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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2026-000227

South Carolina Farm Bureau Mut. Ins. Co. .....Appellant,

v.

John Milin and Angela M. Leone ..... Respondents.

RESPONDENT JOHN MILIN'S INITIAL BRIEF

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Table of Contents

Table of Authorities

South Carolina Cases

Federal Cases

Cases From Other Jurisdictions

Statutes & Court Rules

Secondary Sources

Counter Statement of Issues on Appeal

I. Whether the circuit court correctly held the "escape clause" in a Farm Bureau Farm Policy mutually repugnant to the "excess clause" in a separate Farm Bureau Homeowners Policy issued to the same insured.

Statement of the Case

South Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") issued two separate liability insurance policies to Angela Leone ("the insured"): A Homeowners Policy and a Farm Policy. Both policies purport to provide liability coverage for animal attacks. On June 13, 2023, the insured's dog attacked John Milin when he was mowing grass at the insured's premises. John Milin sustained serious damages and injuries resulting from the attack. Farm Bureau's two insurance policies provide concurrent coverage for the liability resulting from the dog bite. On August 15, 2024, John Milin filed suit against the insured, seeking both compensatory and punitive damages. Farm Bureau tendered the $300,000.00 liability limit under the Homeowners policy but disclaimed coverage under the Farm Policy, which provides up to $1,000,000.00 in coverage for the incident.

On January 24, 2025, Farm Bureau filed a declaratory judgment action in Lancaster County against the injured party, John Milin, and against its insured seeking a declaration that the Farm Policy provides no coverage because of an "escape clause" included in the policy. On May 21, 2025, John Milin filed a motion for summary judgment, asserting five arguments: (1) the Homeowners Policy does not preclude Farm Policy coverage, (2) the tender of $300,000.00 does not discharge the Farm Policy, (3) the "escape clause" is unenforceable, (4) the "escape clause" does not apply after policy exhaustion, and (5) the punitive damages exclusion does not bar defense or coverage. Correspondingly, on June 25, 2025, Farm Bureau filed a cross motion for summary judgment, advancing three arguments: (1) policy limitations on coverage are generally enforceable, (2) the Farm Policy provision is enforceable according to its plain terms, and (3) the "excess clause" in the Homeowners Policy does not prevent enforcement of the "escape clause" in the Farm Policy.

On October 27, 2025, the Lancaster County circuit court granted John Milin's motion for summary judgment, holding Farm Bureau must indemnify and defend Angela Leone under the Farm Policy because the Farm Policy's "escape clause" is mutually repugnant to the "excess clause" in the Homeowners Policy. In response, on October 31, 2025, Farm Bureau filed a motion to alter or amend the order, and, in the alternative, moved to clarify the court's order. There, Farm Bureau argued that the "escape clause" is enforceable under South Carolina law and is not mutually repugnant to the "excess clause." On January 13, 2026, in a Form 4 order, the circuit court denied Farm Bureau's motions and stated the order ended the case.

On April 9, 2026, Farm Bureau filed the present appeal with the sole issue of determining whether the circuit court correctly held the Farm Policy's "escape clause" mutually repugnant to the Homeowners Policy's "excess clause."

Statement of Facts

On June 13, 2023, Respondent John Milin was attacked by Respondent Angela Leone's dog while he was mowing the grass at Angela Leone's property in Lancaster, South Carolina. (Underlying Compl. ¶¶ 3-12). As a result, John Milin suffered serious injuries. (*Id.* at ¶ 12). On August 15, 2024, John Milin filed suit in the Lancaster County Court of Common Pleas against Angela Leone, (hereinafter the "Underlying Action"). (Ex. A, Underlying Compl.). The complaint alleges the incident took place on Angela Leone's property located at 3135 Old Hickory Road in Lancaster, South Carolina. (*Id.* at ¶¶ 3-4).

At the time of the incident, Angela Leone ("the insured") held two separate liability policies issued by Appellant South Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau"): a $300,000.00 Homeowners Policy and a $1,000,000.00 Farm Policy. (Homeowners Policy; Farm Policy). Both policies provide coverage for attacks by animals in the care, custody, or control of the insured. Farm Bureau provided a defense and tendered the limits under the Homeowners Policy. (Aff. of Joseph Barrett ¶ 4). Farm Bureau then disclaimed coverage under the Farm Policy, citing the "escape clause." (Underlying Compl.). Both the Homeowners Policy and Farm Policy included "other insurance" clauses, which describe how the policy would operate if the insured acquired another insurance policy.

The relevant portion of the Homeowners Policy includes:

> **SECTION II – CONDITIONS:**
>
> **9. Other Insurance – Coverage E – Personal Liability.** This insurance is excess over other valid and collectible insurance except insurance written specifically to cover as excess over the limits of liability that apply in this policy.

(Homeowners Policy pp. 49-50).

In comparison, the Farm Policy provides:

SECTION III – FARM LIABILITY CONDITIONS

The following conditions apply in addition to the Common Policy Conditions:
Loss Conditions

***

6. Other Insurance
This condition applies only if, in addition to the insurance provided under this Coverage Form, the "insured" has other insurance under this or any other policy covering the same obligations to pay damages and provide defense against "suits" for damages.

a. We will pay only the portion of covered damages and related defense costs that the applicable Limit of Insurance under this Coverage Form bears to the total amount of all your insurance, in covered "occurrences" arising from any cause except the ownership, maintenance, use, operation or "loading or unloading" of a:

(1) "Motor vehicle";
(2) Vehicle which qualifies as "mobile equipment" only while used on premises you own or rent; or
(3) Watercraft.

***

INSURANCE UNDER MORE THAN ONE POLICY

This endorsement modifies insurance provided under the following:

FARM LIABILITY COVERAGE FORM

The following Paragraph c. is added to Loss Condition 6. Other Insurance in Section III – Farm Liability Conditions:

c. However, regardless of the provisions of Paragraphs a. and b. above, this Policy does not apply to any loss or damage or defense against a "suit" which:

(1) Is covered under any other policy or any renewal or replacement thereof; or

(2) Would be covered under another policy or any renewal or replacement thereof, had the limits of such policy not been exhausted.

(Farm Policy, SFL 01 10 04 16).

On January 24, 2025, Farm Bureau filed a declaratory judgment action against John Milin and its insured seeking a declaration that the Farm Policy provides no coverage for the incident and that Farm Bureau has no duty to defend under the policy because the "escape clause" discharges liability. (DJ Complaint). On February 26, 2025, the insured filed an answer to the declaratory judgment action, denying the central allegations in the Complaint, and praying "the Court declare that the Farm Policy does provide liability for the claims and damages alleged in the Underlying Action and that Farm Bureau be required to pay, indemnify, defend, or otherwise perform under the policy of any and all claims arising out of the June 13, 2023, dog incident." (DJ Answer, Leone, p. 3). Correspondingly, on March 19, 2025, John Milin filed a similar answer seeking a denial of the relief sought by Farm Bureau and seeking a declaration that coverage exists for the loss under the Farm Policy. (DJ Answer, Milin). As an exhibit to his Answer, Milin further provided the circuit court a report from insurance expert Stuart Setcavage, who analyzed the policies and their "other insurance" clauses. Mr. Setcavage found:

> When the two policies are read together, the escape clause versus excess clause, the insured is left with no primary coverage . . . When faced with this claim scenario, claim professionals are trained that the two 'other insurance' clauses must be read together rather than separately. When doing so, clearly, they are in conflict. The insured is left in an untenable position and one in which no reasonable person would have ever guessed would happen having purchased two liability policies to protect oneself.

(Setcavage Report p. 5). Accordingly, Mr. Setcavage concluded both policies apply to the dog attack, resulting in $1,300,000.00 in coverage. (Setcavage Report p. 8).

Thereafter, John Milin and Farm Bureau filed cross motions for summary judgment. John Milin moved for summary judgment on May 21, 2025, and the insured, Angela Leone, joined him in his arguments, filing a memorandum in support of his motion on September 2, 2025. (Milin MSJ; Leone MSJ Memo). The insured and Milin argued Farm Bureau is obligated to indemnify and defend the insured under both the Farm Policy and Homeowners Policy. (Milin MSJ; Leone,

MSJ Memo). On the other hand, Farm Bureau moved for summary judgment on June 25, 2025, arguing there is no duty to defend or indemnify the insured under the Farm Policy because of an "escape clause." (FB MSJ; FB Memo). The parties agreed the dispute involved no material fact questions and was ripe for determination at the summary judgment stage.

On September 3, 2025, the circuit court heard the cross-filed motions for summary judgment. On October 27, 2025, the court granted Milin's motion for summary judgment and denied Farm Bureau's motion for summary judgment. (October 27, 2025, Order). The circuit court held the Farm Policy's "escape clause" combined with the "excess clause" in the Homeowners Policy to create a "circular conflict." (October 27, 2025, Order, pp. 2-4). Accordingly, the court held the clauses were mutually repugnant and disregarded them to prevent an absence of primary coverage. (October 27, 2025, Order, pp. 2-4). On October 31, 2025, Farm Bureau filed a motion to alter or amend the order or, in the alternative, to clarify. (FB Mot. to Alter). The circuit court denied the motion on January 13, 2026. (January 13, 2026, Order). The present appeal followed.

Standard of Review

"When reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rule 56(c), SCRCP…." *USAA Prop. & Cas. Ins. Co. v. Clegg,* 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. "Whether coverage exists under an insurance contract is a question of law for the Court. Further, cross-motions for summary judgment are treated as questions of law." *Progressive Direct Ins. Co. v. Groves*, 438 S.C. 26, 31, 882 S.E.2d 464, 466 (2022). Thus, "[t]his court's standard of review is de novo." *Pearson v. Richland Cnty.*, 445 S.C. 246, 249, 912 S.E.2d 286, 288 (Ct. App. 2025).

Argument

The insured purchased two liability insurance policies from Farm Bureau. Those policies contain "other insurance" clauses, which create a circular conflict and leave the insured with no primary coverage, despite the purchase of two policies.[1] Consistent with South Carolina law and as required to prevent the policies from only providing the illusion of coverage, the circuit court correctly found the "other insurance" clauses mutually repugnant and, therefore, disregarded the clauses.

The circuit court's order should be affirmed. To hold otherwise is to allow two mutually repugnant clauses to create illusory coverage, despite the insured's attempt to be sufficiently insured. The Homeowners Policy's "excess" framework directly conflicts with the "escape" framework in the Farm Policy, resulting in no primary coverage at all. Therefore, under South Carolina law, the circuit court correctly found the clauses mutually repugnant. Farm Bureau's proposed interpretation violates the insured's reasonable expectations, allows Farm Bureau to improperly profit from collection of premiums for policies that provide no coverage,[2] and disrupts settled public policy. Furthermore, the cases relied upon by Farm Bureau are inapplicable to the policies at issue here, as they involve coverages not relevant to this case. Therefore, the circuit court's holding must be affirmed.

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[1] "Three types of other insurance clauses limit the insurer's obligation. For example, a pro-rata other insurance clause provides that the insurer will pay its share of the loss in the proportion its policy limits relates to the aggregate liability coverage available. An excess other insurance clause provides that an insurer will pay a loss only after other available primary insurance is exhausted, and the "escape clause" provides that an insurer is absolved of all liability where other coverage is available." *Am. Auto. Ins. Co. v. First Mercury Ins. Co.*, No. 13-cv-349 MCA/LF, 2017 WL 3575882 (D.N.M. Mar. 31, 2017) (internal citations omitted).

[2] Farm Bureau asserts it "was aware of its other policy issued to this insured when setting the premium rates for the policies," but provides no support for that assertion, beyond showing the policies were issued by the same Farm Bureau agent. (FB Brief § I, p. 8).

I. The circuit court correctly disregarded the Homeowners Policy's "excess clause" and the Farm Policy's "escape clause" because they create a circular conflict, rendering the clauses mutually repugnant.

The circuit court correctly categorized the conflict between the "other insurance" clauses as a circular conflict, properly recognized the clauses as mutually repugnant, and correctly disregarded both clauses. Both policies—the Homeowners Policy and the Farm Policy—defer coverage to the other policy, leaving the insured without primary coverage despite paying two separate premiums. (Setcavage Report, p. 6 ("This creates an insurance paradox: the escape policy disclaims coverage due to the existence of the other policy, and the excess policy refuses to pay until the first policy is exhausted.")).

"If two or more policies insure the same entity against the same risk to the same object, the policies are concurrent, and losses are prorated between the insurers who issued the policies." *South Carolina Ins. Co. v. Fid. & Guar. Ins. Underwriters, Inc.*, 327 S.C. 207, 213, 489 S.E.2d 200, 204 (1997). "If both policies…contain language evincing an intent to provide primary coverage, that one policy may be somewhat more specific than another usually should make no difference." *Id.* at 214, 489 S.E.2d at 204. If policy language is clear and unambiguous, the language alone determines the force and effect. *Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 473, 438 S.E.2d 275, 277 (Ct. App. 1993). However, a policy interpretation cannot read clauses in isolation or disregard policy language. *MGC Mgmt., Inc. v. Kinghorn Ins. Agency*, 336 S.C. 542, 549, 520 S.E.2d 820, 823 (1999); (Setcavage Report, p. 5 ("[C]laim professionals are trained that the two 'other insurance' clauses must be read together rather than separately."). Conflicting "excess" "other insurance" clauses should generally cancel each other out if the interpretation is consistent with the plain meaning of the policy. *S.C. Ins. Co. v. Fid. & Guar. Ins.* at 215, 489 S.E.2d at 204. The South Carolina supreme court explicitly grouped "escape clauses" and "excess

clauses" as "other insurance policies." *Id.* at 211-12, 489 S.E.2d at 202 ("An excess clause provides coverage only after other available primary insurance is exhausted. In contrast, an escape clause absolves an insurer of liability if other coverage is available.").

Here, Farm Bureau provided two separate policies, each with an "other insurance" clause. The Homeowners Policy includes an "excess clause": "This insurance is excess over other valid and collectible insurance except insurance written specifically to cover as excess . . . ." (Homeowners Policy pp. 49-50). In comparison, the Farm Policy includes an "escape clause": "This Policy does not apply to any loss or damage or defense against a 'suit' which: (1) Is covered under any policy … or (2) Would be covered under another policy … had the limits of such policy not been exhausted." (Farm Policy, SFL 01 10 04 16). Thus, both the Homeowners Policy and the Farm Policy include an "other insurance" clause. *S.C. Ins. Co. v. Fid. & Guar. Ins.* at 211-12, 489 S.E.2d at 202.

a. The circuit court correctly labeled the combination of the "excess" and "escape" clauses as a circular conflict.

The circuit court correctly categorized the interaction between the two clauses as a "circular conflict." *See* (October 27, 2025, Order, p. 2); *see also Schoenecker v. Haines*, 88 Wis. 2d 665, 675, 277 N.W.2d 782, 785 (1979) (describing attempts to give effect to conflicting "other insurance" clauses as a "perpetual mental merry-go-round"). If two policies cannot coexist according to their plain meaning interpretations, the policies create a circular conflict. *South Carolina Ins. Co. v. Fid. & Guar. Ins.*, 327 S.C. at 219, 489 S.E.2d at 206.

Here, a circular conflict is created because both policies provide liability coverage for an otherwise covered occurrence, but both policies contain clauses purporting to limit or escape coverage all together. The Homeowners Policy will only afford coverage after the limits of other applicable primary coverages are exhausted. The Farm Policy provides primary coverage for the

loss, but only if the loss is not covered under any other policy. Thus, according to the plain language of the "other insurance" clauses, coverage is not afforded under the Farm Policy if the Homeowners Policy applies, but the Homeowners Policy cannot apply until the limits of the Farm Policy are exhausted. Therefore, a circular conflict exists, because pursuant to the plain language of the policies, coverage is either nonexistent or turns on the order in which the policies are read.

If the Homeowners Policy and its "excess clause" is read first, it would apply only as excess coverage to the Farm Policy, and the Farm Policy would be primary because the loss is not covered under the Homeowners Policy. That reading results in $1,000,000.00 in coverage from the Farm Policy with $300,000.00 in excess coverage from the Homeowners Policy. On the other hand, if the Farm Policy and its "escape clause" is read first, it provides primary coverage, but only if the Homeowners Policy does not provide coverage. The Homeowners Policy provides coverage, but that coverage is excess. Therefore, both policies remain in limbo, with each policy's coverage dependent upon the application of the other, leading to no coverage.

Farm Bureau seeks to break the circular conflict by disregarding the "excess clause" in the Homeowners Policy and tendering the $300,000.00 in coverage under that policy. Farm Bureau must not be permitted to do so. Because "other insurance" clauses exist to apportion loss among insurers and not to diminish the insured's recovery, Farm Bureau cannot invoke or disregard them selectively to convert its own Homeowners Policy into primary coverage and thereby trigger the Farm Policy's "escape clause." *See S.C. Ins. Co. v. Fidelity & Guar. Ins.*, 327 S.C. at 211, 489 S.E.2d at 202 ("other insurance" clauses are intended to apportion an insured loss between or among insurers"). The conflict between the clauses must be resolved by the court under the mutual repugnancy doctrine, not by the insurer's unilateral election. *See Liberty Mut. Ins. Co. v. Pella Corp.*, 633 F. Supp. 2d 714, 724 (S.D. Iowa 2009) ("[U]nder well-established law, 'other

insurance' provisions found in policies providing primary coverage govern the relationship between insurers, and do not diminish an insured's coverage rights under any concurrent insurance policies."). Here, Farm Bureau argues there is no conflict between the policies because it can choose to treat the Homeowners Policy as primary, disregard its "other insurance" clause, and make payment of $300,000.00 instead of $1,300,000.00. However, Farm Bureau does not get to choose which policy provisions to disregard.

Most reported opinions discussing conflicting "other insurance" clauses involve policies written by two separate insurers. In that scenario, both insurers seek to stand on their "other insurance" clauses to disclaim coverage or stand as excess. Neither carrier is incentivized to pay its coverage or disregard its own "other insurance" clause. That is not the case here. Farm Bureau recognizes the two "other insurance" clauses create a conflict. To avoid disregarding both "other insurance" clauses, Farm Bureau attempts to disregard only the "excess clause" in the Homeowners Policy, so it can argue its insured is only insured up to $300,000.00 for this loss. Farm Bureau wrote both policies; Farm Bureau does not get to change the terms. Moreover, the policies are written with "standardized ISO policy language so, regardless of if both policies were underwritten by the same or differing companies, the policy language would remain the same." (Setcavage Report p. 4).

Furthermore, an interpretation that disregards the "excess clause" conflicts with Farm Bureau's policy writing conduct. For example, Farm Bureau listed only one instance where the "excess clause" would not apply when another policy is present: "This insurance is excess over other valid and collectible insurance *except insurance written specifically to cover as excess over the limits of liability that apply in this policy*." (Homeowners Policy pp. 49-50) (emphasis added). The exception language requires specific, unambiguous writing stating another policy operates to

specifically cover excess liability above the limits of the Homeowners Policy. However, Farm Bureau included no language in either policy indicating the "excess clause" would not apply if another policy of primary liability insurance included an "escape clause." Simply put, if Farm Bureau did not want the "excess clause" to apply, it would have included language indicating that intent. Thus, the circuit court correctly labeled the two clauses as creating a circular conflict.

b. The circuit court correctly disregarded both "other insurance" clauses as mutually repugnant.

In *S.C. Ins. Co. v. Fid. & Guar. Ins.*, the supreme court disregarded similar conflicting "other insurance" clauses as "mutually repugnant" when the combined effect of two "excess clauses" left the insured without primary coverage. *Id.* at 218, 489 S.E.2d at 205-06. The court reasoned it could not reconcile the two clauses because both policies facially provided primary coverage but deferred coverage when another policy was present. *Id.* at 217, 489 S.E.2d at 205. Thus, the court disregarded both clauses, treating each policy as providing co-primary coverage. *Id.* at 219, 489 S.E.2d at 206. The circuit court in the case *sub judice* properly did the same.

Likewise, multiple jurisdictions break circular conflicts between "other insurance" clauses by disregarding both clauses. This includes circular conflicts created by "excess" and "escape clauses," like those present here. *See Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 589-90 (Tex. 1969) (refusing to enforce conflicting "excess" and "escape clauses" when the combined effect leaves the insured without coverage, holding a specific "excess clause" and a specific "escape clause" mutually repugnant, ignoring both, and prorating the loss so the insured retained coverage under both policies); *Dette v. Covington Motors, Inc.*, 426 So.2d 718, 720 (La. Ct. App. 1st Cir. 1983) ("Louisiana jurisprudence has determined that in such circumstances "excess" and "escape clauses" are considered mutually repugnant and consequently ineffective"); *see also Home Ins. Co. v. Liberty Mut. Ins. Co.*, 641 N.E.2d 855, 857 (Ill. App. Ct.

1994). Therefore, the circuit court's order is consistent with South Carolina law regarding conflicting "other insurance" clauses and is consistent with the appellate courts of outside jurisdictions that were tasked with interpreting similar "escape" and "excess clauses."

Accordingly, the circuit court properly disregarded the conflicting "other insurance" clauses as mutually repugnant.[3] The two "other insurance" clauses defer coverage to the other policy, resulting in no applicable primary coverage. As in *S.C. Ins. Co. v. Fid. & Guar. Ins.,* where two "excess clauses" could not simultaneously operate, the "excess clause" and the "escape clause" cannot coexist according to their plain meaning. Thus, to avoid the circular conflict problem, the proper mechanism under *S.C. Ins. Co. v. Fid. & Guar. Ins.* is to disregard both clauses as mutually repugnant. That case involved two "excess clauses," but the underlying principle applies directly to the issue in this case: Conflicting "other insurance" clauses are mutually repugnant when they combine to eliminate primary coverage. The "other insurance" framework in these policies cannot coexist according to their plain meanings without depriving the insured of all primary coverage. Thus, the circuit court correctly disregarded the "other insurance" clauses as mutually repugnant.

Moreover, Farm Bureau's reliance on *Spann*, *Camden Wholesale Grocery*, *Young*, and *Walker* is misplaced. Each is a century-old first-party fire-insurance case addressing a forfeiture

[3] Courts typically break circular conflicts between "other insurance" clauses by either disregarding the "escape clause" or disregarding both "other insurance" clauses as mutually repugnant. (Setcavage Report p. 7). In the present action, the outcome is the same regardless of how the circular conflict is broken. Disregarding only the "escape clause" leaves Farm Bureau paying $1,000,000.00 on the Farm Policy as primary coverage and paying $300,000.00 on the Homeowners Policy as excess. Disregarding both clauses leaves co-primary policies, with the Farm Policy indemnifying 10/13 of the loss and the Homeowners Policy indemnifying 3/13 of the loss, up to the policies limits. In either case, Farm Bureau is the carrier paying the claim. Moreover, "the probable value [of this claim] exceeds all available coverages of $1,300,000.00, whether a court decides each must pay a pro rata or whether the Farm [Policy] ($1,000,000.00) is deemed primary, it is a moot point for the purposes of this claim." (Setcavage Report p. 8).

clause that rendered the entire property policy void if the insured procured *any* additional insurance on the same property. *See Spann v. Phoenix Ins. Co. of Hartford*, 83 S.C. 262, 65 S.E. 232 (1909); *Camden Wholesale Grocery v. Nat'l Fire Ins. Co.*, 106 S.C. 467, 91 S.E. 732 (1917); *Young v. St. Paul Fire & Marine Ins. Co.*, 68 S.C. 387, 47 S.E. 681 (1904); *Walker v. Queen Ins. Co.*, 136 S.C. 144, 134 S.E. 263 (1926). Those clauses served the anti-fraud function unique to property insurance of discouraging an owner from over-insuring property and then destroying it for gain. As this Court explained in *S.C. Ins. Co. v. Fid. & Guar.*, "other insurance" clauses "began their lives as an attempt to prevent fraud in the over insuring of property," but are "now . . . widely used in many other types of insurance policies where fraud by over insurance would not be a possibility." 327 S.C. at 211, 489 S.E.2d at 202; *accord Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 586 (Tex. 1969) (recognizing that "other insurance" provisions "began in the area of property insurance" and "have generally been treated differently" in the liability context).

Correspondingly, Farm Bureau's reliance upon *Ferromontan, Inc. v. Georgetown Steel Corp.*, is flawed. 535 F. Supp. 1198, 1213 (D.S.C. 1982). That case did not involve a conflict between an "escape" and "excess clause"; it involved an "escape clause" triggered by a geographical limit. *Id.* Notably, the court found the "escape clause" enforceable because "the insured . . . , a sophisticated industrial entity, should be charged with the terms of its contract . . . . [and] [s]econd, [the insured] is not harmed by the clause, being totally protected by [a different insurer's] obligation to pay and defend." *Id.*

None of those authorities relied upon by Farm Bureau involved concurrent liability policies, conflicting "other insurance" clauses, or how to resolve a circular conflict that, if the "escape clause" were enforced in isolation, would strip the insured of the primary coverage for

which she paid. At most, those cases confirm the unremarkable proposition that an "escape clause" may be enforceable in the abstract. But abstract validity is not the issue. The issue is whether the Farm Policy's "escape clause" and the Homeowners Policy's "excess clause" can be reconciled, and that answer comes from *S.C. Ins. Co. v. Fid. & Guar.*, not a line of pre-Depression fire cases. Where two concurrent clauses are mutually repugnant, both are disregarded. 327 S.C. at 211, 489 S.E.2d at 202. This Court should affirm the order of the circuit court.

II. Farm Bureau's interpretation of the policies violates the reasonable expectations of its insured and violates established principles of public policy.

Applying Farm Bureau's interpretation of the policies defeats the essential purpose of the coverage. Farm Bureau issued two separate policies and collected premiums on both policies, with each purporting to cover the incident. Despite this, "the insured is left in an untenable position and one in which no reasonable person would have ever guessed would happen having purchased two liability policies to protect oneself." (Setcavage Report p. 5).

South Carolina courts have long protected the insured's reasonable expectations. *See McPherson v. Mich. Mut. Ins. Co.*, 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993) (construing ambiguous policy language in favor of the insured); *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 580, 757 S.E.2d 399 (2014) ("[R]easonable expectations of parties entering an insurance contract will be honored within the confines of South Carolina's interpretive rules and fairness principles."); *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 548, 677 S.E.2d 574, 581 (2009) (construing policy exclusions narrowly and in favor of the insured).

Other jurisdictions have expressed a similar view of protecting the insured's reasonable expectations. *See Bailey v. Lincoln Gen. Ins. Co.*, 225 P.3d 1039, 1049 (Colo. 2011); *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 403 P.3d 664, 668 (Mont. 2017); *Est. of Wheeler v. Garrison Prop. & Cas. Ins. Co.*, 564 P.3d 611, 617 (Alaska 2025); *Ky. Employers' Mut. Ins. v.*

Ellington, 459 S.W.3d 876, 883 (Ky. 2015); *California Specialty Insulation, Inc. v. Allied World Surplus Lines Ins. Co.*, 321 Cal. Rptr. 3d 193, 197 (Ct. App. 2024); *Ga. Farm Bureau Mut. Ins. Co. v. Meyers*, 548 S.E.2d 67, 69 (Ga. Ct. App. 2001); *Grant v. Emmco Ins. Co.*, 243 S.E.2d 894, 897 (N.C. 1978).

In the context of conflicting "other insurance" clauses, the *S.C. Ins. Co. v. Fid. & Guar. Ins.* court expressed concern with insurance companies' policy interpretations. *Id.* at 219, 489 S.E.2d 200, 206 ("It seems that insurers generally are attempting to convince the customer when selling the policy that everything is covered and convince the court when a claim is made that nothing is covered."). Correspondingly, the supreme court in *S.C. Farm Bureau v. S.E.C.U.R.E. Underwriters Risk Retention Grp.*, 353 S.C. 249, 253-54, 578 S.E.2d 8, 10-11 (2003) recognized that denying coverage under a policy tailored to a contemplated risk frustrates the insured's reasonable expectations.[4]

Moreover, "[o]ther insurance clauses govern the relationship between insurers; they do not affect the right of the insured to recover under each concurrent policy." *Yaffe Companies v. Great Am. Ins. Co.*, 499 F.3d 1182, 1189 (10th Cir. 2007) (citing Lee R. Russ, *Couch on Insurance* § 219:1 (3d ed. 2007)); *see e.g., Sec. Ins. Co. v. Arcade Textiles, Inc.*, C.A. No. 0:98 2545-17 (D.S.C. Mar. 16, 2000) ("'Other insurance' clauses only affect the insured's right to recovery under each concurrent policy. Inter-insurer loss allocation by way of 'other insurance' clauses never permits allocation of a loss to the insured. Payment of the insured's claim always takes priority over the

[4] The supreme court reversed the court of appeals' decision solely on the ground that the lower court improperly applied the "total policy insuring intent" doctrine to determine priority between two policies with unambiguous "other insurance" clauses. *See S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Grp.*, 353 S.C. 249, 578 S.E.2d 8, 11 (2003). The supreme court never rejected the court of appeals' discussion on the insured's reasonable expectations.

allocation of the loss between concurrent insurers.") (quoting Douglas R. Richmond, *Issues and Problems in "Other Insurance," Multiple Insurance, and Self Insurance*, 22 Pepp. L. Rev. 1373, 1380-81 (1995)); *In re Oil Spill by the Oil Rig DEEPWATER HORIZON in Gulf of Mexico,* on April 20, 2010, MDL No. 2179, 2014 WL 5524268, at *8 (E.D. La. Oct. 31, 2014) *aff'd in part, rev'd in part on other grounds*, 807 F.3d 689 (5th Cir. 2015) (citing *Couch on Insurance*, supra, § 219:1); *Liberty Mut. Ins. Co. v. Pella Corp.*, 633 F. Supp. 2d 714, 724 (S.D. Iowa 2009) ("[U]nder well-established law, 'other insurance' provisions found in policies providing primary coverage govern the relationship between insurers and do not diminish an insured's coverage rights under any concurrent insurance policies."). "'Other insurance' clauses are intended to apportion an insured loss between or among insurers." *S.C. Ins. Co. v. Fid. & Guar. Ins.*, 327 S.C. at 211, 489 S.E.2d at 202; *see also* Carrie Maylor DiCanio, *Avoiding Coverage Denials Based on "Other Insurance"*, Risk Management Magazine, Feb. 2022, at 2 ("It is well-settled that 'other insurance clause disputes should affect only the rights among insurance companies.' States Couch on Insurance. 'Other insurance clauses govern the relationship between insurers, they do not affect the right of the insured to recovery under each concurrent policy.'")[5]

Furthermore, Farm Bureau's critique of the circuit court's reliance upon *S.C. Farm Bureau v. S.E.C.U.R.E.* is misplaced. In *S.E.C.U.R.E.*, the court applied the framework at issue here and held competing "other insurance" clauses are enforced as written *when they can be reconciled* and are disregarded as mutually repugnant when they cannot. 353 S.C. 249, 253-54, 578 S.E.2d 8, 10-11 (2003). In *S.E.C.U.R.E.*, the clauses could be reconciled because one policy's provision made its coverage primary while the other's made its coverage excess. *Id.* Those provisions operated in

[5] https://www.rmmagazine.com/articles/article//2022/03/29/avoiding-coverage-denials-based-on-other-insurance.

sequence rather than in conflict, so both could be given effect. *Id.* Because a "primary clause" and an "excess clause" could coexist, the court found no repugnancy and had no occasion to apply the "total policy insuring intent" rule. *Id.*; *see also* note 4, *supra*. The case *sub judice* is the opposite. The Homeowners Policy's "excess clause" and the Farm Policy's "escape clause" cannot operate in sequence. The "excess clause" withholds coverage until other primary insurance is exhausted, while the "escape clause" withdraws coverage entirely whenever another policy responds. Each provision points to the other as the source of primary coverage, and neither can be given effect without nullifying the other. This leaves the insured with no primary coverage at all. This is precisely the irreconcilable conflict *S.C. Ins. Co. v. Fid. & Guar.* deems mutually repugnant. 327 S.C. 207, 489 S.E.2d 200. Therefore, *S.E.C.U.R.E.* supports affirmance because our courts enforce "other insurance" clauses as written only where they can be harmonized, unlike the clauses here.

Farm Bureau's interpretation would set a dangerous precedent, as it would encourage insurers to collect premiums on two concurrent policies where at best only one actually provides coverage. From an insured's perspective, the illusion of double coverage creates a scenario in which an insured pays two premiums to the same insurer but is unexpectedly and unreasonably better off paying for only one policy. Under Farm Bureau's interpretation, the insured started with $1,000,000.00 in coverage under the Farm Policy, but by purchasing *additional coverage*, the Homeowners Policy, the insured reduced her liability coverage to $300,000.00 for this loss. Because such a result defeats the insured's reasonable expectations and cannot be reconciled with the basic principles of fairness, the circuit court's decision must be upheld to disregard the "escape clause" and interpret the policies as co-primary liability coverage.

Conclusion

For these reasons, Respondent John Milin respectfully requests the Court affirm the circuit court's order. Under South Carolina law and established public policy, the two "other insurance" clauses are mutually repugnant and should be disregarded.

Respectfully submitted,

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