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QUESTIONS PRESENTED

I. DID THE TRIAL COURT PROPERLY GRANT SUMMARY JUDGMENT IN FAVOR OF NGM WHERE THE UNDISPUTED FACTS ESTABLISHED THAT THE MOSHERS WERE TOLD BY THE INSURANCE SOURCE, INC. THAT THEY DID NOT HAVE UNINSURED MOTORIST COVERAGE FOR THEIR MOTORCYCLES UNDER THE NGM UMBRELLA POLICY?

II. WAS THE TRIAL COURT'S RULING THAT THE UMBRELLA POLICY ISSUED BY NGM WAS CLEAR AND UNAMBIGUOUS, AND DID NOT PROVIDE UNINSURED MOTORIST COVERAGE FOR INJURIES SUSTAINED BY LEROY MOSHER WHILE OPERATING A MOTORCYCLE OWNED BY HIM AND NOT COVERED BY THE UNDERLYING POLICIES CORRECT AS A MATTER OF LAW?

III. WAS THE TRIAL COURT'S RULING THAT RSA 264:15, I DOES NOT REQUIRE NGM TO PROVIDE UNINSURED MOTORIST COVERAGE TO AN INSURED WHILE OCCUPYING A VEHICLE WHICH IS SUBJECT TO A CLEAR AND UNAMBIGUOUS EXCLUSION UNDER THE UMBRELLA POLICY'S LIABILITY PROVISIONS, AND INSURED UNDER A POLICY NOT LISTED AS A PRIMARY POLICY ON THE UMBRELLA POLICY CORRECT AS A MATTER OF LAW?

IV. DID THE TRIAL COURT SUSTAINABLY EXERCISE ITS DISCRETION WHEN IT ACCEPTED NGM'S MOTION FOR SUMMARY JUDGMENT ONE MONTH BEYOND THE DISPOSITIVE MOTION DEADLINE SET FORTH IN THE STRUCTURING CONFERENCE ORDER?

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RELEVANT STATUTE

R.S.A. 264:15 Uninsured or Hit-and-Run Motor Vehicle Coverage

I. 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 or 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 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.

STATEMENT OF THE CASE

This is an appeal from the September 14, 2009 Order of the Cheshire County Superior Court (Hon. J. Arnold) granting a Motion for Summary Judgment filed by the Respondent/Appellee, National Grange Mutual Insurance Company ("NGM") in a declaratory judgment action entitled Leroy Mosher and Sally Mosher v. National Grange Mutual Insurance Company, Cheshire County Superior Court, No. 08-E-0136.
The lengthy and complex procedural history of this case is as follows.

On August 18, 2008, the Petitioners/Appellants, Leroy Mosher and Sally Mosher, filed a Petition for Declaratory Judgment and Injunctive Relief against NGM. [App. p. 1-8] The Moshers sought a declaration that they were entitled to uninsured motorist coverage under a personal umbrella policy issued by NGM for injuries sustained by Leroy Mosher in a motorcycle accident on April 18, 2008. At the time of the accident, Leroy was operating a motorcycle which he owned and which was insured under a motorcycle policy issued by Progressive Northern Insurance Company ("Progressive"). The motorcycle was not listed as an insured vehicle under the NGM policy, nor was the Progressive policy listed in the umbrella policy declarations as "primary insurance".

The claims asserted by the Moshers were: 1) under RSA 264:15, I, NGM was required to provide uninsured motorist coverage for the injuries sustained by Leroy while operating his motorcycle; 2) the umbrella policy was ambiguous since it did not contain any uninsured motorist provisions and, therefore, should be construed to provide such coverage; 3) NGM should be estopped from denying coverage due to implicit representations of the alleged agent, The Insurance Source, Inc., that the umbrella policy provided uninsured motorist coverage in the same amount as liability coverage; and 4)

The Insurance Source, Inc., which lists on its website several insurers, including NGM, was acting as agent for NGM as well as for them and, therefore, NGM should be held liable to The Insurance Source, Inc.'s failure to procure umbrella coverage for the motorcycle under the NGM policy.

On November 11, 2008, the Moshers filed a Motion for Summary Judgment pursuant to which they argued that: 1) the motorcycle exclusion within the NGM umbrella policy did not apply to uninsured motorist coverage; 2) NGM was required to provide uninsured motorist coverage under RSA 264:15; 3) NGM could not exclude a motorcycle from coverage under RSA 264:15; and 4) NGM was bound by the acts and representations of The Insurance Source. [App. p. 30-43]

On December 10, 2008, NGM filed a timely Objection to Motion for Summary Judgment, arguing that: 1) the NGM umbrella policy clearly and unambiguously excluded coverage for injury resulting from the use or ownership of any motorcycles owned by the insured and not insured under the NGM policy; 2) RSA 264:15, I does not require NGM to provide uninsured motorist coverage to an insured who is injured while occupying a vehicle which is insured under a policy not listed on the umbrella policy as a primary policy; 3) the Moshers failed to meet their burden of proving any basis for imposing liability on NGM for not listing the Progressive policy as primary insurance on the umbrella policy because (a) they did not submit sufficient verified facts to support a finding of negligence on the part of The Insurance Source, Inc. and (b) NGM cannot be held liable for any errors of omission on the part of The Insurance Source, Inc., an independent agent. [App. p. 55-81]

More than three months later, on March 11, 2009, the trial court (J. Arnold) issued

an Order on Petitioners' Motion for Summary Judgment. [App. p. 84-91] The court denied the motion, ruling that: 1) the motorcycle exclusion in the NGM umbrella policy is unambiguous and clearly excludes liability coverage for accidents involving the use of a motorcycle; 2) Mosher's injuries "resulted from" the use of his motorcycle and fall within the policy exclusion; 3) NGM is not prohibited from excluding coverage for injuries resulting from the use of a motorcycle; 4) NGM is not prohibited from excluding coverage for injuries resulting from the use of a motor vehicle that is not listed as an insured vehicle under the policy; 5) the policy exclusion is valid and enforceable, and applies under the circumstances of this case; 6) the amount of uninsured motorist coverage required by RSA 264:15, I is determined by the amount of liability coverage provided and since the NGM umbrella policy does not provide liability coverage for situations involving the use of a motorcycle, the statute does not compel uninsured motorist coverage under the same circumstances; and 7) the NGM umbrella policy does not provide uninsured motorist coverage for injuries sustained by Mosher while using his motorcycle and, therefore, NGM's denial of the claim was proper. The court also found that there was a question of fact as to whether The Insurance Source was acting as NGM's agent, but noted that the Moshers did not submit an affidavit from The Insurance Source in support of their position. [App. p. 90] Thus, the trial court denied the Moshers' Motion for Summary Judgment in its entirety.

In light of the trial court's Order, NGM filed a Motion to Dismiss Petitioners' Claims on March 18, 2009. [Pltf. App. p. 92-94] NGM argued that the Moshers' claims for uninsured motorist coverage under the umbrella policy should be dismissed in their entirety based on the court's determination that the umbrella policy did not provide

uninsured motorist coverage for injuries sustained by Leroy while using his motorcycle and that RSA 264:15, I did not require NGM to provide such coverage. The Moshers filed a brief Objection to Motion to Dismiss, arguing only that there were issues of material fact as to whether The Insurance Source was NGM's agent. [Pltf. App. p. 97-98]

NGM also filed a Partial Motion for Reconsideration of Order on Plaintiffs' Motion for Summary Judgment on March 17, 2009. [Def. App. p. 31-35] NGM sought reconsideration of the Order insofar as the court ruled that there remained questions of fact as to whether The Insurance Source was acting as NGM's agent. NGM argued that the Moshers failed to submit any verified facts to establish that The Insurance Source was an agent for NGM and, therefore the court should have concluded that there was no agency relationship upon which to base a finding that NGM should be estopped from denying coverage under its policy. [Def. App. p. 32-33] To the contrary, the evidence supported a finding that The Insurance Source acted as agent for the Moshers. Furthermore, NGM argued that there was no factual or legal basis for the imposition of vicarious or agency liability on NGM for any alleged errors or omissions by The Insurance Source, Inc. because the Moshers did not demonstrate a basis for a finding of negligence on the part of The Insurance Source, Inc. [Def. App. p. 33-34] The Moshers objected, arguing that there existed an issue of fact as to the agency issue because the principals of The Insurance Source, Inc. were personal friends and because the NGM policies listed The Insurance Source as the agency. [Pltf. App. p. 95-96] NGM filed a Reply to Plaintiff's Objection, asserting the absence of any verifiable evidence supporting the Moshers' agency theory. [Def. App. p. 41-42]

On March 20, 2009, the Moshers also filed a brief Motion for Partial Reconsideration of Order on Petitioners' Motion for Summary Judgment, essentially reasserting the arguments set forth in previously filed pleadings. [Def. App. p. 36-37] NGM filed a timely Objection. [Def. App. p. 38-40]

On May 8, 2009, the trial court issued an Order on Pending Motions. The court denied NGM's Motion for Partial Reconsideration, ruling that although the Moshers "provided limited facts in support of their agency argument", disputed issues of fact remained as to whether an agency relationship existed between The Insurance Source and NGM. [Pltf. App. p. 101] The court also denied the Moshers' Motion for Partial Reconsideration, noting that had "merely reiterated their previous arguments", and maintaining its ruling that "RSA 264:15 does not require an insurer to provide uninsured motorist coverage in situations where the policy it issued does not provide liability coverage for the vehicle involved." [Pltf. App. p. 102] Finally, the court granted NGM's Motion to Dismiss "to the extent that the Moshers' cannot maintain their case against NGM by arguing that the language of the policy or the provisions of RSA 264:15 entitle them to relief." [Pltf. App. p. 104] The court denied NGM's Motion to Dismiss "to the extent it requests the Court to dismiss the Moshers' agency/estoppel claim", *however, the court also invited the parties to file supplemental motions on the agency/estoppel issue.* [Pltf. App. p. 103-104]

On June 18, 2009, in response to the trial court's invitation, NGM filed a Motion for Summary Judgment arguing that it could not be held liable based on a theory of vicarious liability or estoppel because: 1) the Moshers did not submit verified facts to support a finding of negligence on the part of The Insurance Source, Inc.; and 2) NGM

could not be held liable for any acts or omissions of an independent agent. [Plft. App. p. 105-121] NGM's Motion was supported by excerpts from depositions taken by Moshers' counsel in May of 2009, the Agency Agreement between NGM and The Insurance Source, Inc., and pages from The Insurance Source, Inc.'s website.

The Moshers filed an Objection to NGM's Motion for Summary Judgment on July 17, 2009. [Pltf. App. p. 122-139] They argued, *inter alia*, that NGM's Motion for Summary Judgment was untimely because it was filed three months prior to the September 16, 2009 trial date, rather than four months as stipulated in the Structuring Conference Order dated December 23, 2008. [Pltf. App. p. 82-83]. The Moshers supported their Objection with newly-disclosed excerpts from the depositions of Cheryl Belair and Glenn Barcome, principals of The Insurance Source, Inc., that were taken in a separately-filed lawsuit brought by the Moshers against The Insurance Source, to which NGM was not a party, as well as correspondence and other documents produced during the course of discovery in that action. [Pltf. App. p. 140-226]

On July 31, 2009, NGM submitted a Reply to Petitioners' Objection to Motion for Summary Judgment, addressing the Moshers' timeliness arguments as well as responding to the newly disclosed discovery from the Moshers' lawsuit against The Insurance Source. [Def. App. p. 45-95] This information revealed that The Insurance Source did not represent to the Moshers that the umbrella policy would provide coverage for their motorcycles. To the contrary, the documents and deposition excerpts established that the Moshers not only knew that the policy only covered their "home" and "autos", but that in January of 2007 *they specifically rejected a proposal by The Insurance Source to transfer their umbrella coverage to another insurer so as to provide them with umbrella coverage*

for the motorcycles. [Def. App. p. 49-51] *The Moshers did not respond to NGM's Reply, and did not submit any affidavits or documents to counter the evidence submitted by NGM regarding the communications between Belair and Sally Mosher in 2007*.

On September 14, 2009, the trial court (J. Arnold) issued an Order granting NGM's Motion for Summary Judgment. [Pltf. App. p. 227-237] Although the court ruled that there was sufficient evidence to give rise to a factual dispute as to whether The Insurance Source acted as a dual agent, it determined that "the undisputed facts do not indicate that The Insurance Source did anything, or failed to do something, which caused the Moshers to form a reasonable belief that their motorcycles were covered by the umbrella policy" and, therefore, NGM was entitled to summary judgment as to the Moshers' estoppel claim. [Pltf. App. p. 235] The court noted that "the Moshers have not submitted evidence to indicate that The Insurance Source made assurances regarding umbrella coverage for the motorcycles" and "submitted no verified evidenced to dispute" the evidence presented by NGM that Belair had informed the Moshers "that their motorcycles were not covered by the umbrella policy." [Pltf. App. p. 235-36] *The Moshers did not seek reconsideration of the trial court's Order granting summary judgment in favor of NGM*.

This appeal followed.

STATEMENT OF FACTS

I. The Accident

On April 18, 2008 Leroy Mosher was injured while operating a motorcycle which he owned. He alleged that the accident occurred when he was struck by an uninsured motorist. Sally Mosher sought compensation for loss of consortium.

II. The Progressive Policy

At the time of the accident, Leroy and Sally Mosher were the named insureds under Progressive policy #37154030-4 for the policy period 5/22/07 to 5/22/08. The policy provides for uninsured motorist protection with limits in the amount of $100,000 each person and $300,000 each accident. The "outline of coverage" lists a 2000 Harley Davidson. No other vehicles are listed.

III. The Main Street America Personal Auto Policy

Leroy and Sally Mosher were also named insureds under a Personal Auto Policy #31S85639 issued by Main Street America ("MSA") for the policy period 5/7/07 to 5/7/08. [Def. App. p. 1-30] The list of scheduled autos includes a 2007 GMC Yukon and a 1999 GMC Yukon. [Def. App. p. 2] The policy limits applicable to uninsured motorist benefits are $250,000 per person/$500,000 per accident.

The MSA policy contains a New Hampshire Uninsured Motorists Coverage Endorsement which provides uninsured motorist coverage for damages which an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle" or "underinsured motor vehicle." [Def. App. p. 25] The endorsement also includes the following owned vehicle exclusion:

EXCLUSIONS

A. We do not provide Uninsured Motorist Coverage for "property damage" or "bodily injury" sustained:

1. By an "insured" while "occupying", or when struck by, any motor vehicle owned by that "insured" which is not insured for this coverage under this policy. ..

[Def. App. p. 25] The MSA policy also contains a New Hampshire Endorsement – Amendment of Policy Provisions, which includes the following exclusion:

We do not provide Liability Coverage for the ownership, Maintenance or use of:

1. Any vehicle which:

   a. Has fewer than four wheels; or
   b. Is designed mainly for use off public roads.

   .
   .
   .

2. Any vehicle, other than "your covered auto", which is:

   a. Owned by you; or
   b. Furnished for your regular use.

[Def. App. p. 20]

D. <u>The NGM Umbrella Policy</u>

Leroy and Sally Mosher are the named insureds under a personal umbrella policy (#31S85639) issued by NGM for the policy period 5/7/07 to 5/7/08. [Pltf. App. p. 9-24] The policy contains limits of liability in the amount of $1,000,000 per occurrence with a retained limit in the amount of $250,000. [Pltf. App. p. 10]

The policy declarations lists, as policies providing "primary personal injury and property damage coverage", only the MSA auto policy and two homeowners policies also

issued by NGM. [Pltf. App. p. 10] The Progressive policy is not listed as providing underlying coverage. "**Primary insurance**" is defined as:

> "any policy providing the **insured** with the initial liability insurance *as listed* in the Declarations **Primary Insurance**." [emphasis added]

[Pltf. App. p. 14]

"Retained limit" is defined as:

> "the amount shown in the Declarations which, in the absence of underlying insurance the **insured** shall retain as self insurance with respect to each **occurrence**."

[Pltf. App. p. 14]

Part II – COVERAGE provides:

> We pay damages on behalf of the **insured** arising out of an **occurrence**, *subject to the exclusions* and limit of liability.

[Pltf. App. p. 14]

Part III – EXCLUSIONS provides in pertinent part:

> We do not cover:
> .
> .
> .
> 16. **Personal injury** or **property damage** resulting from the ownership, maintenance, use, loading or unloading of any **motorcycle** owned by or regularly used by an **insured**.

[Pltf. App. p. 15]

The umbrella policy does not contain provisions specifically applicable to uninsured motorist benefits.

E. The Insurance Source, Inc.

The Moshers alleged that in 2003 they contacted The Insurance Source, Inc. for the purpose of purchasing motor vehicle insurance to cover their automobiles and motorcycles, as well as homeowners' insurance. In support of their Motion for Summary Judgment, they submitted the Affidavit of Leroy Mosher which stated only that: 1) Leroy and Sally were personal friends of Cheryl Belair ("Belair") and Glenn Barcome ("Barcome"), principals of The Insurance Source, Inc. since 1997 [Pltf. App. p. 44]; 2) in May of 2003 they transferred all of their personal insurance to The Insurance Source, Inc. because of their acquaintance with Belair and Barcome [Pltf. App. p. 44]; 3) Belair and Barcome recommended that they purchase umbrella insurance [Pltf. App. p. 44]; and 4) they never had any discussions with anyone at The Insurance Source, Inc. about rejecting insurance coverage and did not knowingly reject uninsured motorist coverage [Pltf. App. p. 45]. Significantly, the Moshers did not state under oath that they ever requested or were promised that the umbrella policy issued by NGM would afford uninsured motorist coverage for their motorcycles. In fact, NGM does not even write umbrella policies for motorcycles. [Pltf. App. p. 109]

The Insurance Source, Inc. is an "independently owned and operated agency" established to sell insurance. [Pltf. App. p. 109-112] As an independent agent, The Insurance Source, Inc. has the ability to "do business with as many different insurance companies as they either want or have contracts with." [Pltf. App. p. 109] The Agency Agreement between NGM and The Insurance Source, Inc. clearly states that The Insurance Source, Inc. "is an independent contractor, not an employee of [NGM]." [Pltf. App. p. 109] The Agency Agreement establishes the independent nature of the agency's

relationship with the insurer by providing that the agent is authorized to "[e]xercise his authority personally or through his authorized employees", "[r]epresent other companies", and "[e]xercise exclusive and independent control of his time and the conduct of his agency." [Pltf. App. p. 109-110]. Both the insurer and the agent are required to abide by the terms of the Agency Agreement, however, NGM does not control the agent. [Pltf. App. p. 110]

The Insurance Source, Inc.'s website lists several (sixteen) insurance companies, one of them NGM. [Pltf. App. p. 110] The Insurance Source, Inc. emphasizes its independence from the insurance companies and promotes itself as an agent working on behalf of its customers, stating on its website: "Independent Agents Work for YOU!"; an independent agent "unlike other agents, is not beholden to any one company"; "Is *your* consultant, working with *you* as you determine your needs"; "Is a value under who looks after *your* pocketbook in finding the best combination of price, coverage and service"; and "serving *you* is your independent agent's most important concern." [Pltf. App. p. 110-111] In the same website, The Insurance Source, Inc. advertises itself as an "independent agent" and explains that "unlike captive agents, independent agents and brokers can offer products from many insurance companies. This helps them better serve your interests, as they can review multiple options to find a policy and rate that's right for you." [Pltf. App. p. 111] Thus, The Insurance Source, Inc. was free to recommend to the Moshers an umbrella policy issued by any insurer, including Progressive, and had no obligation to solicit coverage through NGM.

The Moshers originally applied for umbrella coverage with National Grange on May 8, 2003. [Pltf. App. p. 185-86] Their application for umbrella coverage

was submitted to NGM through The Insurance Source, Inc. [Pltf. App. p. 108] The Moshers' application for umbrella coverage was generated by The Insurance Source. [Pltf. App. p. 108] The only vehicles listed on the Personal Umbrella Application are a 1999 GMC Yukon and 2002 V.W. Passat. [Pltf. App. p. 185] The application did not indicate that the Moshers owned motorcycles. [Pltf. App. p. 185] The Moshers, on their application, stated that they had no other automobile insurance other than that procured through NGM. [Pltf. App. p. 185]

On January 12, 2003, Cheryl Belair ("Belair")[1] of The Insurance Source wrote to the Moshers to provide them with insurance quotes which are listed separately as "bikes", "home" and "autos." [Pltf. App. p. 178-79] In that letter, Belair recommended that the Moshers obtain a personal umbrella policy in order to give them additional liability coverage over their home and auto policies:

> "I would highly suggest you consider increasing some of your coverage limits, as well as possibly writing a personal umbrella policy, which would provide an additional $1,000,000 of liability coverage over and above your *home* and *auto* coverages and would have an annual premium of approximately $220.00. [emphasis added]

[Pltf. App. p. 179] During her deposition on June 23, 2009, Belair testified that The Insurance Source had given the Moshers different quotes for their home, autos and motorcycles (or "bikes" as they referred to them at the time). [Pltf. App. p. 146] She stated that the letter she sent to the Moshers "clearly states that [the umbrella] is covering over the homeowner and the automobile liability, and…it does not say it's covering over the motorcycles." [Pltf. App. p. 146]

During her deposition, Belair testified that she knew at the time she wrote

[1] The correspondence was sent under Belair's married name, Barcome.

the original policy for the Moshers in 2003 that the umbrella policy did not cover motorcycles and that "[the Moshers] were informed at the time [The Insurance Source] wrote the original policy." [Pltf. App. p. 145; 175-76] She also stated that when the Moshers signed their application, her "normal spiel would have included the …discussing the umbrella and the lack of umbrella coverage over the motorcycles again." [Pltf. App. p. 148]

On July 12, 2003, Belair wrote to the Moshers and enclosed their new Homeowners and Personal Umbrella policies. [Pltf. App. p. 181] In that letter Belair advised the Moshers to "take time to examine them carefully to make sure the limits of coverage meet your needs and that no items have been omitted." [Pltf. App. p. 181] She also asked the Moshers to call for an explanation if there were any portions of the policy that they did not understand. [Pltf. App. p. 181]

Belair testified that in January of 2007 she obtained a quote from Peerless Insurance Company for an umbrella policy that would have provided umbrella coverage for the Moshers' motorcycles. [Pltf. App. p. 148-51] On January 18, 2007, Belair spoke with Sally Mosher and explained to her that the Peerless policy would provide them with the umbrella coverage over their motorcycle policies that the NGM policy did not provide, however, the Peerless policy would not give them guaranteed replacement cost on their home. [Pltf. App. p. 149-51, 155] Sally Mosher rejected the proposal, informing Belair that they did not want to make a change at that time and preferred to leave things as they were. [Pltf. App. p. 151] Belair documented her conversation with Sally Mosher in the following handwritten notation on the Personal Insurance Proposal for coverage with Peerless Insurance Company that she had prepared for the Moshers:

> "Talked to Sally about updating coverages and moving to PIC –
> Explained good program – can cover over cycle w/umbrella
> No G.R.C. on home – wants to stay w/NGM for now. CB"

[Def. App. p. 85] The January 17, 2007 Proposal for the Peerless Umbrella policy specifically listed "2 Motorcycles Listed for Road Use" under "Additional Rating Information and Premiums." [Def. App. p. 86] Based both on her note and her own recollection, Barcome described her conversation with Sally Mosher as her "normal umbrella conversation" during which she told Sally that their NGM "umbrella policy does not cover over your motorcycle liability. The Peerless umbrella will give you that coverage." [Pltf. App. p. 155] She continued to testify that this statement:

> was followed up with a but, you won't get guaranteed replacement cost on your home if we move this. So it…there was a… these two quotes that…the coverage with National Grange and the quote with Peerless were not exactly apples to apples. The point that I was making with them is you'd have umbrella coverage over the motorcycle liability, but you won't have guaranteed replacement cost on your homeowner's because Peerless won't give that to you.

[Pltf. App. p. 155]

Therefore, at the time of the April 18, 2008 motorcycle accident, the Moshers were aware that the National Grange umbrella policy did not provide coverage for their motorcycles and had consciously rejected a proposal from The Insurance Source to obtain a policy from a different insurer – Peerless Insurance Company - that would have provided them with such coverage.

SUMMARY OF ARGUMENT

This Court should uphold the trial court's decision granting summary judgment in favor of NGM because the undisputed facts established that the Moshers were told by The Insurance Source, Inc. prior to the accident that the umbrella policy gave them coverage only over their "home" and "autos", they did not have uninsured motorist coverage for their motorcycles under the umbrella policy, and that they could obtain such coverage if they transferred their umbrella coverage to Peerless but they declined to do so. The Moshers failed to present evidence of specific facts showing the existence of a genuine issue for trial as is required of a party opposing a motion for summary judgment.

The trial court also correctly ruled as a matter of law that the umbrella policy did not afford any coverage for the motorcycles. Both the liability provisions of the umbrella policy and the underlying MSA automobile policy clearly and unambiguously excluded motorcycles from coverage. The umbrella policy clearly provided coverage only over those policies listed as primary policies in the Declarations.

This Court should also affirm the trial court's ruling that RSA 264:15, I does not require NGM to provide uninsured motorist coverage under the umbrella policy because the liability provisions contained a clear and unambiguous exclusion for motorcycles. RSA 264:15, I requires only that uninsured motorist coverage be provided in the same amount as liability coverage.

The trial court's decision to accept NGM's Motion for Summary Judgment did not result in any prejudice to the Moshers and was well within its discretionary authority.

Finally, there is no basis for the Moshers' "enhanced duty" argument due to both the absence of a "special relationship" and lack of justifiable reliance.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF NGM WHERE THE UNDISPUTED FACTS ESTABLISHED THAT THE MOSHERS WERE TOLD BY THE INSURANCE SOURCE, INC. THAT THEY DID NOT HAVE UNINSURED MOTORIST COVERAGE FOR THEIR MOTORCYCLES UNDER THE NGM UMBRELLA POLICY

A. Summary Judgment Standard of Review

When reviewing a trial court's grant of summary judgment, this Court will consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the nonmoving party. Town of Peterborough v. McDowell Colony, Inc., 157 N.H. 1, 5, 943 A.2d 768 (2008). If the Court's review of the evidence does not reveal a genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, the Court will affirm the trial court's decision. Id. The trial court's application of the law to the facts is to be reviewed *de novo*. Id.

B. The Undisputed Facts Established That The Insurance Source, Inc. Advised The Moshers That The NGM Umbrella Policy Did Not Provide Coverage For Their Motorcycles

1. The Trial Court Found That The Insurance Source Advised The Moshers That The Umbrella Policy Did Not Apply To Their Motorcycles

On September 14, 2009, the trial court granted NGM's Motion for Summary Judgment, ruling that the Moshers failed to present sufficient facts to enable their estoppel claim to survive the motion for summary judgment. [Pltf. App. p. 227-37] The court's decision was based on the critical uncontroverted fact that the Moshers were told in 2003, or, at the very latest in 2007, over one year prior to the accident, that the umbrella policy did not provide coverage for their motorcycles. The Court found that

even if it assumed that The Insurance Source acted as NGM's agent, the undisputed facts established that the Moshers could not reasonably believe that their motorcycles were covered by the umbrella policy. The court noted that "*the Moshers have not submitted evidence to indicate that The Insurance Source made assurances regarding umbrella coverage for the motorcycles.*" [emphasis added] [Pltf. App. p. 235] It found that "the evidence shows that Ms. Belair also informed the Moshers, either in 2003 when she was writing the policy or in 2007 when she suggested the Moshers switch from NGM to Peerless, that their motorcycles were not covered by the umbrella policy. *The Moshers submitted no verified evidence to dispute these facts.*" [emphasis added] [Pltf. App. p. 235-36] The court concluded that "the undisputed facts do not suggest that the Moshers' prior dealings with The Insurance Source led the Moshers to form a reasonable belief, which they held at the time of Mr. Mosher's accident, that the umbrella policy provided them with coverage for their motorcycles." [Pltf. App. p. 236] Rather, the court found that "the undisputed evidence shows that before the Moshers filed their claim with NGM, Ms. Belair had informed them that their motorcycles were not covered by the umbrella policy." [Pltf. App. p. 236]

2. The Moshers Failed To Present Evidence Of Specific Facts Showing The Existence Of A Genuine Issue For Trial

It is well-established that the party opposing a motion for summary judgment must support its objection by submitting "one or more affidavits or refer specifically to affidavits, pleadings, depositions, answers to interrogatories or admissions on file which establish the existence of a disputed issue of material fact." Omiya v. Castor, 130 N.H. 234, 237, 536 A.2d 194 (1987). The evidence submitted by the opposing party "must do more than give notice of his objection to the motion or dispute the facts set forth in the

moving party's affidavit." Id. Rather, the opposing party must produce evidence of "specific facts showing the existence of a genuine issue for trial." Id. at 237, *quoting* Arsenault v. Willis, 117 N.H. 980, 983, 380 A.2d 264 (1977). "Mere denials or vague and general allegations of expected proof are not enough." Id.

As preliminary matter, the Moshers' implication that they did not respond to the evidence submitted by NGM regarding the conversation between Sally Mosher and Belair in 2007, as supported by Belair's sworn deposition testimony and documented by Belair's handwritten notation on the Personal Insurance Proposal for coverage with Peerless Insurance Company that she had prepared for the Moshers, because the information was not contained within NGM's original motion is disingenuous. The information was not disclosed to NGM until the Moshers filed their Objection to Motion for Summary Judgment, to which they attached the deposition of Cheryl Belair taken in the course of discovery in their case against The Insurance Source – a case in which NGM was not a party and its counsel was not invited to attend depositions. As a result, NGM filed a Reply to Objection to Motion for Summary Judgment referencing Belair's testimony. NGM's Reply was filed on July 31, 2009. The trial court did not issue its decision until September 14, 2009 – nearly two months after NGM filed its Reply. During these two months the Moshers were silent and offered no additional affidavits, deposition testimony, or other evidence to counter the evidence submitted by NGM. Nor did the Moshers seek reconsideration of the trial court's order. If the Moshers had verifiable information to contradict the facts proffered by NGM, they should have presented them to the trial court for its consideration. No such evidence was presented, and this Court is bound to base its decision on the record below.

3. The Trial Court's Decision Was Amply Supported By The Record

The sole affidavit submitted by the plaintiffs – that of Leroy Mosher – did not establish that The Insurance Source, Inc. was negligent. Leroy stated only that the principals of The Insurance Source, Inc. were personal friends of theirs, and that they recommended that the Moshers obtain umbrella coverage. [Pltf. App. p. 44-45] The Moshers did not submit a sworn statement to the effect that they specifically requested umbrella coverage for their motorcycles, or that the principals of The Insurance Source, Inc. did or said anything to lead them to believe that umbrella coverage would be provided for the motorcycles under the NGM policy. *See*, Godbout v. Lloyd's Insurance Syndicates, 150 N.H. 103, 834 A.2d 360 (2003) (rejecting argument that insurer was estopped from denying coverage where plaintiff failed to establish that the insured requested or the insurance agent promised, unlimited insurance coverage that exceeded the scope of his flying certificate, and ruling that unambiguous policy exclusion barred coverage even though insured never received copy of policy). An insured's broad or general request for insurance coverage, such as a request for "full coverage" or "the best policy" "does not place an insurance agent under a duty to determine the insured's full insurance needs, to advise the insured about coverage, or to use his discretion or expertise to determine what coverage the insured should purchase." DeWyngaerdt v. Bean Insurance Agency, 151 N.H. 406, 408, 855 A.2d 1267 (2004) (insurance agent owed no duty to inform or advise the insured of policy exclusion despite the insured's request for "full coverage" and the agent's knowledge concerning the basic operations of the business). Rather, the insured "must make a *specific* request for a particular type of insurance coverage in order to impose a duty upon an agent to procure that particular type

of coverage or to inform the insured that such coverage is excluded." Id. at 409. *Compare*, Trefethen v. New Hampshire Ins. Group, 138 N.H. 710, 715, 645 A.2d 72 (1994) (an enforceable expectation of liquor liability coverage arose from the insureds' specific request for coverage on every saleable item coupled with the agent's knowledge that beer was one of those items and agent's statement that he would "put it on that day").

The Moshers' claims were premised almost entirely on unsupported allegations rather than the sworn statements and documentation required in opposition to a summary judgment motion. The Moshers simply failed to set forth a sufficient basis for establishing liability on the part of The Insurance Source, Inc.

Thus, the trial court had before it the following uncontroverted evidence presented by NGM through the sworn deposition testimony of Belair as well as documents produced by The Insurance Source in response to the Moshers' discovery requests. Belair's uncontested testimony was clear. She told the Moshers in 2003 that the umbrella policy provided coverage for their home and autos only, and in 2007 she proposed that the Moshers' transfer their umbrella coverage from NGM to Peerless so that they could have umbrella coverage for their motorcycles, also advising them that the downside to doing so was the loss of guaranteed replacement cost coverage for their home. [Pltf. App. p. 145] The proposal was rejected by Sally Mosher.[2]

[2] It was not, as the Moshers suggest, necessary for The Insurance Source to have consulted with Leroy after being told by Sally that they did not want to change their coverage. In fact, under RSA 264:15, I, "[r]ejection of [uninsured motorist] coverage by *a* named insured shall constitute a rejection of coverage by all insureds," RSA 264:15, I. Nor is a written rejection of coverage by the insured required under the circumstances of this case. RSA 264:15, I requires a written rejection of uninsured motorist coverage when corresponding liability coverage is provided and the automatic coverage provisions of the statute would be applicable. Here, the policy clearly and unambiguously excludes liability coverage for damages arising from the use of a motorcycle. Since there is no liability coverage for the motorcycles, there was no statutory entitlement to uninsured motorist coverage and, therefore, no need to obtain a written rejection.

Therefore, at the time of the April 18, 2008 motorcycle accident, the Moshers were well aware that the NGM umbrella policy did not provide coverage for their motorcycles and had consciously rejected a proposal from The Insurance Source to obtain a policy from a different insurer – Peerless Insurance Company - that would have provided them with such coverage. In light of this, it is simply not credible for the Moshers to claim that The Insurance Source was negligent in failing to recommend or procure an umbrella policy that would have provided them with umbrella coverage while using their motorcycles. Since there was no basis for imposing liability on The Insurance Source, the Moshers' estoppel claim was properly disposed of by the trial court.

II. THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN RULING THAT THE UMBRELLA POLICY ISSUED BY NGM DID NOT PROVIDE UNINSURED MOTORIST COVERAGE FOR INJURIES SUSTAINED BY LEROY MOSHER WHILE OPERATING A MOTORCYCLE OWNED BY HIM, NOT COVERED BY THE UNDERLYING POLICIES AND SUBJECT TO A CLEAR AND UNAMBIGUOUS MOTORCYCLE EXCLUSION

A. Standard of Review – Interpretation of Insurance Policy

Interpretation of the language in an insurance policy is a question of law. Peerless Ins. v. Vermont Mut. Ins. Co., 151 N.H. 71, 72, 849 A.2d 100 (2004). The court will construe the language of an insurance policy "as would a reasonable person in the position of the insured based on a more than casual reading of the policy as a whole." Miller v. Amica Mut. Ins. Co., 156 N.H. 117, 119, 931 A.2d 1180 (2007). Where the terms of the policy are clear and unambiguous, the court should "accord the language its natural and ordinary meaning." *Id.* It is only if the policy is reasonably susceptible to more than one interpretation and one interpretation favors coverage, that the policy will be construed in favor of the insured and against the insurer. Id. at 120.

It is well settled that absent statutory provisions or public policy to the contrary, insurers have a right to limit their liability by exclusions written in terms that convey their meaning and effect to a reasonable person in the position of the insured. Trombley v. Liberty Mut. Ins. Co., 148 N.H. 748, 751, 813 A.2d 1202 (2002). This rule applies to uninsured motorist coverage as well as liability coverage. Harrington v. Concord General Mutual Ins. Co., 152 N.H. 26, 28, 871 A.2d 54 (2005) (applying policy exclusion to deny underinsured motorist benefits to insured who settled claim against employer of tortfeasor without first obtaining insurer's consent). For exclusionary language to be considered clear and unambiguous, two parties cannot *reasonably* disagree about its meaning. Id.

B. The NGM Umbrella Policy Clearly And Unambiguously Excludes Coverage For Injury Resulting From The Use Or Ownership Of Any Motorcycles Owned By The Insured And Not Insured Under The NGM Policy

The NGM umbrella policy clearly and unambiguously excludes coverage for personal injury or property damage resulting from the use of a motorcycle owned or regularly used by the insured. [Pltf. App. p. 15] The primary policy issued by MSA and listed in the policy declarations also clearly and unambiguously excludes liability coverage for any vehicle with "fewer than four wheels." [Def. App. p. 20] That policy also clearly excludes uninsured motorist coverage for injury sustained by "an 'insured' while 'occupying', or when struck by, any motor vehicle owned by that 'insured' which is not insured for this coverage under this policy." [Def. App. p. 25] Thus, the underlying, primary policy does not provide uninsured motorist coverage for Mosher while using a motorcycle which he owned and which he did not insure under the MSA policy.

While the umbrella policy does not contain uninsured motorist provisions, it does repeatedly reference the "primary" or underlying policy as the source of coverage – with the MSA Personal Auto Policy as the only "primary" auto policy listed. Additionally, Part II – COVERAGE of the umbrella policy states that NGM's obligation to pay is "subject to the exclusions and limit of liability" as described in the policy. [Pltf. App. p. 14] Part IV – LIMITS OF LIABILITY provisions also describe coverage in terms of the "primary" policy. [Pltf. App. p. 16] Therefore, in determining the scope of coverage afforded under the umbrella policy, it is appropriate to consider the coverage limitations set forth in the primary policy.

New Hampshire law does not preclude an insurer from excluding coverage for injury resulting from the use of a motorcycle, particularly where, as here, the motorcycle is owned by the insured and not listed as an insured vehicle on the policy.[3] It is well established that an insurer is not required to provide uninsured motorist coverage to an insured who is injured while occupying a vehicle which is owned by the insured but which is not listed as an insured vehicle under the policy. Beliveau v. Norfolk & Dedham Mut. Fire Ins. Co., 120 N.H. 73, 411 A.2d 1101 (1980) (upholding household exclusion which provided that coverage did not apply to injury to an insured while occupying a vehicle owned by the insured or a relative resident in the same household). This Court has explained that the requirements of the Financial Responsibility Act are not without limit:

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[3] Under RSA 264:15, I, an insurer cannot exclude uninsured motorist coverage for an insured injured when *struck by* an uninsured motorcycle *while operating an insured motor vehicle. See,* Hartford Accident & Indemnity Co. v. Come, 100 N.H. 177, 181, 123 A.2d 267 (1956) (statutory definition of "motor vehicle" encompasses motorcycles); Chakalos v. Phoenix Ins. Co., 110 N.H. 321, 267 A.2d 573 (1970) (insurer was required by statute to furnish uninsured motorist coverage against injury to passenger on uninsured motorcycle owned by operator).

> The plaintiff essentially asks us to find that the statute mandates coverage for the named insured whenever and wherever he is injured by an uninsured motorist. No evidence exists that the legislature intended the statute to sweep so broadly. Nothing in the statute requires uninsured motorist coverage for persons not occupying the vehicle described in the policy when injured. Where the legislature has desired to require coverage for specific classes of individuals, it has done so explicitly. *Beliveau*, 120 N.H. at 76, 411 A.2d at 1103; it has not seen fit to require that uninsured motorist coverage run to the person insured in any and all circumstances. Rather, the requirement that all automobile liability policies include uninsured motorist coverage assures that such coverage runs at a minimum *to the vehicle insured. See, id.* ("uninsured motorist coverage is vehicle related"). We are unable to discern a legislative purpose to require more. [emphasis added]

Turner v. St. Paul Property & Liability Ins. Co., 141 N.H. 27, 30, 676 A.2d 109 (1996) (RSA 264:15, I does not require insurer to provide uninsured motorist coverage to insured who was killed in a collision with motorcycle while riding a lawn mower, since he was not occupying the vehicle described in the policy at the time of the accident). *See, also,* Miller v. Amica Mut. Ins. Co., 156 N.H. at 124 ("nothing in New Hampshire law requires uninsured motorist coverage for persons not 'occupying' a vehicle listed in the policy").

The underlying or "primary" personal auto policy issued by MSA excludes uninsured motorist coverage for "bodily injury" sustained by an "insured" while "occupying" any motor vehicle owned by that "insured" which is not insured under the policy. [Def. App. p. 25] This language, specifically the "under this policy" phrase, clearly excludes uninsured motorist coverage to the insured while occupying a vehicle owned by the insured and not listed as an insured vehicle under the policy. *Compare*, Limoges v. Horace Mann Ins. Co., 134 N.H. 474, 477, 596 A.2d 125 (1991) (insurer may eliminate ambiguity in household exclusion by inserting limiting language such as

"insured automobile under this policy"). Furthermore, the umbrella policy clearly and unambiguously excludes coverage for personal injury "resulting from the ownership, maintenance, use, loading or unloading of any motorcycle owned by or regularly used by an insured." [Pltf. App. p. 15] As explained more fully below, New Hampshire law does not require the insurer to provide uninsured motorist coverage that is broader than, or even as broad as, the liability coverage afforded under the policy – in fact, all that the law requires is that the *amount or limits* of the coverage be the same, not the *scope* of coverage.

III. THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN RULING THAT RSA 264:15, I DOES NOT REQUIRE NGM TO PROVIDE UNINSURED MOTORIST COVERAGE TO AN INSURED WHILE OCCUPYING A VEHICLE WHICH IS EXCLUDED FROM LIABILITY COVERAGE UNDER THE NGM UMBRELLA POLICY AND INSURED UNDER A POLICY NOT LISTED AS A PRIMARY POLICY ON THE UMBRELLA POLICY

RSA 264:15, I requires that policies providing liability coverage also provide uninsured motorist coverage "equal to the liability coverage elected." RSA 264:15, I. The statute also provides that "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 witing." RSA 264:15, I.

This Court has interpreted RSA 264:15, I as requiring "only that uninsured motorist coverage be provided to policy holders in the same *amount* as liability coverage." Harrington v. Concord General Mutual Ins. Co., 152 N.H. at 28. The statute is intended "to allow policy holders to protect themselves against injury from an uninsured motorist to the same extent that they protect themselves against liability." Id.

See, also, Wyatt v. Maryland Cas. Co., 144 N.H. 234, 239, 738 A.2d 949 (1999) ("The statute merely requires that where an insured chooses to purchase liability coverage greater than the statutory minimum, underinsured motorist coverage shall be equal to that amount"); Trombley v. Liberty Mut. Ins. Co., 148 N.H. at 752 (RSA 264 requires that a policy providing general liability coverage to an insured also provide uninsured motorist coverage to that insured with the same monetary limits, although not necessarily the same scope); Swain v. Employers Mut. Cas. Co., 150 N.H. 574, 578, 845 A.2d 1239 (2004) (policy that provided uninsured motorist coverage in an *amount* equal to the liability coverage complied with RSA 264:15, I even though liability coverage applied to "non-owned autos" while uninsured motorist coverage applied only to "owned autos"). "This [C]ourt is not at liberty…to find uninsured motorist coverage when it is not demanded by the statute or to read into the statute a prohibition of an exclusion which is neither express nor implied." Charest v. Union Mut. Ins. Co., 113 N.H. 683, 686 (1973).

The umbrella policy's motorcycle exclusion is clear. The only statutory requirement is the provision of uninsured motorist coverage in the same amount as the liability coverage purchased under the umbrella policy. Since liability coverage was not even purchased for motorcycles, uninsured motorist coverage for motorcycles is not required under RSA 264:15, I. Although the umbrella policy does not describe uninsured motorist coverage, it should not be construed as providing coverage for uninsured motorists *broader* than the liability coverage. *See,* Wegner v. Prudential Property & Casualty Ins. Co., 148 N.H. 107 (2002) (where a valid policy exclusion in an automobile insurance policy bars liability coverage in a particular situation, RSA does not mandate uninsured motorist coverage for the same injury).

RSA 264:15, I does not require NGM to provide excess limits to all policies issued to the Moshers, including the Progressive policy, even though that policy is not listed in the schedule of primary insurance. The umbrella policy itself defines "primary insurance" as any policy providing the insured with the initial liability insurance *as listed* in the Declarations Primary Insurance." [Pltf. App. p. 14] The Progressive policy is not listed in the Declarations as primary insurance. The only auto policy listed in the Declarations as "primary insurance" is the NGM policy which does not provide coverage for the motorcycle. Where an umbrella policy defines primary or underlying insurance as policies of insurance listed in the schedule or declarations, the umbrella policy does not provide excess coverage over coverage provided under policies that are not listed. *See, e.g.* Cincinnati Ins. Co. v. CPS Holdings, Inc., 115 Ohio St.3d 306, 875 N.E.2d 31 (2007) (where umbrella policy defined "underlying insurance" as "the policies of insurance listed in the Schedule", insured's E&O policy, which was not listed, did not constitute underlying insurance and umbrella policy provided no coverage); American Resources Ins. Co. v. H&H Stephens Construction, Inc., 939 So.2d 868 (Ala. 2006) (insured's umbrella policy which contained endorsement excluding coverage for injury arising out of the use of any auto except to the extent coverage is provided in "underlying insurance", defined "underlying insurance" as "the coverage(s) afforded under insurance policies designated in Item 7 of the Declarations", and listed three policies but did not list policy covering the vehicle operated by the insured's employee at the time of his accident, did not provide excess liability coverage for injuries caused by employee); North Star Mutual Ins. Co. v. Rasmussen, 734 N.W.2d 352 (S.D. 2007) (umbrella policy which contained an exclusion for watercraft unless the watercraft was covered by

"underlying insurance", described as insurance policies shown in the Declarations, was not required to provide excess coverage for boating accident where the policy covering the insured's boat was not listed in the umbrella policy Declarations); Evins v. Louisiana Farm Bureau Mut. Ins. Co., 907 So.2d 733 (La.App. 1 Cir. 2005) (where umbrella policy provided that it applied only to damages sustained in excess of the policies listed on the schedule of underlying insurance, no coverage was available for accident involving vehicle that was insured under a policy not listed in the schedule).

IV. THE TRIAL COURT DID NOT COMMIT AN UNSUSTAINABLE EXERCISE OF DISCRETION WHEN IT ACCEPTED NGM'S MOTION FOR SUMMARY JUDGMENT ONE MONTH BEYOND THE DISPOSITIVE MOTION DEADLINE SET FORTH IN THE STRUCTURING CONFERENCE ORDER

A. Standard of Review

The Preface to the superior court rules authorizes the trial court to waive the application of any rule "[a]s good cause appears and as justice may require." Super. Ct. R. Preface. Contrary to the Moshers' assertion, NGM was not required to prove the existence of "accident, mistake or misfortune," the former standard which was broadened effective January 1, 2000 through adoption of the current Preface. Donnelly v. Eastman, 149 N.H. 631, 633, 826 A.2d 586 (2003). [Brief of Plaintiffs/Appellants, p. 22] The trial court's decision to waive the application of a superior court rule will be upheld absent a showing that the trial court unsustainably exercised its discretion. Gulf Ins. Co. v. AMSCO, Inc., 153 N.H. 28, 33, 889 A.2d 1040 (2005). To show an unsustainable exercise of discretion, the Moshers must demonstrate that the court's decision "was clearly untenable or unreasonable to the prejudice of [their] case." Zola v. Kelley, 149 N.H. 648, 652, 826 A.2d 589 (2003). If there is some support in the record for the trial court's decision, it should be upheld. In re Martel, 157 N.H. 53, 63, 944 A.2d 575

(2008).

B. The Trial Court's Decision To Accept NGM's Motion For Summary Judgment Was Not An Unsustainable Exercise Of Discretion

This Court has frequently upheld the principle that the interest of reaching a fair and just result takes precedence over procedural technicalities. *See, e.g.*, Porter v. City of Manchester, 151 N.H. 30, 54, 849 A.2d 103 (2004) (although noting that it was troubled by plaintiff's apparent failure to disclose its expert in a timely fashion, concluding that the trial court did not commit an unsustainable exercise of discretion when it denied the defendant's motion *in limine* and permitted the expert to testify at trial); Whittaker v. L. A. Drew, 149 N.H. 55, 58, 816 A.2d 984 (2003) (given the court's emphasis on justice over procedural technicalities, the plaintiff's failure to meet the trial court deadline for disclosure of experts should not have resulted in the exclusion of plaintiff's expert and the resulting dismissal of his case); Keshishian v. CMC Radiologists, 142 N.H. 168, 181, 698 A.2d 1228 (1997) (the trial court is vested with the discretion to waive the time limit for filing motions to dismiss based on the statute of limitations, and that decision will not be overturned on appeal if there were grounds to find good cause to waive it, and plaintiff failed to show that the court's decision constituted an abuse of discretion).

In this case, the trial court acted entirely within its discretion when it accepted NGM's Motion for Summary Judgment three months prior to the scheduled trial date despite the fact that the scheduling conference order established a filing deadline of four months before trial. The court was well aware that the parties and counsel on both sides were diligent in their efforts to obtain a judicial resolution by way of dispositive motion, thereby avoiding the time and expense of potentially lengthy trial. The fact that the parties did not receive a ruling on the Moshers' November 11, 2008 Motion for Summary

Judgment until March 11, 2009 – a period of four months – was a significant factor in the timing of the filing of subsequent dispositive motions because it was not until then that the issues were narrowed. Furthermore, discovery in this case was ongoing, with depositions of representatives of NGM being taken as late as May of 2009, and additional crucial information obtained through discovery in the separate action brought by the Moshers against The Insurance Source which was not disclosed to NGM until July of 2009.

Furthermore, although the court did not specifically address the issue, NGM's filing of its Motion for Summary Judgment in June of 2009 did not result in any prejudice to the Moshers whatsoever. There was no delay in the scheduled trial – in fact the court's ruling on the motion eliminated the need for a trial that would have required them to incur substantial legal costs and fees only to learn that they were not entitled to coverage under the umbrella policy.

V. THE MOSHERS ARE NOT ENTITLED TO UNINSURED MOTORIST COVERAGE UNDER THE UMBRELLA POLICY, REGARDLESS OF THE CLEAR AND UNAMBIGUOUS EXCLUSION APPLICABLE TO MOTORCYCLES, BASED ON AN ALLEGED ENHANCED DUTY OF CARE OWED BY THE INSURANCE SOURCE, INC.

A. The Moshers Did Not Establish The Existence Of A "Special Relationship" Sufficient To Impose "An Enhanced Duty Of Care" On The Insurance Source, Inc.

"[A]n insurance agent owes clients a duty of reasonable care and diligence, but absent a special relationship, that duty does not include an affirmative, continuing obligation to inform or advise an insured regarding the availability or sufficiency of insurance coverage." Sintros v. Hamon, 148 N.H. 478, 480, 810 A.2d 553 (2002) (agent who had been providing automobile insurance to insured over a period of seven years did

not have a "special relationship" and, therefore, did not have a duty to advise the insured regarding the adequacy of coverage). This Court has emphasized that "[i]mposing liability on insurance agents for failing to advise insureds regarding the sufficiency of their insurance coverage 'would remove any burden from the insured to take care of his or her own financial needs and expectations" and enable insureds to retroactively "insure after the loss by merely asserting they would have bought the additional coverage had it been offered." Id. at 481, *quoting* Nelson v. Davidson, 155 Wis.2d 674, 456 N.W.2d 343, 346 (1990).

In order to demonstrate a "special relationship", the insured must establish that "there exists something more than the standard insurer-insured relationship." Id. at 481. A "special relationship" may exist where there is an "express agreement, a long established relationship of entrustment in which the agent clearly appreciates the duty of giving advice, additional compensation apart from premium payments, and the agent holding out as a highly-skilled expert coupled with reliance by the insured." Id. at 482.

The only evidence of anything more than simply a typical insurer-insured relationship was provided by way of Leroy's affidavit in which he stated that he and Sally were personal friends of Barcome and Belair, played tennis together and have known them since 1997. [Pltf. App. p. 44-45] They did not submit any evidence to establish that The Insurance Source did anything *as an insurance agency* to create anything more than a typical relationship giving rise only to an ordinary duty to exercise reasonable care. The Moshers have not submitted any authority whatsoever for the position that a personal friendship or tennis partnership is sufficient to impose an enhanced duty of care on an insurance agent.

B. Regardless Of The Existence Or Absence Of A "Special Relationship" The Moshers Can Not Establish Justifiable Reliance

Significantly, this Court has held that not only must the insured establish the existence of a special relationship, but he must also prove "that he or she justifiably relied upon that relationship." Sintros v. Hamon, 148 N.H. at 482. The Moshers did not establish justifiable reliance under the circumstances of this case for the following reasons: 1) the plain language of the umbrella policy clearly and unambiguously excludes coverage for motorcycles; 2) The Insurance Source in fact recommended to the Moshers that they purchase uninsured motorist coverage as well as umbrella coverage; 3) Belair told the Moshers in 2003 when they applied for the umbrella policy that it provided excess coverage only for their home and autos; 4) in January of 2007 Belair specifically offered the Moshers a Peerless policy that would have provided them with uninsured motorist coverage for their motorcycles, but the Moshers rejected the offer.

Simply stated, having had an unanticipated motorcycle accident and facing significant financial consequences as a result of their own failure to procure and pay for the coverage they elected not to purchase, the Moshers cannot retroactively insure themselves at the expense of NGM. NGM has made a deliberate and lawful business decision not to insure motorcycles, the use of which involves a substantial risk of serious injury, and its policy exclusions are clear and unambiguous. If umbrella coverage for the motorcycles was important to the Moshers, they could have specifically asked for it in their dealings with their agent or chosen to change coverage from NGM to Peerless. For these and all of the foregoing reasons, this Court should uphold the decision of the trial court.

REQUEST FOR ORAL ARGUMENT

The Respondent/Appellee, National Grange Mutual Insurance Company, respectfully requests that its attorney, Naomi L. Mooney, Esq., be afforded an opportunity to present a fifteen minute oral argument.

CONCLUSION

For the foregoing reasons, the Respondent/Appellee, National Grange Mutual Insurance Company respectfully requests that this Honorable Court:

A. Affirm the trial court's order granting summary judgment in favor of National Grange Mutual Insurance Company (9/14/09);

B. Affirm the trial court's order granting National Grange Mutual Insurance Company's Motion to Dismiss (5/8/09); and

C. Grant such other and further relief as is just and equitable.

Respectfully submitted,

NATIONAL GRANGE MUTUAL INSURANCE COMPANY

By Its Attorneys,

GETMAN, SCHULTHESS & STEERE, P.A.

Dated: January , 2010

By:_____

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief on Behalf of Respondent/Appellee have been mailed first class to Eric R. Gardner, Esquire, counsel for the Petitioners/Appellants.

Dated: January , 2010

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Naomi L. Mooney, Esq. (NH Bar #10484)