,000,000.00 CHANGE TO THE COVERAGE AMOUNT OF EARLIER EXPIRED POLICIES, REQUIRED THAT THE INSURER PROVIDE UNDERINSURED MOTORIST COVERAGE EQUAL TO THE LIABILITY INSURANCE COVERAGE PURSUANT TO R.S.A. 264:15?

> This issue was preserved in the Petitioner's Objection to Motion for Summary Judgment (Appendix to Brief, P. 42), supporting Memorandum of Law (Appendix to Brief, P. 72) and in the Motion to Reconsider (Appendix to Brief, P. 12).

II. WHETHER A WAIVER OF INCREASED UNDERINSURED MOTORIST COVERAGE APPLIES TO ANY AND ALL FUTURE INSURANCE POLICIES EVEN THOUGH R.S.A. 264:15, I SEEMINGLY LIMITS A WAIVER TO "AMENDMENTS" OR "RENEWALS?"

> This issue was preserved in the Petitioner's Objection to Motion for Summary Judgment (Appendix to Brief, P. 42), supporting Memorandum of Law (Appendix to Brief, P. 72) and in the Motion to Reconsider (Appendix to Brief, P. 12).

III. WHETHER R.S.A. 264:15, I IS AMBIGUOUS IF THE STATUTE ALLOWS DIFFERING INTERPRETATIONS TO THE TERMS "AMENDMENT OR RENEWAL" WHERE THE TERMS ARE NOT DEFINED?

> This issue was preserved in the Petitioner's Objection to Motion for Summary Judgment (Appendix to Brief, P. 42), supporting Memorandum of Law (Appendix to Brief, P. 72) and in the Motion to Reconsider (Appendix to Brief, P. 12).

STATEMENT OF THE CASE

This appeal arises out of a Petition for Declaratory Judgment filed by John O'Donnell against Allstate Indemnity Company. Mr. O'Donnell is looking to enforce the insurance coverage under an umbrella policy which was in effect from September 2, 2015 through September 2, 2016. The excess policy terms are set out at Appendix to Brief (hereinafter AB), pp. 155-165. The claim is for underinsured motorist coverage with limits of $1,000,000.

Mr. O'Donnell sought underinsured motorist coverage under the umbrella policy following a motor vehicle crash on November 12, 2015. He required a surgery on his arm which went poorly; he was subsequently diagnosed with complex regional pain syndrome in his dominant arm. He has not worked since the surgery in 2016.

The excess insurance policy complements and supplements the automobile and homeowner's insurance purchased by Mr. O'Donnell from Allstate.

Allstate Indemnity Company filed a Motion for Summary Judgment. AB, p. 183. The motion relied on a waiver of enhanced underinsured motorist coverage dated September 27, 2011. AB, p. 209. An objection to the motion was filed and a hearing was held on August 2, 2018 before the Honorable Judge Messer.

The Objection to the Motion for Summary Judgment relied on the evidence associated with the 2015 umbrella insurance policy, the prior policies from 2011 through September 2, 2015, and the dictates set out within R.S.A. 264:15, I. A waiver which is signed in the context of an

earlier insurance contract can only apply prospectively where the policy is amended or where the policy is simply renewed. *See*, R.S.A. 264:15, I.

The insured, John O'Donnell, did not sign a rejection or waiver of enhanced underinsured motorist coverage with regard to the policy commencing on September 2, 2015. AB, p. 166-168. Mr. O'Donnell only signed a waiver on September 27, 2011. *Id.*

Importantly, John O'Donnell approached Allstate Indemnity Company prior to the expiration date of the 2014 policy where he requested to change his coverage limits by $1,000,000 (one million dollars) at the start of a new umbrella policy on September 2, 2015. In 2014, the excess insurance policy had $2,000,000 in coverage, but the coverage was changed to $1,000,000 as of the beginning of the new policy term (September 2, 2015) which followed the expiration date of the 2014 policy.

The Superior Court granted Allstate's Motion for Summary Judgment. Brief, p. 47. A Motion to Reconsider was filed, but was denied by the Superior Court. Brief, p. 56.

This appeal challenges summary judgment where there are genuine issues of material fact relating to whether the September 2, 2015 insurance policy is a new policy as opposed to a renewal policy or an amendment to a policy. The 2011 waiver can only be effective to the 2015 policy if the new policy is a renewal or an amendment pursuant to the express language of R.S.A. 264:15, I. Interestingly, the Court did not apply the actual statutory language to give effect to the 2011 waiver, but instead, the Court found that the 2015 policy was a renewal with amendments. A "renewal with amendments" is not a statutory basis to give legal effect to a waiver signed in association with an earlier policy term. *See*, R.S.A. 264:15, I. The

Court's ruling that a "renewal with amendments" is allowed under R.S.A. 264:15, I is contradictory to the language within the law. This was a legal error. The statute permits an earlier waiver to apply to a new contract only if the new contract is an "amendment" or "renewal."

STATEMENT OF FACTS

On September 2, 2015, John O'Donnell entered into a new contract with Allstate Indemnity Company for a policy of umbrella insurance coverage. The limits of coverage were $1,000,000 (one million dollars). Prior to September 2, 2015, Mr. O'Donnell had four earlier umbrella policies beginning on September 2, 2011 through September 2, 2014 where each of the earlier, twelve-month contracts, provided coverage limits of $2,000,000. AB, pp. 94-110.

John O'Donnell's first umbrella policy had an effective date of September 2, 2011. AB, pp. 212, 94. Even with the first documentation of the new policy, dated September 8, 2011 (AB, p. 212, 94), Allstate attempted to eliminate the statutory mandated coverage of equal uninsured (and underinsured) motorist coverage. This was wrong. Allstate Indemnity included a stamped statement that "uninsured motorists insurance rejected." The New Hampshire uninsured motorist statute requires that a rejection or waiver of enhanced uninsured motorist coverage can only be accomplished where the insured rejects the enhanced coverage in writing.

In the case at bar, there was no written rejection or waiver when the first policy commenced on September 2, 2011 nor was there a waiver in writing on September 8, 2011 when the first documentation of the umbrella policy was published. In fact, the first and only waiver of enhanced uninsured motorist coverage occurred on September 27, 2011. AB, p. 209; AB, p. 166-168 (Allstate's Reponses to Request to Admit). The waiver applied to the 2011 umbrella policy. No other waiver was ever signed by John O'Donnell. AB, p. 166-168; 181-182 (Affidavit of John O'Donnell).

John O'Donnell suffered serious and permanent injuries to his right (dominant) arm in a motor vehicle crash that occurred on November 12, 2015. AB, p. 181. He had surgery and he then developed complex regional pain syndrome, a nerve dystrophy. *Id.* The person who caused the automobile crash had coverage limits of $100,000; those limits were paid. AB, p. 357. Mr. O'Donnell has not worked since his March 2016 surgery. He has filed claims for underinsured motorist coverage with Allstate Indemnity Company.

John O'Donnell relies on the mandatory duty of Allstate Indemnity Company to provide underinsured motorist coverage equal to the liability coverage in the 2015 umbrella policy. AB, p. 155. R.S.A. 264:15, I mandates that the uninsured and underinsured motorist coverage limits are equal to the liability coverage with regard to all policies including where an insured purchases ". . . umbrella or excess policies that provide excess limits to policies described in R.S.A. 259:61 . . . ." Equal coverage is not required in an ongoing relationship, but only when the insured signs a written waiver or rejection, and the waiver applies to a "policy amendment or renewal." R.S.A. 264:15, I.

What is clear is that any rejection of enhanced underinsured motorist coverage must be in writing. As of September 2, 2015, there was no rejection of the underinsured motorist coverage with the new policy beginning on that date. The September 2, 2015 policy was not an amendment of an earlier policy, and it was not a renewal of an earlier policy because the umbrella coverage was changed by one million dollars; this was a material change to the risk relationship in comparison to that of the earlier insurance contracts. The new policy on September 2, 2015

required equal coverages for the underinsured motorist coverage and the liability coverage where the coverage limits were significantly changed from the earlier, expired contracts. Allstate Indemnity Company was free to have requested John O'Donnell to sign a new rejection or selection form, but it did not do so.

SUMMARY OF ARGUMENT

Genuine issues of material fact bar summary judgment where findings are necessary to determine if the 2015 coverage changes to the umbrella policy are material, and whether the new policy and coverages are either an "amendment or a renewal" in the context of the earlier, expired contracts. The evidence strongly supports that the 2015 umbrella policy was a "new policy" such that an "amendment" cannot be found after the 2014 contract expired, and a "renewal" cannot be found where the 2015 policy did not have the same coverage. A factual question remains: is a one million dollar change to the insurance coverage limits material and, if so, is the contract a new policy and are equal coverages required?

It is clear that the Superior Court's grant of summary judgment was legally erroneous where the Court failed to apply the actual language of R.S.A. 264:15, I; rather, the Court created a right where an earlier waiver can apply to a new contract if the contract is a renewal with amended coverage terms, AB, p. 54. The Court's analysis is contradictory to the language within R.S.A. 264:15, I. In fact, R.S.A. 264:15, I allows an earlier waiver to apply to a new policy term, but only in the restrictive, limited scenario where a policy is amended or there is a renewal policy. R.S.A. 264:15, I. The new contract term on September 2, 2015, with a $1,000,000 change in the limits of coverage, is not a "renewal" or a "policy amendment." With the change to the 2015 policy limits, the old (2011) waiver is not salvaged by the language of R.S.A. 264:15, I.

The Superior Court disregarded the usual rules of statutory construction, and it failed to interpret the undefined terms of the statute

liberally to effectuate the purpose of the uninsured motorist statute which is intended to protect those who are victims of uninsured or underinsured motorists who cause harm. Summary judgment must be vacated.

ARGUMENT

I. SUMMARY JUDGMENT IS NOT WARRANTED IN THE CASE AT BAR WHERE R.S.A. 264:15, I REQUIRED THAT THE SEPTEMBER 2, 2015 PERSONAL UMBRELLA POLICY HAVE UNDERINSURED MOTORIST COVERAGE WHICH WAS EQUAL TO THE LIABILITY COVERAGE AS AN EARLIER WAIVER OF THE EQUAL COVERAGE MANDATE WAS NULLIFIED BY A $1,000,000 CHANGE TO THE COVERAGE TERMS.

Summary judgment was not warranted where the evidence presented to the Superior Court demonstrates that there were genuine issues of material fact relating to the continued applicability or effectiveness of an earlier, 2011 waiver of enhanced underinsured motorist coverage under a personal umbrella policy. *See*, Lacasse v. Spaulding Youth Center, 154 N.H. 246, 248 (2006). The central issue for the Superior Court was whether a preexisting waiver that was signed on September 27, 2011 would be effective to a September 2, 2015 personal umbrella policy where the coverages under the new policy were changed by $1,000,000 as compared to the coverages that were in effect when the insured signed the waiver on September 27, 2011. *Id.*

The genuine issues of material fact relate to whether the changes in the personal umbrella policy rendered the new insurance contract (beginning on September 2, 2015) a new policy or whether it was simply a "renewal policy" or an "amendment" to a prior policy. With a new policy, in light of the very significant change in the coverage terms by $1,000,000, R.S.A. 264:15, I required the liability and the underinsured motorist coverage to be equal, not reduced, as opposed to a finding that the new

policy term was simply a “renewal” or an “amendment” which would not have required equal coverage limits. R.S.A. 264:15, I.

John O’Donnell was insured under a personal umbrella policy issued by Allstate Indemnity Company such that the policy took effect on September 2, 2015 and it ran for a twelve (12) month term expiring on September 2, 2016. Affidavit of John O’Donnell, AB, p. 182; AB, p. 57) (Declaration Page to the September 2, 2015 Personal Umbrella Policy). The personal umbrella policy provided supplemental insurance coverage to the coverages that Mr. O’Donnell purchased through Allstate with respect to his homeowner’s coverage and, separately, to automobile coverage. AB, p. 58, 59. The September 2, 2015 policy provided limits of liability coverage in the amount of $1,000,000 for each occurrence. AB, p. 60.

Prior to September 2, 2015, John O’Donnell had purchased other personal umbrella policies, all with a one-year term beginning on September 2nd of each year, going back to his first policy which was effective on September 2, 2011. AB, p. 94-97. The limits of coverage on the earlier umbrella policies, beginning on September 2, 2011 through the expiration of the fourth policy on September 2, 2015, were always $2,000,000 per occurrence until John O’Donnell requested a change from $2,000,000 to $1,000,000, effective September 2, 2015. AB, p. 175 (Allstate’s Answers to Interrogatories, No. 6); AB, p. 182 (Affidavit of John O’Donnell).

The Superior Court erroneously applied the 2011 waiver or rejection form, reducing the enhanced underinsured motorist coverage within the personal umbrella policy to the policy that began on September 2, 2015. The Court’s reliance on the 2011 waiver is not allowed by R.S.A. 264:15, I.

Insurance companies must provide the same underinsured motorist coverage limits that their policies provide for liability coverage limits, except in a situation where an insured waives or rejects, in writing, enhanced underinsured motorist coverage limits. R.S.A. 264:15, I. Once signed, a rejection form can be applied to successive renewals of insurance policies between an insured and an insurer or to amendments to policies. *Id.* In the case at bar, the September 2, 2015 personal umbrella policy with a $1,000,000 change to the coverage limits, was not a renewal and it was not an amendment to the policy: there are genuine issues of material fact as to whether the policy should be considered a "new policy;" a "renewal policy;" or an "amendment" to a preexisting policy. Such an analysis barred summary judgment. R.S.A. 491:8-a. The Superior Court's grant of summary judgment must be vacated.

The Superior Court not only failed to identify and address the disputed issues of fact, but the Court also misapplied and misinterpreted R.S.A. 264:15, I. The Superior Court concluded that the significant change ($1,000,000) in the coverage limits was ". . . a renewal of his previous umbrella policies, with amended coverage terms." Order of the Superior Court, AB, p.54. The Court's conclusion did not apply the actual language of the statute, but rather, it crafted its own statutory right to allow an old waiver to apply to renewals which have "amended" coverage limits.

This statute allowed an old waiver or rejection to apply only where there is a renewal policy or an amendment to a policy. R.S.A. 264:15, I. The statute did not authorize a "renewal of his previous umbrella policies, with amended coverage terms." This analysis, and ruling, was legally erroneous.

The Superior Court failed to apply the actual words included within R.S.A. 264:15, I by the Legislature and, instead, the Court, in effect, re-drafted the words of the statute and failed to apply the ordinary usage assigned to the undefined terms within the statute. *See*, Sundberg & a. v. Greenville Board of Adjustment & a., 144 N.H. 341, 344 (1999) (the ordinary rules of statutory construction govern our analysis, and thus, all undefined words and phrases will be given their common meaning, and we will look to the legislative history only if a term is ambiguous). *See also*, Santos v. Metropolitan Property and Casualty Insurance Company, 2019 W.L. 275137, p. 8 (N.H. Supr. January 17, 2019) ("in matters of statutory interpretation, we are the final arbiters of the Legislature's intent as expressed in the words of a statute as a whole. When construing a statute, we first examine the language found in the statute, and, where possible, we ascribe the plain and ordinary meanings to the words used.") Applying the plain and ordinary meaning to the terms "renewal" and to "amendment" gives rise to questions of fact about the effect of, or the materiality of, the coverage change. Considering the materiality of the coverage change leads to a finding that Allstate is not entitled to judgment where the old waiver is ineffective as the new policy cannot be construed to be a "renewal" or "policy amendment." *See,* R.S.A. 491:8-a.

a. Summary Judgment Is Inappropriate.

"While summary judgment can at times be a useful avenue to pursue in order to eliminate baseless claims from costs of litigation, trial courts must be wary of its application . . . . Yet we have also made it clear that 'although the statute is designed to reduce unnecessary trials, it is not intended that deserving litigants be cut off from their day in court.' [citation

omitted]." Ianelli v. Burger King Corp., 145 N.H. 190, 192 (2000). Summary judgment is only appropriate where there are no genuine issues of material fact and only where the moving party is entitled to judgment as a matter of law. R.S.A. 491:8-a. The Superior Court is charged with the duty to ". . . determine whether a reasonable basis exists to dispute the facts claimed in the moving party's affidavit at trial. If so, summary judgment must be denied." Ianelli, 145 N.H. at 193. "The reviewing Court must consider the evidence in the light most favorable to the party opposing the motion giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence." *Id.* In a review of a grant of summary judgment, the Supreme Court reviews the Superior Court's application of the law to the facts *de novo.* Lacasse v. Spaulding Youth Center, 154 N.H. 246, 248 (2006).

Allstate Indemnity Company challenges that its coverage exposure is equal to the liability coverage afforded to Mr. O'Donnell through the personal umbrella policy where it relies upon a 2011 waiver or rejection form that was signed by Mr. O'Donnell in relationship to an earlier, expired insurance policy. AB, p. 183. R.S.A. 264:15, I requires equal coverages between underinsured motorist coverage and liability coverage unless the insured party has rejected, in writing, the enhanced underinsured coverage limits. *Id.* However, through a 2007 amendment to R.S.A. 264:15, I, the insurance carrier does not need a waiver with each policy renewal or where there is a change (amendment) within a term of a particular policy. *See*, R.S.A. 264:15, I ("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.") (*Emphasis supplied*.)

With respect to the Allstate Indemnity Company policy issued to John O'Donnell on September 2, 2015, there was no new waiver or a new rejection of underinsured motorist coverage, and within the new policy there was no reference to or incorporation of the waiver or rejection signed by John O'Donnell on September 27, 2011. Allstate Indemnity Company has acknowledged, in response to requests for admissions propounded upon it, that John O'Donnell signed only one waiver or rejection and that occurred on September 27, 2011. AB, p. 166-168. In order to defeat the equivalency requirement set out in R.S.A. 264:15, I, that the liability and underinsured motorist coverage be equal in the setting of the September 2, 2015 personal umbrella policy, it is incumbent upon Allstate Indemnity Company to show or to prove that the 2011 waiver or rejection applies to the contractual relationship commenced on September 2, 2015. *See*, R.S.A. 264:15, I ("rejection of such coverage by a named insured shall constitute a rejection and shall remain effective upon policy amendment or renewal.") *See also*, R.S.A. 491:22-a (insurer always has the burden of proof to show non-coverage).

b. The Plain And Ordinary Meaning Of The Terms Policy "Amendment" Or "Renewal" Demonstrate That The September 2, 2015 Policy Was A New Policy Negating The Effect Of The 2011 Waiver.

The statute at issue does not define the meaning of a policy "amendment" or "renewal." Consequently, the statute must be interpreted by the plain and ordinary meanings to the words used. Santos v. Metropolitan Property and Casualty Insurance Company, *supra*, at 8.

Legislative intent is drawn from the statute as written and the Supreme Court will not consider what the Legislature might have said or add language that the Legislature did not see fit to include. State v. Surrell, ___ N.H. ___ _____, 189 A.3d 883, 885 (2018). *Accord,* Kenison v. Dubois, 152 N.H. 448, 451 (2005) ("when statutory terms are undefined, we ascribe to them their plain and ordinary meaning.") The Supreme Court also interprets statutes ". . . to give meaning to every word and phrase[.] [citations omitted] . . . Our goal is to apply statutes in light of the legislature's intent in enacting them and in light of the policy sought to be advanced by the entire statutory scheme." O'Brien v. New Hampshire Democratic Party & a., 166 N.H. 138, 142 (2014). *Accord*, Wolfeboro Planning Board v. Charles H. Smith, *et al*, 131 N.H. 449, 453 (1989) ("we assume that all words in a statute were meant to be given meaning in the interpretation of a statute.") When construing a statute, the Supreme Court "give[s] effect to all words in a statute and presume that the Legislature did not enact superfluous or redundant words." Appeal of Carlos Marti, 169 N.H. 185, 190 (2016).

R.S.A. 264:15, I provides and requires that all policies that afford automobile liability coverage provide uninsured motorist coverage, including underinsured motorist coverage, in limits that are equal to the liability coverage. R.S.A. 264:15, I. This statute particularly requires that excess or umbrella policies provide equal coverage for uninsured and underinsured motorist coverage as well as traditional liability policies. *Id.* The language within the statute is mandatory: "shall also provide uninsured motorist coverage equal to the limits of liability purchased. . . ." *Id.* The statute demands that a certain class of victims are protected by

having access to uninsured and underinsured motorist coverage. Rivera v. Liberty Mutual Fire Insurance Company, 163 N.H. 603, 608 (2012).

"Uninsured motorist statutes are designed to provide an innocent victim a source of restitution when that injured party cannot recover the full amount of damages from the tortfeasor." Swain v. Employers Mutual Casualty Company, 150 N.H. 574, 576 (2004). These statutes are to be liberally construed to accomplish their legislative purpose. Rivera v. Liberty Mutual Fire Insurance Company, 163 N.H. 603, 607 (2012) (*citing* Charest v. Union Mutual Insurance Co., 113 N.H. 683, 686 (1973)). In Rivera, the New Hampshire Supreme Court explained the purpose of the uninsured motorist statute is: ". . . to allow policyholders to protect themselves against injury from an uninsured motorist to the extent they protect themselves against liability." Rivera, 163 N.H. at 608 (*quoting* Swain, *supra* at 577.) The Rivera Court summarily described that ". . . the overall goal of the statute 'is to promote a public policy of placing *insured persons* in the same position that they would have been if the offending uninsured motorist had possessed comparable liability insurance by broadening protection for those injured in accidents involving uninsured motorists.'" Rivera, *supra*, at 608-609 (*quoting* Miller v. Amica Mutual Insurance Company, 156 N.H. 117, 124 (2007)).

In reviewing the Superior Court's decision on the Motion for Summary Judgment filed by Allstate Indemnity Company, the Court seemingly ignored the plain and ordinary meaning of the terms "amendment" or "renewal," and the Superior Court did not liberally construe R.S.A. 264:15 to allow John O'Donnell a source of restitution

when he could not recover the full amount of damages from the tortfeasor. Rivera, *supra* at 608.

In fact, the Superior Court did not give effect to all of the words within R.S.A. 264:15, I. The Court broadened the law by allowing the meaning of a "renewal" to include amendments to earlier policies rather than finding that a "renewal" was restrictive in the sense of limiting a renewal policy to a policy with the same coverages as the earlier, expired policies. Also, the Court simply dropped the conjunctive term "or" within R.S.A. 264:15, I which served to limit the legal significance of an old waiver of underinsured coverage to apply to an "amendment" or "renewal," not to renewals with amendments. As such, the grant of summary judgment must be reversed when the Court failed to correctly apply R.S.A 264:15, I.

The September 27, 2011 waiver or rejection form signed by John O'Donnell, AB, p. 209, has no effect on the mandated coverage within the September 2, 2015 personal umbrella policy where the coverage limits under this new policy were significantly altered. Until the new policy on September 2, 2015, Mr. O'Donnell had purchased personal umbrella policies with coverage limits of $2,000,000 per occurrence which complemented or supplemented the earlier automobile policies and the earlier homeowner's policies. However, on September 2, 2015, at the request of John O'Donnell, Allstate Indemnity Company agreed to reduce the coverage limits from $2,000,000 per occurrence to $1,000,000 per occurrence. AB, p. 166-168 (Allstate's Answers to Plaintiff's Request to Admit No. 5); AB, p. 182 (Affidavit of John O'Donnell, Par. 3). This

material change to the historical coverage limits created a new policy at the beginning of a new policy term.

It is important to point out that as of September 2, 2015, there was a new policy contract for a new policy term of twelve (12) months; each of Mr. O'Donnell's past or earlier personal umbrella insurance policies expired on September 2nd of each year. This new policy beginning on September 2, 2015 with significant changes to the coverage limits, changed the parties' risk relationship. *See,* 3 *Widiss, Uninsured and Underinsured Motorist Insurance* § 32.6 (Rev. 3d ed.) (courts have concluded that when an insurance policy is being renewed, the legislation only mandates another rejection when there is a material alteration in the terms of the coverage arrangement).

c. A "Renewal" Requires That A Succeeding Insurance Policy Have Coverage Limits At Least Equal To The Preceding Insurance Policy.

As mentioned, R.S.A. 264:15, I does not define the term "renewal." The plain and ordinary meaning must be applied to the term "renewal" in order to determine if an earlier rejection or a waiver of uninsured motorist coverage (from September 27, 2011) would apply to the new insurance policy dated September 2, 2015. Santos, *supra*, at 8. *Black's Law Dictionary*, defines "renew" to mean: "to make new again; to restore to freshness; to make new spiritually; to regenerate; to begin again; to recommence; to resume; to restore to existence; to revive; to reestablish; to recreate; to replace; to grant or obtain an extension of." *Black's Law Dictionary* 1165 (5th ed. 1979). The term "renewal" is defined to mean: "the act of renewing or reviving. A revival or rehabilitation of expiring

subject; that which is made anew or reestablished . . . an obligation being 'renewed' when the same obligation is carried forward by the new paper or undertaking, whatever it may be." *Id.* In *Webster's Dictionary*, "renewal" is defined to mean: ". . . to begin or take up again; resume; or to make effective for an additional period." *Random House, Webster's Dictionary* 562 (2nd ed. 1996). *Accord, 2 Couch on Insurance* 3D § 29:1 (2010) ("It has been said that primarily, the term 'renewal' means that the original policy shall be repeated in substance, it having the same significance in this connection as the word 'extended,' and renewal implies a fixed contract at the expiration of the original coverage.")

From the dictionary definitions and treatise, it is clear that a renewal speaks to a restoration that is preserved, restored, and continued forward. *Id.* The spirit or the thrust of most of the characterizations used to define a "renewal" or to "renew" relate to a recommencement or revival. It would be an unusual and a strained interpretation to suggest that a "renewal" could include the restructuring or the renegotiation of insurance coverage limits where the limits are cut in half from $2,000,000 per occurrence to $1,000,000 per occurrence. The September 2, 2015 personal umbrella was not a "renewal."

The spirit or the intent of the Legislature is clearly discerned when a close reading of R.S.A. 264:15, I is considered: the statute qualifies that an earlier rejection or a waiver of underinsured motorist coverage will apply to all insureds and to all vehicles then or thereafter eligible to be covered under the policy. R.S.A. 264:15, I. Such a rejection or waiver applies to policy <u>amendments</u> and to the renewal of a policy. In other words, where there are subtle changes to an existing policy, i.e., amendment, or to a

succeeding policy, i.e., renewal, with usual or expected changes with respect to changes to insureds or to vehicles, an earlier waiver or rejection is given effect. *Id.* What the statute does not do (or what it does not say) is that an earlier rejection or a waiver will apply to all "new policies" or to changes in the risk relationship or changes to the coverage terms. *See*, R.S.A. 264:15, I.

Applying the liberal construction that is required to carry out the legislative intent associated with underinsured motorist statutes, requires that R.S.A. 264:15, I is construed liberally for the benefit of the innocent persons contemplated by the statute. Rivera, *supra*, at 607. John O'Donnell is an innocent victim of an individual who was underinsured and who caused him great harm. Mr. O'Donnell has explained in his Affidavit, AB, p. 181-182, that he suffered an injury to his arm in a motor vehicle accident which brought about a surgery and, thereafter, caused a permanent nerve dystrophy known as complex regional pain syndrome. Where the statute contained undefined terms, and the plain and ordinary meaning supports a limitation or a restriction on the effectiveness of an earlier waiver or rejection, Mr. John O'Donnell was entitled to enhanced uninsured motorist coverage when there was a significant change to the coverage terms by an amount equal to a $1,000,000 change. *See*, 3 *Widiss, Uninsured and Underinsured Motorist Insurance* § 32.6 (Rev. 3d ed.), *supra*.

While the term "renewal" is not defined within R.S.A. 264:15, I, the same term "renewal" is defined in a similar and related statute. A similar statute should be considered in scrutinizing undefined terms in related statutes. *See* State. v. Woods, 139 N.H. 399, 401, 1995. Within R.S.A.

417-A:1, a statute that applies to automobile insurance policies and to policies of insurance providing uninsured motorist coverage, the term "renewal" is explained to mean ". . . 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, ..." R.S.A. 417-A:1, II. (*Emphasis supplied.)* The statute is said to apply to "that portion of policies of automobile insurance providing bodily injury and property damage liability, comprehensive, and collision coverages and to the provisions therein, if any, relating to medical payments and **uninsured motorist coverage**, which take effect subsequent to September 1, 1969." R.S.A. 417-A:2 (*Emphasis supplied*.)

The Superior Court summarily dismissed the definition of "renewal" set out within R.S.A. 417-A:1. The Court referenced the title to the statute finding that it applied to a different chapter which more narrowly governed uninsured motorist coverage. Order of the Superior Court, dated October 12, 2018, Brief, p. 47. The Superior Court emphasized that R.S.A. 417-A:1 related to the cancellation of policies and refusals to renew. *Id.*

The language within 417-A:1 describes that the law expressly applies to policies of insurance providing uninsured motorist coverage. R.S.A. 417-A:2. There is no doubt that this statute does not apply to earlier waivers of underinsured motorist coverage, but its definition sheds light on a common definition of "renewal" which is applicable to automobile insurance policies, and it serves to corroborate the common and ordinary meanings to the term "renewal" as explained in *Black's Law Dictionary* and in *Random House, Webster's Dictionary*.

With respect to the Superior Court's avoidance of the definition set out within R.S.A. 417-A:1, the Court focused too strongly on the title to the statute and failed to give effect to the fact that the statute applied to ". . . that portion of policies of automobile insurance providing . . . uninsured motorist coverage . . . ." R.S.A. 417-A:2. "The title of a statute is not conclusive of its interpretation, and where the statutory language is clear and unambiguous, this Court will not consider the title in determining the meaning of the statute." State v. Kilgus, 125 N.H. 739, 742 (1984). Moreover, when statutes relate to similar subjects, the statutes should be construed consistently with one another. State v. Woods, 139 N.H. 399, 401 (1995).

The definition of "renewal" within R.S.A. 417-A:1 has strong language which emphasizes that a "renewal" of an insurance policy must "provide types and limits of coverage at least equal to those contained in the policy being superseded." R.S.A. 417-A:1, II. (*Emphasis supplied.)* This is significant when considered in the context as to whether the coverage change by $1,000,000 to the risk relationship between Allstate Indemnity Company and John O'Donnell, as of September 2, 2015, was a "renewal" or not. The policy that Mr. O'Donnell entered into, as of September 2, 2015, reduced his coverage – and correspondingly, the exposure to the insurance company – by $1,000,000. This is not a subtle, slight, or *de minimis* change to an insurance contract; in fact, the change caused a great variance between the old and new coverages. The new policy was significantly altered to cut the coverage in half which changed his premium associated with the personal umbrella policy by almost one-half. The definition within R.S.A. 417-A:1 should be considered by the

Supreme Court in its interpretation of the ordinary and plain meaning associated with the undefined term within R.S.A. 264:15, I. *See*, Kenison v. Dubois, *supra*, at 451.

Similarly, with respect to automobile insurance, the New Hampshire Insurance Department issued a definition of the term "renewal" within Insurance Regulation 1402.02. The New Hampshire Insurance Department definition defines a renewal to be "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 and having the types and limits of coverage at least equal to those contained in the policy being superseded." Ins. 1402.02 (p). While this regulation does not directly apply to an umbrella policy, it does apply to automobile insurance coverage, and it defines what is meant by a renewal. Here again, the Insurance Department's definition of the term "renewal" should be considered in the context of the plain and ordinary meaning of a "renewal" policy.

When the plain and ordinary meaning to the term "renewal" is considered, there is strong evidence that a "renewal" requires coverage to be the same; to start anew; to extend the same terms and limits for another period of time. *Black's Law Dictionary* 1165 (5th ed. 1979); *Random House, Webster's Dictionary* 562 (2nd ed. 1996). The common and ordinary definition of a "renewal" policy excludes a policy where there is a $1,000,000 change in coverage.

It is important to note that the Superior Court did not apply the plain and ordinary meaning to the term "renewal" in order to assess whether the September 27, 2011 waiver applied to the September 2, 2015 personal umbrella policy. Instead, the Superior Court looked at a definition for an

"amendment" ("to reform, convert or make better or to change or alter in any way") to more broadly define a "renewal:" ". . . the Court finds Plaintiff['s] 2015 policy was a renewal of his previous umbrella policies, with amended coverage terms." AB, p. 54. The Superior Court rewrote the statute to describe a renewal of an insurance policy – based on all of the earlier policies – with amended coverage terms. Amended coverage terms, beyond that which is allowed under R.S.A. 264:15 (a change to vehicles during the policy term) is a new contract; it is alteration of the material terms of the insurance policy.

d. An "Amendment" Must Occur During The Policy Term And An Amendment Is By Endorsement.

John O'Donnell entered into a series of insurance contracts with Allstate beginning on September 2, 2011 and running through September 2, 2016. Each contract had an expressed duration; each contract ran from September 2nd and then ran for twelve months ending on the next September 2nd. AB, p. 245 (policy period: September 2, 2011 ends on September 2, 2012); AB, p. 57 (policy period runs from September 2, 2015 and ends on September 2, 2016). Yet, on September 2, 2015, the new premium was reduced by almost half for the personal umbrella policy, and the coverage limits were reduced by $1,000,000. This new policy was not an "amendment" where it occurred outside the time limitations that applied to the earlier policy, that being September 2, 2014 which ran until September 2, 2015.

A change in insurance coverage, where it is requested by an insured, must be changed by an endorsement. AB, p. 65 (Allstate's Policy Terms). An endorsement is a term of art in the insurance industry which calls for a

change to the terms of the policy. *See*, Ellis v. Royal Insurance Companies, 129 N.H. 326, 338 (1987) (". . . the purpose of an endorsement is, by definition, to change the terms of the policy [] . . . "). During the September 2, 2014 through September 2, 2015 policy term, there was not any endorsement or amendment to that policy. AB, p. 175. (Allstate's Answers to Interrogatories No. 6 showing no amendment to the contract beginning on September 2, 2014 through September 2, 2015). Rather, at the end of the 2014 policy, Mr. O'Donnell requested a change in the coverage terms by $1,000,000. AB, p. 166. Effective on a new commencement date of a new contract, that being September 2, 2015, Mr. O'Donnell was issued a new policy with new coverage terms that were materially different than the coverage terms that had existed in the prior policy. There was no endorsement and there was no "amendment" or change during the policy term. Rather, a new policy was issued to John O'Donnell.

A contract which includes a policy term or duration imposes duties and obligations on each party for the term of the contract. Twitchell, *et al* v. The Town of Pittsford, 483 N.Y.S. 2d 524, 525 (Supreme Court, App. Div. 4th Dept., NY 1984) (when a contract is terminated, such as by expiration of its own terms, the rights and obligations thereunder cease; the obligations of the parties are as a matter of law not measured by the terms of the contact which has expired); *accord*, International Technologies Marketing, Inc. v. Verint Systems, LTD, 157 F.Supp.3d 352, 363 (S.D.N.Y., January 27, 2016). *See also*, Appeal of Alton School District, 140 N.H. 303, 307 (1995) (in the absence of a binding automatic renewal clause, a collective bargaining agreement ends on its termination date).

When looking at the September 2, 2015 personal umbrella policy, a relation back to the preexisting policy or the earlier policies is not appropriate – except where a waiver relates to a "renewal" or an "amendment." The September 2, 2015 policy stands on its own.

An amendment, by its plain and ordinary meaning, is defined to mean the act of amending or the state of being amended; an alteration of or addition to a bill. *Random House, Webster's Dictionary* 21 (2d ed. 1996). *Black's Law Dictionary* defines an amendment to mean "to change or modify for the better. To alter by modification, deletion or addition." *Black's Law Dictionary* 74 (5th ed. 1979). An earlier version of *Black's Law Dictionary* defines "amendment" to be "a change, ordinarily for the better. An amelioration of the thing without involving the idea of any change in substance or essence." *Black's Law Dictionary* (4th ed. 1951).

To amend or an amendment calls for a change. However, when there is an amendment or a change to a contract for a set period of time with an expiration set on a definitive date, the amendment cannot happen after the policy has expired. One cannot amend what does not exist. A contract for a terms ends on its termination date; in the context of a collective bargaining agreement, if the parties continue to negotiate for a successor agreement after the expiration of the contract, their obligations to one another are governed by the doctrine of maintaining the status quo. Appeal of Alton School District, *supra* at 307. Certainly new terms cannot be considered to be amendments once the contract has ended. Once the 2014 personal umbrella policy between John O'Donnell and Allstate Indemnity Company expired on September 2, 2015, the rights and obligations thereunder ceased. *See*, International Technologies Marketing,

Inc. v. Verint Systems, LTD, *supra* at 363. Any material changes after the expiration date serves to create a new agreement or a new policy. *See*, 3 *Widiss, Uninsured and Underinsured Motorist Insurance* § 32.6 (Rev. 3d. ed.)

Under the plain terms of the personal umbrella policy issued by Allstate Indemnity Company, changes or amendments to the policy are done by an endorsement. AB, p. 65. In 2014, there was no additional endorsement which changed the coverage terms. Instead, the coverage terms were only changed by $1,000,000 on the new contract date of September 2, 2015, this date being the first day of a new contract. This significant change was not an amendment or a renewal, but rather, it created a new insurance policy. Relying upon the language of R.S.A. 264:15, I, a rejection or a waiver of the enhanced uninsured motorist coverage is only effective on a policy renewal or policy amendment, but it does not apply where the coverage terms are substantially altered or changed.

II. MATERIAL CHANGES UNDER A NEW POLICY NEGATED THE EFFECT OF THE 2011 WAIVER OF ENHANCED UNDERINSURED MOTORIST COVERAGE.

R.S.A. 264:15, I permits a preexisting or earlier waiver or rejection of enhanced underinsured motorist coverage to apply to prospective insurance policies or to an existing policy so long as the rejection relates to a "policy amendment or renewal." We know in the case at bar that John O'Donnell requested new coverage terms effective September 2, 2015. AB, p. 166. Allstate Indemnity has acknowledged that John O'Donnell

made the request upon the insurance company and the coverage terms were changed by $1,000,000. AB, p. 166. The question to be determined is whether the changes to the September 2, 2015 policy amount to a policy amendment or policy renewal. The New Hampshire Supreme Court has not yet interpreted the particular phrase at issue within R.S.A. 264:15, I. At the same time, the statute contains undefined terms. What is also known is that earlier rejections do not remain in full force and they do not have an effect on any and all future contractual relations between an insured and an insurer. R.S.A. 264:15, I. Rather, an earlier waiver is limited or qualified to situations where there is a policy amendment or renewal. It is the Petitioner's position that the plain and ordinary meaning of an amendment applies to changes within the duration of the policy term, and that a renewal applies to the same terms or coverages at issue. The 2015 insurance policy is neither an amendment nor a renewal.

Courts in other jurisdictions have considered similar or substantially similar statutes that allow a waiver of uninsured motorist coverage to apply to successive policies, but not to all future relationships between an insured and the insurer. Many jurisdictions have adopted a test of "materiality" in order to determine if there is a renewal policy, substitute policy, or a replacement policy. *See*, Dempsey v. Automotive Casualty Insurance and Allstate Insurance Company, 680 So. 2d 675, 679-680 (La. App. 1 Cir. June 28, 1996). In Louisiana, prior to a statutory change, the Court of Appeals noted that the general rule regarding the rejection of uninsured motorist coverages "… is that an initial valid rejection or selection of lower limits by an insured is also valid for renewal, reinstatement or substitute policies." *Id*. at 679. The Court noted that in Louisiana the term "renewal"

was defined in that a renewal could occur only at the end of a policy term and that a renewal contemplated uninterrupted coverage. The Court in Dempsey dealt with whether the addition of a new person to an insurance policy qualified as a substitute policy. *Id.* The Court noted that where there was a change in coverage, such as an increase in coverages, or the addition of a new person, without a new selection or rejection form being executed, the original or initial selection/rejection form was invalid. *Id*. at 681.

In Torgerson v. State Farm Mutual Automobile Insurance Company, 957 P.2d 1283 (Wa. App. 1998) the appeals court found that a new written waiver of uninsured motorist coverage was required in the setting where the coverage limits were changed and/or increased. Torgerson, *supra* at 1287. The Torgerson Court explained that a new written rejection of uninsured motorist coverage was not required if there was simply a "renewal" but, if there was a new policy, or, if there were material changes to a policy, then a new written rejection was required. *Id*. at 1286-1287. *Accord*, American Commerce Insurance Company v. Ensley & a., 220 P.3d 215, 218-219 (Wa. App. Div. 3 2009) (An uninsured motorist waiver is enforceable so long as there are no material changes in the insurance coverages; changes in insurance coverage levels are material and result in a new policy).

In Kingston v. State Farm Automobile Insurance Company, 344 P.3d 167 (Ut. App. 2015), the Court considered a statute where the insured could reject uninsured motorist coverage "on all future renewals of the policy, and on all replacement policies unless and until I make an express written request to add or increase the coverages." Kingston, *supra* at 179. The Court found that the statutory language permitted a rejection to apply

to future renewals and replacements; however, the Court noted that if there was a new policy issued or if there was a material change to an existing policy, a new, written rejection form would be necessary in order to reduce the uninsured motorist coverage. *Id*. at 173. The Court in Kingston explained that a material change must consider whether the change ". . . would meaningfully alter the risk relationship between the insurer and the insured." *Id.* In that case, the Kingston Court found that the risk relationship was not altered where the insured's premiums and coverages remained the same. *Id.*

In Mitchell v. Liberty Mutual Insurance, 24 P.3d 711 (Ks. 2001), the Supreme Court considered a statute where an insured was allowed to reject uninsured motorist coverage on any supplemental, renewal, reinstated, transferred or substitute policies of insurance. Mitchell, 24 P.3d at 719. The Mitchell Court concluded that where one policy replaces another policy between the same parties and contains substantially the same provisions, it qualifies as a renewal. *Id.*

In Duckett-Murray v. Encompass Insurance Company of America, 178 A.3d 527 (Md. App. 2018), the Court found that where there were significant changes to an insurance policy where the law required equal coverage for uninsured motorist benefits, the changes to the policy ". . . took it out of the category of a routine renewal policy and triggered application of equality of coverage . . . ." Duckett-Murray, *supra* at 541. The Court explained that "the changes in the insurance policy were major material changes that altered the risks [being] insured . . . and it would have justified the insured's thinking that the policy was new. *Id*. The Court adopted the standard that where there are material changes to a policy, after

an initial waiver or rejection of uninsured motorist coverage, a new rejection or new waiver is necessary under the terms of the new policy. *Id*.

In Iverson v. State Farm Mutual Insurance Company, 256 P.3d. 222 (UT 2011), the Supreme Court announced that even where parties to an insurance contract had prior relationships, a new contract or a new policy is formed when there are material changes to the contract. Iverson, 256 P. 3d at 224-225. A material change was shown to an existing or past contractual relationship if the change "meaningfully alters the risk relationship between the parties." *Id*. at 228. The Court in Iverson detailed that the considerations should include: whether the change to a policy was requested by the insured or was a routine or ministerial change made by the insurance company; and, whether in response to the change, the average insured would want to reevaluate the amount of risk she would be willing to bear under the policy. *Id*.

In Allstate Insurance v. Kaneshiro, 999 P.2d 490 (HI 2000), the Supreme Court considered whether an insurance policy was a new policy or a renewal of a preexisting policy. Kaneshiro, 999 P.2d at 492-493. Under the Hawaiian statute, an insured must be given the option to buy equal uninsured motorist coverage when a policy is first offered but no such obligation applies to any "renewal or replacement policy." *Id*. at 493. However, the Kaneshiro Court noted that if there was a material change to the policy, then the insurer was required to, again, offer uninsured motorist coverage equal to the liability coverage. *Id*. at 497. The Kaneshiro Court noted that a renewal policy meant to extend the same coverage for an additional specified time. *Id*. at 495. In Kaneshiro, the Court found that there was a material change to the new policy because the named insured

changed and an entirely different vehicle was added to the policy. *Id*. at 500-501. A new rejection or waiver was required. *Id*.

In Dennis v. Liberty Mutual Group, 2014 WL 1089291 (W.D.WA. March 14, 2014), the federal court considered whether a change in the scope of coverage amounted to material changes which required a new underinsured motorist waiver. Dennis, 2014 WL 1089291, p. 5-6. The Washington statute allowed a waiver to continue in effect with a supplemental or renewal policy, but not so with respect to a new policy. *Id*. at p. 5. The Court found that a new waiver was required where the new policy included a change in the description of the insured vehicles to include "any autos." The Court explained that the change to include coverage for "any auto" expanded the liability coverage and amounted to a material change; requiring a new written waiver. *Id*. at p. 7.

The courts in other jurisdictions have construed statutes that oftentimes allowed an initial or original waiver to apply to renewal policies, but the courts almost uniformly found that where there are marked or material changes, a policy will not be considered a renewal.

New Hampshire is similar to the other jurisdictions in that an initial waiver or rejection can apply to a renewal policy or to a policy amendment during the course of the policy. R.S.A. 264:15, I. The New Hampshire statute further delineates that an initial rejection will apply to all insureds and to vehicles contemplated by the policy. *Id*. The statute does not suggest that an initial rejection or waiver will apply to any and all prospective, contractual relations between the parties. *See,* R.S.A. 264:15, I. In fact, where R.S.A. 264:15, I contains the limiting language that an earlier rejection will apply only to renewals or to a policy amendment, there

is a requirement to show that any new policy or change to a policy is either a renewal or an amendment. The plain meaning of these terms suggests that a $1,000,000 change to the coverage terms is not a renewal and, where a new contract began on September 2, 2015 at the time of the coverage change, there was not an amendment to the earlier contract. Accordingly, Summary Judgment must be vacated where the plain and ordinary meaning to the terms amendment and renewal are inconsistent with the coverage changes made on September 2, 2015.

III. R.S.A. 264:15, I MUST BE FOUND TO BE AMBIGUOUS IN THE SITUATION WHERE A $1,000,000 CHANGE TO THE COVERAGE LIMITS IS FOUND TO BE AN "AMENDMENT" OR "RENEWAL."

To the extent that the plain and ordinary meanings to the terms amendment or renewal can apply to a $1,000,000 policy change, R.S.A. 264:15, I must be considered to be ambiguous. Where a statute is ambiguous, the legislative history is considered to learn the legislative intent meant by the statutory language. Appeal of Town of Belmont, 2019 WL 1247435 (March 19, 2019) p. 4. If the dictionary definitions of undefined terms reasonably support each party's position, the statute is ambiguous. *Id.*

Allstate Indemnity has suggested that the term amend would include the changes to the September 2, 2015 policy. It seems obvious to the Petitioner that an amendment occurs only during the term of the contract, not at or after the time of expiration. Nevertheless, if the dictionary definitions support an "amendment" as a change to the contract with respect to the $1,000,000 change to the coverage terms, then the term amend can be

construed through each party's reliance on the dictionary definitions. Where there is a reduction of coverage, it is also curious as to whether a reduction or contraction to the coverage could be construed as an amendment where an amendment is usually considered a change for the better. *Random House, Webster's Dictionary* 21 (2nd Ed. 1996). Nevertheless, an amendment does speak to a modification or change. If reference is found necessary and consideration of legislative history is considered, Senate Bill 38 is available for the Court's review at AB, p. 337-352.

The changes to R.S.A. 264:15 were brought about by a bill sponsored by Senator D'Allesandro wherein he had constituents who were not aware that they had rejected uninsured or underinsured motorist coverage. AB, p. 344-345. The bill was designed to allow a waiver or rejection to be in writing. The insurance lobby weighed in on the changes requesting that any such rejection of uninsured motorist coverage would be valid for renewals or if there was a change of an automobile. AB, p. 341; 346. The legislative history does not reveal that an initial rejection or waiver of uninsured motorist coverage should apply to all future or prospective coverage changes or material changes to an insurance policy. *Id.* Rather, the concern was to allow a waiver in writing and to allow the waiver to continue forward if there was a change to the vehicles or where the policy was a renewal. *Id*. Considering the legislative history leads to a finding that the General Court did not intend to defeat the requirement of equal liability and uninsured motorist coverage where a policy term drastically changed the coverage limits; rather, an amendment was meant to apply to all insureds and to replaced or changed vehicles.

CONCLUSION

The $1,000,000 change to the 2015 coverage limits, considering that the purpose for uninsured motorist coverage is to compensate innocent victims of those who are underinsured and the liberal construction applied to uninsured motorist statutes, requires that with a significant or material change to the coverage limits, the insured person is entitled to the enhanced underinsured or uninsured motorist limits unless there is a new written waiver. In the case at bar, Mr. O'Donnell changed his coverage by $1,000,000 at the start of a new policy term; this naturally leads to the belief that he had a new policy with new terms and conditions. The insurer was required to have provided a new rejection or selection form at the time that the material significant changes came about on September 2, 2015 or, to do what is required by R.S.A. 264:15, I: provide equal coverage limits.

Respectfully submitted,

JOHN F. O'DONNELL

By His Attorneys,
MCDOWELL & OSBURN, P.A.

Date: April 5, 2019 By: */s/ Mark D. Morrissette*_____

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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:

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*/s/ Mark D. Morrissette*_____

REQUEST FOR ORAL ARGUMENT OF 15 MINUTES BEFORE THE FULL COURT

The issue for consideration involves the interpretation of the uninsured motorist statute and when insurers can negate the statutory mandate of equal coverages. This appeal involves an issue of first impression for the Supreme Court where the Supreme Court has yet to interpret the particular language of R.S.A. 264:15, I where a waiver of underinsured motorist coverage, once signed, will apply to renewals or policy amendments. This case involves a $1,000,000 change to the coverage limits and the full Court should consider whether an old, preexisting waiver is effective to defeat the statute's mandate calling for equal coverage.

*/s/ Mark D. Morrissette*_____

RULE 16 (3) (I) CERTIFICATION

I certify that the decisions from which this appeal has been taken are in writing and are appended to this Brief.

*/s/ Mark D. Morrissette*_____

CERTIFICATION OF WORD LIMIT

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

*/s/ Mark D. Morrissette*_____

THE STATE OF NEW HAMPSHIRE
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October 16, 2018

FILE COPY

Case Name: **John O'Donnell v Allstate Indemnity Company**
Case Number: **216-2017-CV-00463**

You are hereby notified that on October 12, 2018, the following order was entered:

RE: MOTION FOR SUMMARY JUDGMENT:

See copy of Order attached. (Messer, J.)

This matter has been removed from the December 05, 2018 Trial List. Related Conference removed as well.

W. Michael Scanlon
Clerk of Court

(923)

C: Mark D. Morrissette, ESQ; Doreen F. Connor, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

John O'Donnell

v.

Allstate Indemnity Company

Docket No. 216-2017-CV-00463

ORDER

Plaintiff brought the instant action seeking a declaratory judgment to determine the extent to which his personal umbrella policy, issued by defendant, contained underinsured motorist benefits. Defendant now moves for summary judgment, arguing plaintiff did not have underinsured motorist coverage under his personal umbrella policy. Plaintiff objects. The court held a hearing on August 2, 2018. Upon consideration of the pleadings, arguments, and applicable law, defendant's motion is GRANTED.

Factual Background

Plaintiff purchased automobile, homeowner, and umbrella insurance policies from Allstate in September 2011. (Def.'s Ex. 2.) Allstate issued plaintiff's personal umbrella policy on September 6, 2011, policy number 925184881, which covered plaintiff from September 2, 2011, though September 2, 2012. (Id. Ex. 3.) The plaintiff signed the Allstate umbrella policy application on September 8, 2011. (Id. Ex. 2, RPD 3.) The declarations that accompanied his umbrella policy stated in bold print: **"Uninsured Motorist Insurance Rejected."** (Id. Ex. 3, RPD 9.) On September 27, 2011, plaintiff signed a New Hampshire Personal Umbrella Policy Uninsured Motorist

Selection/Rejection form, and checked the box indicating he "wish[ed] to reject Uninsured Motorist Insurance (Coverage SS) for my Personal Umbrella Policy." (Id. Ex. 2, RPD 4.) The form informed plaintiff that his rejection would "apply now and to all future renewals or continuations of [his] policy unless [he] notif[ied] [Allstate] otherwise in writing." (Id.)

Plaintiff does not dispute he renewed his umbrella policy with Allstate multiple times prior to his accident. On July 13, 2012, Allstate sent plaintiff a policy renewal offer, which stated in bold print: **"Uninsured Motorist Insurance Rejected."** (Id. Ex. 6, RPD 67.) On September 25, 2012, Allstate sent plaintiff an amended declaration page for his umbrella policy, which again stated in bold that he rejected uninsured motorist insurance. (Id. Ex. 7, RPD 151.) On July 12, 2013, Allstate sent plaintiff a policy renewal offer, which again stated in bold that he rejected uninsured motorist coverage. (Id. Ex. 6, RPD 77.) On February 27, 2014, Allstate sent plaintiff an amended declarations page, which again notified plaintiff that he rejected uninsured motorist coverage. (Id. Ex. 10, RPD 43.)

On July 14, 2014, Allstate sent plaintiff a policy renewal offer, which informed plaintiff that he rejected uninsured motorist coverage. (Id. Ex. 11, RPD 89.) On August 6, 2015, Allstate sent plaintiff notice of his policy change, which notified plaintiff that his policy's coverage and limits had changed. (Id. Ex. 16, RPD 59.) The attached policy declaration again informed plaintiff that he had rejected uninsured motorist coverage. (Id. at RPD 61.) The change to plaintiff's policy was a reduction in insurance coverage, from $2,000,000 to $1,000,000, which reduced his premiums from $298.34 to $158.59—a forty-seven percent decrease. (Pl.'s Ex. 6.; Def.'s Ex. 16)

On November 12, 2015, plaintiff was involved in a car accident where he was rear-ended by another motorist who did not have sufficient insurance coverage. Plaintiff filed a claim with Allstate to receive underinsured motorist benefits under his automobile and personal umbrella policies. Allstate denied plaintiff's claim. It is undisputed that at no point prior to November 12, 2015, did plaintiff revoke his umbrella underinsured motorist rejection in writing. (Pl.'s Req. for Admissions, 2–3.)

Legal Standard

In deciding whether to grant summary judgment, the court considers the pleadings, affidavits, and other evidence, as well as all inferences properly drawn from them, in the light most favorable to the non-moving party. See Amica Mut. Ins. Co. v. Mutrie, 167 N.H. 108, 111 (2014). In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath sufficient to indicate that a genuine issue of material fact exists." Brown v. Concord Grp. Ins. Co., 163 N.H. 522, 527 (2012). An issue of fact is "material" for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law. Macie v. Helms, 156 N.H. 222, 224 (2007) (quoting VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006)). "If there is no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, the grant of summary judgment is proper." Town of Barrington v. Townsend, 164 N.H. 241, 244 (2012) (quoting Bates v. Vt. Mut. Ins. Co., 157 N.H. 391, 394 (2008)); see also RSA 491:8-a, III.

Legal Analysis

Plaintiff argues he is entitled to uninsured motorist benefits under his umbrella policy because his September 2, 2015 policy was a new contract and not a renewal of,

nor amendment to, his prior policy. Plaintiff asserts the 2015 – 2016 policy was materially different from his prior policies, thus making it a new policy and requiring Allstate to provide uninsured motorist coverage equal to the amount of his liability coverage and mandating that a new uninsured motorist selection/rejection form be obtained by Allstate. The court disagrees.

RSA 264:15, I, states, in relevant part:

> 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.

Plaintiff contends that the foregoing language, which requires a written request for coverage after it has been previously rejected, is limited to policy amendments or policy renewals. He further contends that the September 2015 policy contained substantially different terms and therefore constituted a new policy, requiring a new uninsured motorist coverage offer. Without that offer, and a new written rejection, plaintiff argues he is entitled to uninsured motorist coverage equal to the liability coverage provided under the new personal umbrella policy.

In support of his position, plaintiff first directs the court's attention to RSA 417-A:1, II, the definition of "renewal." The statute there, however, expressly limits the applicability of the definitions to Chapter 417-A. ("As used in this chapter the following

definitions shall apply . . . .") While applicable to "refusal to issue, cancellation and refusal to renew automobile insurance," the court cannot presume that the legislature necessarily intended the definition of "renewal" in RSA 417-A:1 to apply to an entirely different chapter which more narrowly governs uninsured motorist coverage.

Plaintiff further urges the court to follow a number of cases from foreign jurisdictions that have applied a materiality standard in determining whether a policy constitutes a new policy rather than a renewal. (Def. Mem. of Law, p. 10-13). However, each of the cases cited by plaintiff depend upon either different statutory language or a materiality standard expressly adopted the respective State's appellate courts. And, importantly, a number of the courts utilize a materiality standard in making this determination because that State's statute, unlike the New Hampshire statute, does not include an express provision regarding amendments.

For example, in Am. Commerce Ins. Co. v. Ensley, the Washington Court of Appeals applied a "materiality standard" in determining whether a policy was "new" or a "renewal." 220 P.3d 215, 218 (Wash. 2009). The Washington Court of Appeals stated that "[t]he key question [was] whether the changes made to the policy [were] sufficiently material to support a conclusion that a new, as opposed to a renewal, policy was issued." Id. at 218–19; see also Torgerson v. State Farm Mut. Auto. Ins. Co., 957 P.2d 1283, 1287 (Wash. 1998); Johnson v. Farmers Ins. Co., 817 P.2d 841 (Wash. 1991) (materiality standard applied in determining whether a policy is "new" or "renewal" policy.) Notably, the Washington statute only addresses supplemental or renewal policies, and has no express provision regarding "amendments." See RCW 48.22.030 ("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.")[1]

Similarly, in Duckett-Murray v. Encompass Ins. Co. of Am., the Maryland Court of Special Appeals held that "changes to a policy that alter the level of risk insured, or introduce new decision-makers, so as to remove the policy from being a mere continuation of coverage, should not be treated differently from 'new business' policies." 178 A.3d 527, 540 (Md. 2018). The Court further concluded that an insurer was required to offer uninsured coverage for new policies or for "an existing policy that through renewals has materially changed so as to meaningfully alter the risk relationship between the insurer and the insured." Id. Like the Washington statute, the Maryland statute makes no express provision for the rejection of uninsured coverage remaining in place after an amendment to the policy.[2]

However, unlike the Washington or Maryland statutes at issue in those cases, RSA 264:15 provides that uninsured motorist coverage need not be re-offered for renewals *or amendments*. An "amendment" is defined as "the process of amending." Merriam-Webster's Third New International Dictionary 68 (unabridged ed. 2000). "Amend" is defined as "to reform, convert, or make better," or "to change or alter in any way." Id. The court finds this distinction compelling, as RSA 264:15 expressly

[1] RCW 48.22.030(4) states, in relevant part:

> 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.

[2] Md. Code Ann., Ins. § 19-510 states:

> (b)(1) If the first named insured under a policy . . . does not wish to obtain uninsured motorist coverage in the same amount as the liability coverage provided under the policy or binder, the first named insured shall make an affirmative written waiver of having uninsured motorist coverage in the same amount as the liability coverage . . . . (e) A waiver made under this section by a person that is insured continuously by an insurer . . . is effective until the waiver is withdrawn in writing.

contemplates the insured's insurance policy changing while still not requiring the insurer to re-offer uninsured motorist coverage unless the insured requests such coverage in writing. Therefore, because RSA 264:15 contemplates insurance policies undergoing substantive amendments, the court declines to adopt a materiality standard in determining whether any given change would effectively create a new policy.

Applying RSA 264:15 to the instant facts, the court finds plaintiff's personal umbrella policy does not include underinsured motorist coverage. It is undisputed that plaintiff expressly rejected Allstate's offer for his policy to contain underinsured motorist coverage in 2011. (Def.'s Ex. 2, RPD 4.) Plaintiff subsequently renewed his policy in 2012, 2013, 2014, and 2015. Although plaintiff argues the 2015 policy was a new policy, the court is unpersuaded. The September 2015 umbrella policy was issued to him in August 2015—with an effective date of September 2, 2015, his regular policy renewal date. The policy had the same policy number, coverage period, and, except for the coverage limits, substantially the same terms. (Def.'s Ex. 15, RPD 53; Ex. 16, RPD 59.) The "Amended Personal Umbrella Policy Declarations" dated August 6, 2015 included the reduction in coverage from $2,000,000 to $1,000,000, the reduction in premium amount from $298.34 to $158.59, and the notice "**Uninsured Motorist Insurance Rejected.**" (Def.'s Ex. 16) Therefore, the court finds plaintiff 2015 policy was a renewal of his previous umbrella policies, with amended coverage terms.[5]

Plaintiff finally argues the public policy underlying the uninsured motorist statute supports his position. The court again disagrees. "The purpose of requiring uninsured motorist coverage is to close a gap in the protection afforded the public under our

[5] Although plaintiff argues an amendment cannot occur at the time a policy is being renewed, he provides no law or authority that prohibits an amendment from occurring simultaneous with a policy being renewed.

Financial Responsibility Act." Rivera v. Liberty Mut. Fire Ins. Co., 163 N.H. 603, 608 (2012). "To that end, the intent of the statute is to allow policy holders to protect themselves against injury from an uninsured motorist to the extent they protect themselves against liability." Id. However, the court is "not at liberty to find uninsured motorist coverage when it is not required by the statute or to read into the statute a prohibition of an exclusion that is neither expressed nor implied." Id. at 607. Here, plaintiff chose to reject adding uninsured motorist coverage to his policy in 2011 and was notified in each subsequent renewal offer that his policy did not include uninsured motorist coverage. Therefore, because plaintiff chose not to purchase uninsured motorist coverage and at no point requested in writing that it be added to his policy, he is not entitled to such coverage under the statute.

Accordingly, for the foregoing reasons, defendant's motion for summary judgment is GRANTED.

SO ORDERED.

10/12/2018
Date

Amy B. Messer
Amy B. Messer
Presiding Justice

THE STATE OF NEW HAMPSHIRE
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December 05, 2018

FILE COPY

Case Name: **John O'Donnell v Allstate Indemnity Company**
Case Number: **216-2017-CV-00463**

You are hereby notified that on November 04, 2018, the following order was entered:

RE: MOTION FOR RECONSIDERATION OF COURT'S ORDER GRANTING SUMMARY JUDGMENT:

See copy of Order attached. (Messer, J.)

W. Michael Scanlon
Clerk of Court

(923)

C: Mark D. Morrissette, ESQ; Doreen F. Connor, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

John O'Donnell

v.

Allstate Indemnity Company

Docket No. 216-2017-CV-00463

ORDER

Currently before the court is plaintiff's motion to reconsider this court's October 12, 2018 order granting defendant's motion for summary judgment. "A motion for reconsideration allows a party to present points of law or fact that the [c]ourt has overlooked or misapprehended." Broom v. Continental Cas. Co., 152 N.H. 749, 752 (2005). Upon review of plaintiff's motion and the court's order, the court finds plaintiff's motion to reconsider contains the same arguments previously raised and considered by the court. Therefore, for the reasons stated in the court's October 12 order, plaintiff's motion to reconsider is DENIED.

SO ORDERED.

12-4-18
Date

Amy B. Messer
Presiding Justice