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Case Number 102,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARTHA IRENE GONZALEZ LANKFORD, and UNITED FARM FAMILY INSURANCE COMPANY	:	No.: 102, 2018
Defendants Below, Appellants,	:	Court Below: Superior Court of the State of Delaware
v.	:	
	:	C.A. No.: K16C-12-026 JJC
MARIE SAINT HILAIRE, Individually and as wife and Administratrix of the Estate of Therisson Augustin, and MARCEA AUGUSTIN, and EDNEST AUGUSTIN,	:	
Plaintiffs Below, Appellees.	:	

APPELLANTS' AMENDED OPENING BRIEF

KENT & MCBRIDE, P.C.

By: */s/ David C. Malatesta, Jr.*
David C. Malatesta, Jr., Esq.
Delaware State Bar ID #3755
824 N. Market Street, Suite 805
Wilmington, DE 19801
(302) 777-5477
Attorneys for Appellants

WARD & HERZOG, LLC

By: */s/ Margaret Fonshell Ward*
Margaret Fonshell Ward
Admitted *Pro Hac Vice*
102 W. Pennsylvania Avenue, Suite 401
Baltimore, MD 21204
(410) 296-1573
Attorneys for Appellants

Dated: May 22, 2018

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APPELLANT'S OPENING BRIEF

Appellant United Farm Family Insurance Company ("Farm Family") submits this Opening Brief and appeals the declaratory judgment entered by the Superior Court of the State of Delaware in and for Kent County.

NATURE OF PROCEEDINGS

This case involves the interpretation of an umbrella insurance policy with regard to whether it must respond to pay damages when a specific term of the Policy has not been met by the insured. The Appellees filed a Complaint for Declaratory Judgment and the parties, agreeing that there were no disputes of fact and that the matter was a question of law, submitted the matter on briefs and oral argument to the trial court. The trial court properly considered the matter as cross motions for summary judgment. The court issued a declaration that the umbrella policy issued by Farm Family has an obligation to pay any damages awarded to the Appellees in excess of $250,000. Farm Family asserts here that the trial court's declaration is incorrect as a matter of law.

SUMMARY OF ARGUMENT

1. The umbrella policy requires the insured to maintain collectible primary insurance of no less than $250,000.
2. The umbrella policy requires that $250,000 be actually paid by or on behalf of the insured before the umbrella policy has any obligation to pay damages.
3. The requirements of payment of the mandatory underlying insurance limits of an umbrella policy cannot be met by merely giving a “credit” to the umbrella insurer for the amount of primary insurance not actually maintained or paid.

STATEMENT OF FACTS

On December 30, 2014, Therisson Augustin ("Augustin") was involved in an auto accident with Martha Irene Gonzalez Lankford ("Lankford") in Sussex County. (A8) As a result of the accident, Augustin suffered injuries and subsequently died. (A9) Augustin's widow and children ("the Heirs") made a claim against Lankford for his injuries and death.

At the time of the accident, Lankford's car, which was owned by her husband, was insured by United Farm Family Insurance ("Farm Family") with a policy providing $100,000 per person liability coverage. Lankford and her husband lived with her husband's father, Robert A. Lankford, in Delmar, Maryland. Robert Lankford held an umbrella policy issued by Farm Family that provided $1,000,000 in liability coverage ("the Umbrella Policy"). (A9) That Policy requires that the insured maintain not less than $250,000 in primary insurance and that $250,000 must be paid as damages for any covered loss before Farm Family will be required to indemnify the insured pursuant to the terms of the Umbrella Policy. (A13)

On December 28, 2015, the Heirs entered into a Settlement Agreement and Release whereby they accepted $100,000 from United Farm Family in partial settlement of their claims against Lankford and agreed to release Lankford from all

further personal liability. (A9) No one has paid the additional $150,000 required to be paid for the indemnity obligations of the Umbrella Policy to be triggered.

In exchange for this limited release of liability Martha Lankford and Robert Lankford assigned to the Heirs all rights Lankford may have for insurance benefits available in the Umbrella Policy as a result of the accident of December 30, 2014. (A9) The parties agree that Lankford qualifies as an insured pursuant to the terms of the Umbrella Policy. The parties further agree that Maryland law applies to interpretation and application of the Umbrella Policy. (A10)

ARGUMENT

Question 1

Does the Umbrella Policy require that the insured maintain $250,000 of primary insurance coverage?[1]

Scope of Review

As a pure question of law, the trial court's decision is to be reviewed *de novo. Bay City, Inc. v. Williams*, 2 A.3d 1060, 1061 (Del.Supr. 2010).

Merits of Argument

The trial court based its declaratory judgment on an incorrect foundation by stating early in its Memorandum Opinion:

> The policy defines primary insurance as "any insurance collectible by the INSURED which covers the INSURED'S liability for PERSONAL INJURY or PROPERTY DAMAGE." The definition of primary insurance does not reference the amount of coverage necessary other than to refer to that which is "collectible." *Germanely, this definition of primary insurance, which is used throughout the policy, does not reference a minimum amount of underlying coverage.*

(Opinion, p. 4)(emphasis supplied). (A19) The court overlooked, however, the statement at the head of the Policy's Definitions section that "The following terms have the special meanings described below, and when used in the defined manner, the terms appear in the policy as shown here, in all capitalized letters." (A15)

[1] This issue was preserved in the Superior Court as part of the Oral Argument presented on December 15, 2017 at A49, A59-60, A61, A64-65.

The words PRIMARY INSURANCE in all capital letters appear first on the Declaration Page in the following statements:

> **TO AVOID GAPS IN COVERAGE, YOU MUST MAINTAIN THE MINIMUM LIMITS OF LIABILITY STATED BELOW ON ALL PRIMARY INSURANCE POLICIES WHICH APPLY TO YOU.**
>
> **SCHEDULE OF PRIMARY INSURANCE REQUIREMENTS**

Policy Type	**Bodily Injury Per Person/Per Occurrence**
Personal Auto Liability	$250,000/$500,000 per occurrence. (A13)

Maryland law is clear that the policy must be viewed and interpreted as a whole. *Empire Fire & Marine Insurance Co. v. Liberty Mutual Insurance Co.*, 117 Md. App. 72, 96, 699 A.2d 482, 493 (1997)("To divine properly the parties' intent, the policy is viewed as a whole, without emphasis being placed on particular provisions."); *Conners v. Gov't Employees Ins. Co.*, 442 Md. 466, 480, 113 A.3d 595, 603 (2015)("[W]hen interpreting contracts, the contract must be construed in its entirety and, if reasonably possible, effect must be given to each clause so that a court will not find an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed."); *Philadelphia Indemnity. Insurance Co. v. Maryland Yacht Club, Inc.*, 129 Md. App. 455, 467-68, 742 A.2d 79, 85-86 (1999)("[i]n construing insurance contracts in Maryland we give the words of the contract their ordinary

and accepted meaning, looking to the intention of the parties from the instrument as a whole."). *See, also, Finci v. American Casualty Co.*, 323 Md. 358, 369-70, 593 A.2d 1069 (1991); *Baltimore Gas & Electric Co. v. Commercial Union Ins. Co.*, 113 Md.App. 540, 688 A.2d 496 (1997) ("a contract must be construed as a whole, and effect given to every clause and phrase, so as not to omit an important part of the agreement."); *Baush & Lomb Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 625 A.2d 1021 (1993) ("Insurance policy is not to be construed most strongly against insurer, but rather, as with contracts generally, parties' intention is to be ascertained from policy as a whole"). Consequently, in every place further in the Policy where the term Primary Insurance occurs in all capital letters, this requirement of a minimum amount of underlying coverage of $250,000 is carried through as the primary insurance that the insured must maintain. That minimum amount must also be, by the Policy definition, "collectible by the insured."

Insurance policies are construed like any other contract. "The 'first principle of construction of insurance policies in Maryland is to apply the terms of the contract.'" *Empire Fire & Marine Insurance Co.*, 117 Md. App. at 96. In so doing, the court is to give the words of the contract "their 'customary, ordinary, and accepted meaning,' unless there is an indication that the parties intended to use the words in a technical sense." *State Farm Mutual Auto Insurance Co. v. DeHaan*,

393 Md. 163, 193, 900 A.2d 208 (2006); *Cole v. State Farm Mutual Insurance Co.*, 359 Md. 298, 305, 753 A.2d 533 (2000). No Maryland case specifically defines the word "collectible" in the context of an insurance policy and it is not defined in the Policy. Collectible is defined by *Merriam-Webster* as "due for present payment." It is defined by Dictionary.com as "capable of being collected." Accordingly, to meet the terms of the Policy, the insured must have a minimum of $250,000 underlying insurance that can be collected by the insured to pay any judgment for the insured's liability.

Question 2

Does the umbrella policy require that $250,000 be actually paid by or on behalf of the insured before the umbrella policy has any obligation to pay damages?[2]

Scope of Review

As a pure question of law, the trial court's decision is to be reviewed *de novo. Bay City, Inc. v. Williams*, 2 A.3d 1060, 1061 (Del.Supr. 2010).

Merits of Argument

The Umbrella Policy is unambiguous in its requirement that the required $250,000 primary insurance be actually paid by Lankford or on her behalf and that conclusion is supported by Maryland law.

The Policy states in relevant part as follows:

> **Part II – Coverages**
>
> We will pay on an INSURED'S behalf DAMAGES for which an INSURED becomes legally responsible due to PERSONAL INJURY or PROPERTY DAMAGE caused by an OCCURRENCE. This coverage applies only to DAMAGES in excess of the PRIMARY INSURANCE or the RETAINED LIMIT, whichever applies.[3]
>
> **Part IV – Limit of Liability**

[2] This issue was preserved in the Superior Court as part of the Oral Argument presented on December 15, 2017 at A56, A59-60, A62, A67-68, A71, A74-75, A78, A79, A82-83.

[3] By definition, the Retained Limit applies only if the primary insurance policies applicable do not provide coverage, circumstances not applicable here.

1. This policy pays only after the limits of the PRIMARY INSURANCE …*have been paid by you or on your behalf.*

(emphasis supplied) (A27)

Part V – Primary Insurance Requirements

This policy requires that all insureds have and maintain the PRIMARY INSURANCE coverage at or above the limits of liability shown on the declaration page. . . . If the PRIMARY INSURANCE does not provide at least the limits indicated, *you will be responsible for the loss up to the required limits.* We will pay only for the amount of the loss which is:

1. above the required PRIMARY INSURANCE limits; and
2. above any other insurance collectible for an OCCURRENCE.

(emphasis supplied) (A28)

These unambiguous policy terms unequivocally require Martha Lankford to have primary insurance in a minimum amount of $250,000 and to have that amount paid by her or on her behalf before the Umbrella Policy is required to pay any amount in damages. There are no ambiguities in any of the provisions set forth above that allow for any interpretation other than giving the words of the contract "their 'customary, ordinary, and accepted meaning.'" *State Farm Mutual Auto Insurance Co. v. DeHaan*, 393 Md. 163, 193, 900 A.2d 208 (2006). On the contrary, the Policy is clear in its repeated pronouncements that the required underlying insurance of $250,000 is mandatory and must be paid before the Umbrella Policy is triggered.

Question 3

Can the requirement of payment of the minimum underlying insurance be met by merely giving a "credit" to the umbrella insurer for the amount of primary insurance not actually paid?[4]

Scope of Review

As a pure question of law, the trial court's decision is to be reviewed *de novo*. *Bay City, Inc. v. Williams*, 2 A.3d 1060, 1061 (Del.Supr. 2010).

Merits of Argument

It is critical to this analysis to understand the purpose of an umbrella insurance policy:

> "[A]n umbrella policy is a supplemental form of insurance that is distinguishable from more specific primary policies, such as motor vehicle liability insurance or homeowner's insurance. For example, *Black's Law Dictionary* defines an "umbrella policy" as "[a]n insurance policy covering losses that exceed the basic or usual limits of liability *provided by other policies.*" *Black's Law Dictionary* 811 (7th ed.1999) (emphasis added). Moreover, "umbrella insurance" is specifically referred to as "[i]nsurance that is *supplemental,* providing coverage that exceeds the basic or usual limits of liability." Black's Law Dictionary 808 (7th ed.1999) (emphasis added). Under either definition, therefore, umbrella policies are described not merely as an extension of the primary policy, but rather as a distinct and different form of coverage. . . . Not only are the basic definitions and coverages different in motor vehicle liability policies and umbrella policies, but the purpose of both forms of coverage are different. Although primary insurance attaches

[4] This issue was preserved in the Superior Court as part of the Oral Argument presented on December 15, 2017 at A63-64, A70-71, A73-74, A76.

> "upon the happening of the occurrence that gives rise to liability ... [e]xcess insurance [,] [by contrast,] attaches only after a predetermined amount of primary coverage has been exhausted." *Empire Fire & Marine Insurance Co.,* 117 Md.App. at 117, 699 A.2d at 504 (citations and quotations omitted). In fact, umbrella policies generally "require the existence of a primary policy as a condition of coverage[,]" because the umbrella coverage only "kicks in" after the primary policy is exhausted to protect against *catastrophic loss.*

Stickley v. State Farm Fire and Casualty Co., 431 Md. 347, 360–62, 65 A.3d 141, 150 (2013). *See, also, U. S. Fire Insurance Co. v. Maryland Casualty Co.*, 52 Md. App. 269, 271–72, 447 A.2d 896, 898, (1982)("'Excess' or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted.") The common theme in these descriptions, fundamental to the resolution of this dispute, is the exhaustion of a predetermined amount of primary or underlying coverage before the umbrella insurer must make any payments.[5]

[5] The trial court twice rejected portions of Farm Family's analysis by asserting that "there is a difference" between umbrella policies and excess policies. (Opinion, pp. 10, 13) That is an incorrect statement of Maryland law. While it is true that, as the trial court noted, an umbrella may provide insurance on a first dollar basis for risks not covered by the primary, for the purposes of assessing the role of an umbrella policy vis-à-vis the primary, umbrella and excess policies are functionally the same. *See, Stickley*, 431 Md. 347, 65 A.3d 141, where the Court of Appeals routinely interchanges the terms "umbrella" and "excess" in describing the purposes and roles of those policies:

"Not only are the basic definitions and coverages different in motor vehicle liability policies and umbrella policies, but the purpose of both forms of coverage are different. Although primary insurance attaches 'upon the happening of the occurrence that gives rise to liability ... [e]xcess insurance [,] [by contrast,] attaches only after a predetermined amount of primary coverage has

The trial court's declaration that Farm Family must be merely given "credit" for $250,000 contradicts not only the Policy language, but the purpose of umbrella or excess insurance and Maryland law. The court based its decision on a perceived conflict between two provisions of the Policy and on an inapplicable and distinguishable case from Minnesota.

It is important that the trial court does not find the Policy ambiguous, so as to interpret it against Farm Family. Rather, the court simply takes two provisions and combines them to reach a conclusion that is expressly contradicted by the very Policy sections of which they are a part.

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been exhausted.' . . . Moreover, one scholar noted that umbrella policies are "clearly designed to be comprehensive *excess* policies." 65 A.3d 141, 150;

"As noted in *Couch on Insurance 3d* § 220:32 (2005): The intent of excess and umbrella policies to serve a different function from primary insurance policies with 'other insurance' clauses can be discerned from the fact that different rate structures apply to excess and umbrella policies on the one hand, and primary policies with other insurance clauses on the other." 65 A.3d 141, 152; and

"Moreover, the *Stickleys'* umbrella policy required underlying coverage of automobile liability, recreational motor vehicle liability, personal residential liability, and watercraft liability, further indicating a fundamental distinction between the underlying primary policy and the supplemental, excess umbrella policy. In fact, such a requirement is typical of supplemental umbrella and excess policies. *See Couch on Insurance 3d* § 220:32 (2005) (noting that "[b]oth true excess and umbrella policies require the existence of a primary policy as a condition of coverage"). 65 A.3d 141, 152–53.

Similarly, the Minnesota case on which the trial court relied for other purposes described that "an 'umbrella' policy [] provides 'excess' insurance coverage." *Cincinnati Ins. Co. v. Franck,* 644 N.W.2d 471, 473 (Minn.App. 2002).

The court relied upon subsection 2 of:

Part IV – Limit of Liability

1. This policy pays only after the limits of the Primary Insurance . . . *have been paid by you or on your behalf.*

2. If the Primary Insurance terminates or the limits are less than the limits shown in the declarations page, we pay damages we would have paid as if the Primary Insurance had not been terminated or if its limits had not been less than the limits shown in the declarations page.

(A27), and on subsection 1 of:

Part V – Primary Insurance Requirements

This policy requires that all insureds have and maintain the Primary Insurance coverage at or above the limits of liability shown on the declaration page. . . . If the Primary Insurance does not provide at least the limits indicated, *you will be responsible for the loss up to the required limits.* We will pay only for the amount of the loss which is:

1. above the required PRIMARY INSURANCE limits; and
2. any other insurance collectible for an OCCURRENCE.

(A28) The court's Opinion found that these two subsections describe the "consequences of Mrs. Lankford's failure" to have the required $250,000 of underlying insurance to be that Farm Family is "relie[ved] of its duty to indemnify" for any damages below $250,000. Hence, the final decision is that Farm Family gets "a credit of $150,000 toward any damages ultimately assessed over $100,000 in the tort action." (Opinion, p. 9)

The first flaw in this conclusion is that it expressly disregards the emphasized Policy language that immediately precedes the portions the trial court favored. Each of those provisions unequivocally states that Farm Family will pay "only after" the insured meets her responsibility to pay the total $250,000 or have it paid on her behalf. The provisions on which the trial court relied do not authorize Farm Family merely getting credit for the underlying coverage; they instead confirm that Farm Family's obligation to pay indemnity under the Policy is triggered only if and when the entire $250,000 underlying responsibility has been met and "paid by [Lankford] or on [her] behalf."

Further, the court's opinion conflicts with Maryland law. As *Stickley* describes, "the umbrella coverage only 'kicks in' after the primary policy is exhausted." *Stickley v. State Farm Fire and Cas. Co.*, 65 A.3d 141, 150. *Accord*, *U. S. Fire Insurance Co. v. Maryland Casualty Co.*, 52 Md. App. 269, 271–72, 447 A.2d 896, 898, (1982)("'Excess' or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted."). Here, the trial court inherently found that "exhausted" means that Farm Family will get credit for the required underlying insurance requirement.

The applicability of umbrella or excess insurance, though, is highly analogous to Maryland's statutory scheme of underinsured motorist insurance, which requires that any applicable liability coverage be exhausted before the injured party's own underinsured motorist coverage is required to pay. Md. Insurance Code § 19–509(g) provides:

> *Limit of insurer's liability.*—The limit of liability for an insurer that provides uninsured motorist coverage under this section is the amount of that coverage less the amount paid to the insured, that exhausts any applicable liability insurance policies, bonds, and securities, on behalf of any person that may be held liable for the bodily injuries or death of the insured.

In a case where an injured party settled with a driver for less than the applicable liability policy limits, the Court of Special Appeals declined to agree that the underlying policy limits had been "exhausted" and declined to allow for recovery of the underinsured motorist coverage by giving the UIM insurer a "credit" for the gap amount. *Kurtz v. Erie Ins. Exchange*, 157 Md.App. 143, 149, 849 A.2d 1050, 1054 (2004). In *Kurtz*, the Court found:

> Neither the word "exhaust," nor the statute in which it is used, is ambiguous. "Exhaust" is defined as "to use up the whole supply or store of: expend or consume entirely." Webster's Third New International Dictionary 796 (2002). Giving the word exhaust its ordinary meaning and reading it in context, the intent of § 19–509(g) is plain: it requires that the insured must have been paid the entire amount of the tortfeasor's liability policy to be entitled to additional benefits under the insured's UM policy. Moreover, this construction of § 19–509(g) comports with how the concept of exhaustion is understood in insurance law. In

> insurance parlance, exhaustion contemplates the complete use of a primary liability policy before resort to any secondary or excess policy. As this Court has declared, "[w]ithin the meaning of an excess policy, 'exhaustion' does not occur until the limits of underlying insurance have been met." *Mayor & City Council of Baltimore v. Utica Mut. Ins. Co.*, 145 Md.App. 256, 314, 802 A.2d 1070, *cert. granted*, 371 Md. 613, 810 A.2d 961 (2002), *dismissed*, 374 Md. 81, 821 A.2d 369 (2003).

849 A.2d 1050, 1054–55. This analysis is wholly applicable to the present matter.

While the *Kurtz* opinion relied in part on a statute using the word "exhaustion," the principle is seamlessly transferred to this case by *Kurtz's, Stickley's, and U. S. Fire Insurance Co.'s* acceptance of the fundamental premise that in insurance parlance exhaustion of a policy means that the required amount of underlying insurance has been paid and that umbrella insurance is not triggered until the underlying insurance is exhausted. When these principles are combined with the cases of *Highlands Insurance Co. v. Gerber Products Co.*, 702 F.Supp. 109 (D.Md. 1988), and *McGirt v. Royal Insurance Co. of America*, 399 F.Supp.2d 655, 667 (D.Md. 2005); *affirmed*, 2006 WL3456369 (4th Cir. 2006), in which the federal court, applying Maryland law, ruled that umbrella and excess policies are not required to "drop down" to cover the missing underlying limits, it is plain that the Maryland appellate courts would hold that Lankford must actually pay the $250,000 required underlying insurance before Farm Family is required to indemnify her in accordance with the terms of the Policy.

Further, the Policy language does not permit the Heirs to somehow "waive" recovery of the $150,000 gap and thereby recover from the Umbrella Policy. The trial court seemed to adopt such a waiver concept in ruling that Farm Family should get credit for the missing insurance, citing a Minnesota case. *Cincinnati Ins. Co. v. Franck*, 644 N.W.2d 471 (Minn. Ct. App. 2002), is not applicable or persuasive as compared to existing Maryland law. In that case, the court noted that "the injured party, the insured, and the primary insurer reach[ed] a settlement for less than the primary policy limits and the injured party agree[d] to absorb the gap between the settlement amount and the primary policy limits," 644 N.W.2d 471, 476, and further based its decision on a prior case that permitted a below limits settlement to allow for a credit to the excess insurer. Here, the Heirs did not agree in the Release to absorb Lankford's gap in coverage and requiring Farm Family to pay its excess limits before complete and actual exhaustion of the underlying limits is contrary to Maryland law.

Moreover, Maryland law and the Policy language is most consistent with cases in other jurisdictions which have concluded that there must be actual payment of the full underlying limits before the umbrella insurer is required to make payment. Some states require that the payment of the underlying limits be strictly made by the primary insurer. *See, Comerica Inc. v. Zurich American*

Insurance Co., 498 F. Supp. 2d 1019, 1032 (E.D. Mich. 2007)(“ The Court believes that the excess policy in this case likewise requires that the primary insurance be exhausted or depleted by the actual payment of losses by the underlying insurer. Payments by the insured to fill the gap, settlements that extinguish liability up to the primary insurer's limits, and agreements to give the excess insurer ‘credit’ against a judgment or settlement up to the primary insurer's liability limit are not the same as actual payment.”). In that scenario, payment of a gap by the insured still does not trigger the umbrella.

Other cases hold that the underlying limits must simply be paid in full, even if by cash or some other means from the insured. *See, Trinity Homes LLC v. Ohio Casualty Insurance Co.*, 629 F.3d 653, 658 (7th Cir. 2010)(“While the umbrella agreement does state that a CGL policy is exhausted when the policy limit has been completely expended, it does not clearly provide that the full limit must be paid out by the CGL insurer alone.”); *Zeig v. Massachusetts Bonding & Insurance Co.*, 23 F.2d 665, 666 (2d Cir.1928)(exhaustion of a primary policy limit could be accomplished by way of a settlement agreement where the primary insurer paid some of the limit and the insured paid the remainder, so long as the contract did not provide otherwise). If the mandatory underlying insurance payment is not met by a primary insurance policy, the language of the Umbrella Policy requires Lankford

to actually pay the $150,000 gap in its unambiguous provisions that, **“**If the Primary Insurance does not provide at least the limits indicated, you will be responsible for the loss up to the required limits,” and “This policy pays only after the limits of the Primary Insurance . . . have been paid by you or on your behalf.”

CONCLUSION

Consequently, Martha Lankford, and the Heirs by their assignment from her, cannot require Farm Family to pay any indemnification under the Umbrella Policy until and unless Martha Lankford or someone on her behalf pays the $150,000 necessary to have full payment of the underlying primary insurance limits required by the Umbrella Policy. Neither the Policy language nor the law support the trial court's conclusion that Farm Family must indemnify Lankford after receiving credit for the amount of underlying insurance Lankford failed to maintain. Instead, absent full exhaustion of the underlying limits by actual payment, Farm Family has no indemnity obligation.

WHEREFORE, Defendants Martha Irene Gonzalez Lankford and United Farm Family Insurance Company respectfully request that the declaratory judgment entered be reversed and that judgment be entered in favor of United Farm Family Insurance Company, together with costs and such other relief as the Court deems appropriate.

KENT & MCBRIDE, P.C.

By: */s/ David C. Malatesta, Jr.*
David C. Malatesta, Jr., Esq.
Delaware State Bar ID #3755
824 N. Market Street, Suite 805
Wilmington, DE 19801
(302) 777-5477
Attorneys for Appellants

WARD & HERZOG, LLC

By: */s/ Margaret Fonshell Ward*
Margaret Fonshell Ward
Admitted *Pro Hac Vice*
102 W. Pennsylvania Avenue, Suite 401
Baltimore, MD 21204
(410) 296-1573
Attorneys for Appellants

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