

STATE OF SOUTH CAROLINA  
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS  
FOR THE TENTH JUDICIAL CIRCUIT

Robert Ayers, Paul Barkal, Susan Barkal, Gloria Bennett, Kurt Blaettler, Vandy Kim, Glenn Kornett, Gudrun Kornett, David Larson, Lucye Larson, Florence Lince, Mike Lince, Michael McGraw, Diane Bernat, and William Schaidle,

Plaintiffs,

vs.

Chris Dixon, Black Harbor Wealth Management, LLC, Samuel J. Dixon, Faw Casson & Co., LLP, ShurWest LLC, and Pacific Life Insurance Company,

Defendants.

Case No.: 2019-CP-04-00752

**RECEIVED**

**Feb 23 2021**

**SC Court of Appeals**

**ORDER GRANTING IN PART  
PLAINTIFFS' MOTION TO STRIKE  
SHURWEST'S THIRD PARTY  
COMPLAINT OR IN THE ALTERNATIVE  
TO SEVER**

Before the Court is Plaintiffs' Motion to Strike or in the Alternative to Sever Shurwest's Third Party Complaint. The matter has been fully briefed by Plaintiffs, Shurwest, and Third-Party Defendants, Melanie Schulze-Miller ("Miller") and MJSM Financial, LLC ("MSJM"). A hearing was held on the matter on Wednesday January 20, 2021 beginning at 4:00 PM with the following appearances: Robert Rikard of Rikard & Protopapas, LLC on behalf of Plaintiffs; I.S. Leevy Johnson of Johnson Toal and Batiste, PA and Jason Hopkins of DLA Piper on behalf of the Defendant Shurwest; and Deborah Barbier of Deborah B. Barbier, Attorney at Law on behalf of the Third-Party Defendants. Having fully considered the matter, including the motion, the parties' briefs and

memoranda, and oral arguments, it is hereby **ORDERED** that Plaintiffs' Motion to Strike or in the Alternative to Sever is **GRANTED IN PART** for the reasons set forth in more detail below.

### **BACKGROUND**

Plaintiffs move to strike or in the alternative to sever Shurwest's Third Party Complaint against Third-Party Defendants Miller and MSJM on the grounds that Shurwest's third-party claims are not derivative of Plaintiffs' underlying claims, because Miller cannot be liable to Shurwest, and because of the potential for prejudice to Plaintiffs case and underlying claims. Shurwest argues that res judicata does not apply to its third-party claims against Miller and that they are true third-party claims that are derivative of Plaintiffs' underlying claims.

A detailed summary of the factual background of the case is included in the Court's July 24, 2020 Order Denying Shurwest's Motion to Dismiss. In the interest of brevity, the Court refers to that summary in lieu of repeating here.

### **LEGAL STANDARD**

"The question of whether to grant a motion to strike a third-party claim, whether filed with or without the leave of court, is addressed to the sound discretion of the trial court." *Beach v. Hudson*, 298 S.C. 424, 426, 380 S.E.2d 869, 871 (Ct. App. 1989). A trial court is accorded wide discretion in determining whether to permit third party procedure, however, "the third-party claim must be 'derivative' of the plaintiff's claim". *Thompson v. UFP Eastern Div., Inc.*, 2012 WL 3686064, at \*1 (D.S.C. 2012)

## ANALYSIS

Here, the evidence before the Court establishes that Plaintiffs' Motion to Strike should be Granted, in part, as set forth below.

### **A. Shurwest's Third-Party Claims Are Not Derivative**

For a third-party claim to be derivative of a plaintiff's claim, "the non-party must be potentially liable to the third party plaintiff" and "the non-party's liability must relate to the plaintiff's claim against the defendant / third party plaintiff such that the third party defendant's liability arises only if the defendant / third party plaintiff is first held liable to plaintiff." *Thompson v. UFP Eastern*, 2012 WL 3686064, at \*2 (quoting *Tetra Tech EC/Tsoro Joint Venture v. Sam Temples Masonry, Inc.* No. 10-1597, 2011 WL 1048964, at \*3 (D.S.C. 2011)).<sup>1</sup>

Shurwest's claims against Miller and MSJM do not satisfy either of these conditions. As explained by another court, "[A] third party claim is not appropriate where the defendant and putative third party plaintiff says, in effect, "It was him, not me." *Watergate Landmark*, 117 F.R.D. at 578. That is what Shurwest is arguing here, that Miller is responsible for the conduct that harmed Plaintiffs, not Shurwest. The Third-Party Complaint explicitly states that "Shurwest is not responsible for any of the Plaintiffs' alleged damages relating to the promotion or sale of FIP products. Schulze-Miller and MJSM are." Third-Party Compl., at ¶ 12. Accordingly, Ms. Miller and MSJM's liability to Shurwest is not "dependent on the outcome of" Plaintiffs' claims against Shurwest. *Laughlin v. Dell Fin. Svcs, L.P.*, 465 F.Supp.2d 563, 566 (D.S.C. 2006).

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<sup>1</sup> S.C. R. Civ. P. "Rules 14(a) through (c) are substantially the same as the Federal Rule, except for the omission of references to admiralty and maritime practice, and the addition of Rule 14(c) as to joinder. Comment to Rule 14 S.C. R. Civ. P.

**B. Shurwest's Breach of Contract and Breach of Fiduciary Claims Are Barred By Issue Preclusion**

“Issue preclusion bars the relitigation of only the particular issues that were actually litigated and decided in the prior suit.” *Catawba Indian Nation v. State of S.C.*, 407 S.C. 526, 537, 756 S.E.2d 900, 907 (2014). It appears to this Court that the breach of contract and breach of fiduciary claims that Shurwest has asserted in its Third-Party Complaint are substantially the same as the breach of contract and breach of fiduciary duty claims that Shurwest asserted against Ms. Miller in the 2018 Arizona state court case, No.: CV2018-004665.

The evidence before the Court shows that Shurwest agreed to dismiss the Arizona claims with prejudice in September 2018. As such, Shurwest is barred from relitigating those issues here.

**C. Shurwest's Third-Party Claims Will Unduly Complicate This Litigation and Prejudice Other Parties**

“When considering a request to strike or to sever a third-party claim, the court may properly consider “the effect the additional parties and claims will have on the adjudication of the main action – in particular, whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way.” *Beach v. Hudson*, 298 S.C. 424, 426, 380 S.E.2d 869, 871 (Ct. App. 1989) (citing 6 C. WRIGHT AND A. MILLER, *Federal Practice and Procedure* § 1460 at 320-21 (1971)).

Based on the evidence and arguments presented here, the Court finds that continued joinder of the Third-Party Defendants will complicate the litigation and prejudice the Plaintiffs in a substantial way, including, but not limited to the likelihood that continued

joinder of Miller and MSJM will cause this case to be stayed because of Receivership proceedings that are currently pending in the Federal Court. See, *In Re. Receiver for S. Kohn et al.*, C.A. 6:19-cv-01112 (D.S.C.).

**D. Shurwest's Equitable Indemnification Claim is Premature**

To recover on an equitable indemnification cause of action, Shurwest must prove: 1) Schulze-Miller and MJSM are liable for Plaintiffs' damages; 2) Shurwest was exonerated from any liability for those damages; and 3) Shurwest suffered damages as a result of Plaintiffs' claims against Shurwest, which were eventually proven to be the fault of Schulze-Miller and MJSM. *Walterboro Community Hosp. v. Meacher*, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2011). Shurwest will not be able to make that showing until Plaintiffs' claims have been resolved. Accordingly, the claim for equitable indemnification is premature and should be severed so that it does not complete the trial of Plaintiffs' underlying claims.

**CONCLUSION**

For these reasons, Plaintiffs' Motion to Strike is **GRANTED** as to Shurwest's Third-Party claims for breach of contract and fiduciary duty. Plaintiffs' Motion to Strike is **DENIED** as to Shurwest's third-party claim for equitable indemnification. Plaintiffs' Motion in the Alternative to Sever is **GRANTED** as to Shurwest's third-party claim for equitable indemnification.

The Clerk of Court is hereby directed to assign a new and separate civil action number to Shurwest's equitable indemnification claim and Third-Party Complaint.

February \_\_\_\_\_, 2021

s/\_\_\_\_\_  
The Hon. R. Lawton McIntosh

Anderson, SC



Anderson Common Pleas

**Case Caption:** Robert Ayers , plaintiff, et al VS Chris Dixon , defendant, et al

**Case Number:** 2019CP0400752

**Type:** Order/Other

S/R. LAWTON McINTOSH

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