

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

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

Defendants.

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Shurwest, LLC

Third-Party Plaintiff,

vs.

MJSM Financial, LLC and Melanie Schulze-  
Miller,

Third-Party Defendants.

Civil Action No. 2019-CP-04-00752

**ORDER**

**RECEIVED**

**Feb 23 2021**

**SC Court of Appeals**

Before the Court is Third-Party Defendants Melanie Schulze-Miller (“Schulze-Miller”) and MJSM Financial, LLC’s (“MJSM”) (collectively “Third-Party Defendants”) Motion to Dismiss the Third-Party Complaint pursuant to South Carolina Rule of Civil Procedure 12(b)(6). The matter has been fully briefed by both Third-Party Defendants and Third-Party Plaintiff Shurwest, LLC (“Shurwest”), and a hearing was held on the matter on January 20, 2021. Having fully considered the matter, including the motion, the parties’ briefs and memoranda, exhibits, and

oral arguments, it is hereby **ORDERED** that Third-Party Defendants' Motion to Dismiss is **GRANTED** for the reasons set forth in more detail below.

### **BACKGROUND**

The instant lawsuit was filed on April 17, 2019, by Plaintiffs Robert Ayers, Paul Barkal, Susan Barkal, Gloria Bennett, Kurt Blaettler, Vandy Kim, Glenn Kornett, Gundrun Kornet, David Larson, Lucye Larson, Florence Lince, Mike Lince, Michael McGraw, Diane Bernat and William Schaidle, consumers who had purchased structured cash flows sold by Future Income Payments, LLC, ("FIP"). FIP has been deemed a Ponzi scheme. Plaintiffs assert claims against the insurance agents who sold them the FIP products, Christopher J. Dixon and Samuel J. Dixon, and their company Black Harbor Wealth Management, LLC, (collectively "Dixon") and the issuers of indexed universal life insurance policies that Plaintiffs funded using the FIP product, Defendants Minnesota Life Insurance Company ("MLIC") and Pacific Life Insurance Company ("Pac Life"). (See Plaintiffs' Complaint). Plaintiffs also named as a defendant Shurwest, LLC, an Arizona corporation that previously employed Schulze-Miller. On September 30, 2019, Plaintiffs dismissed Schulze-Miller and MJSM from this suit without prejudice. (See Stipulation for Dismissal of Schulze-Miller and MJSM).

Plaintiffs' Complaint alleges that Dixon, with advice, recommendation, and education provided by Shurwest and Schulze-Miller, failed to conduct proper due diligence in facilitating the sale of life insurance products in conjunction with certain funding mechanisms administered by third parties, including FIP, which Plaintiffs refer to as the "Life Insurance Retirement Strategy a/k/a IRA Reboot Program" (the "Program"), allegedly causing harm to Plaintiffs in the form of financial losses. (Plaintiff's Compl. ¶¶ 3-5, 84-87.) Plaintiffs also allege that Schulze-Miller "was an employee and/or agent of Shurwest" and that at "all times complained of herein acted within

the scope of her employment as National Sales Director for Life Insurance for Shurwest.” (*Id.* ¶¶ 55-56.)

On July 27, 2020, Shurwest filed a Third-Party Complaint against Schulze-Miller and MJSM alleging that Schulze-Miller, MJSM, and Dixon failed to conduct proper due diligence on the FIP products and negligently disregarded risks associated with the FIP program. (Third-Party Complaint ¶ 7.) Shurwest alleges that Schulze-Miller and MJSM are responsible for the damages claimed against Shurwest by the Plaintiffs in this action arising from investments with FIP. (*Id.* ¶ 1.) Shurwest claims that it rejected Schulze-Miller’s request to promote FIP products to Shurwest clients, and, despite this, Schulze-Miller thereafter formed MJSM and marketed FIP products to agents, including Dixon. (*Id.* at ¶ 6.) Shurwest denies any knowledge of Schulze-Miller’s and MJSM’s alleged conduct. (*Id.* at ¶¶ 6,8.)

Specifically, in its Third-Party Complaint, Shurwest asserts three causes of action for: 1) equitable indemnification against Schulze-Miller and MJSM; 2) breach of contract against Schulze-Miller; and 3) breach of fiduciary duty as to Schulze-Miller. In its first claim, Shurwest seeks equitable indemnification of “any” of Plaintiffs’ alleged damages, which arise from Schulze-Miller’s alleged conduct in dealing with Plaintiffs, Dixon, and others, including the alleged dealings with FIP as part of the Program. (Third-Party Complaint ¶ 12.) In its second claim, Shurwest alleges that Schulze-Miller breached an employment agreement with Shurwest by misusing Shurwest’s confidential information in relation to the Plaintiffs’ claims. (*Id.* ¶ 15.) In its third claim, Shurwest alleges that Schulze-Miller breached a fiduciary duty to Shurwest by engaging in and concealing her unauthorized business related to FIP through MJSM, with resulting harm to Shurwest’s reputation and business. (*Id.* ¶¶ 18-20.)

## PROCEDURAL HISTORY

Shurwest first sued Schulze-Miller on May 15, 2018, in *Shurwest, LLC v. Melanie Schulze-Miller, et al.*, Maricopa County (Arizona) Superior Court Case No. CV2018-004665 (the “Arizona Lawsuit”). (See Mot. to Dismiss, Ex. 1; Shurwest’s Resp. to Mot. to Dismiss, Ex. A at 1.)<sup>1</sup> In the Arizona complaint, Shurwest alleged that Schulze-Miller was a Shurwest employee from June 2012 to May 2018 and the company’s National Sales Director for Life Insurance. (Mot. to Dismiss, Ex. 1 ¶ 6.) The terms of her employment were based on an At-Will Employment and Restrictive Covenants Agreement (the “Employment Agreement”). (*Id.* ¶ 7.)

Shurwest alleged that the Employment Agreement restricted Schulze-Miller’s ability to access and use Shurwest’s confidential information, including information about Shurwest’s “Clients,” except in the ordinary course of her employment. (*Id.* ¶ 8.) By Shurwest’s definition, “Clients” included, among other things: “Clients, consumers, and individuals who hold insurance or annuity policies distributed by or through [Shurwest or its affiliates]” (*Id.* ¶ 9.)

Shurwest claimed that in April 2018 it discovered Schulze-Miller had breached the Employment Agreement and violated her fiduciary duties by allegedly marketing, promoting, or selling the FIP products at issue in the instant action. (Mot. to Dismiss, Ex. 1 ¶ 13.) Shurwest alleged that Schulze-Miller was not authorized to engage in these FIP activities, and that she concealed her actions from Shurwest. (*Id.* ¶ 16.) Shurwest also alleged that Schulze-Miller formed MJSM to conduct the FIP activities without Shurwest’s knowledge, and that she used Shurwest’s confidential Client information in connection with her FIP activities. (*Id.* ¶¶ 17-18.) Shurwest

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<sup>1</sup>In analyzing a Rule 12(b)(6) motion to dismiss, the Court may consider documents incorporated into the complaint by reference, including judicial notice of court orders. See *Doe v. Bishop of Charleston*, 407 S.C. 128, 135, 754 S.E.2d 494, 498 (2014) (holding motion to dismiss not converted into motion for summary judgment where trial court relied on transcripts and court orders in underlying class action lawsuit).

asserted these actions could have implied a relationship between FIP and Shurwest, and that Shurwest's reputation was harmed because FIP was under governmental scrutiny. (*Id.* ¶¶ 19, 22.) Shurwest terminated Schulze-Miller for these allegedly unauthorized actions related to FIP. (*Id.* ¶ 21.)

Based on these allegations, Shurwest asserted claims in the Arizona lawsuit against Schulze-Miller for breach of the Employment Agreement (Mot. to Dismiss, Ex. 1 ¶¶ 25-30), breach of the implied covenant of good faith and fair dealing under the Employment Agreement (*Id.* ¶¶ 31-36), and breach of fiduciary duty arising from her employment with Shurwest and related to the FIP circumstances at issue in this action (*Id.* ¶¶ 37-43). Schulze-Miller answered the complaint on June 11, 2018, and denied all wrongdoing. (Mot. to Dismiss, Ex. 2.) She also asserted several counterclaims against Shurwest for declaratory judgment, breach of Shurwest's obligation to pay wages to her under the Employment Agreement, and breach of the covenant of good faith and fair dealing. (*Id.* ¶¶ 42-138)

On September 12, 2018, the parties entered a settlement agreement ("Settlement") in which the parties agreed that they would seek an order dismissing "all claims and counterclaims in the Lawsuit with prejudice with each side to bear its/his/her own costs and attorneys' fees." (Third-Party Pl.'s Response to Mot. to Dismiss, Ex. 1 at 1-2). Thereafter, on September 14, 2018, the parties filed a stipulation to dismiss the Arizona Lawsuit with prejudice as to all claims and counterclaims, each side to bear its own costs and attorneys' fees. (*See* Mot. to Dismiss, Ex. 3.) Following that stipulation, on September 20, 2018, the Arizona (Maricopa County) Superior Court dismissed with prejudice the Arizona Lawsuit. (*See* Mot. to Dismiss, Ex. 4.)

## LEGAL STANDARD

Under Rule 12(b)(6), SCRCPP, a complaint should be dismissed if it fails “to state facts sufficient to constitute a cause of action.” Rule 12(b)(6), SCRCPP. “Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case.” *Brown v. Theos*, 338 S.C. 305, 309-10, 526 S.E.2d 232, 235 (Ct. App. 1999), *aff’d*, 345 S.C. 626, 550 S.E.2d 304 (2001) (quoting *Jarrell v. Petoseed Co., Inc.*, 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998)).

The general rule is well established that once a person has had a full and fair opportunity to litigate a claim, the person is precluded, under the doctrine of res judicata, from relitigating it. *See New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001). “When claims arising out of a particular transaction or occurrence are adjudicated, res judicata bars the parties to that suit from bringing subsequent actions on either the adjudicated issues or any issues that might have been raised in the first suit.” *Judy v. Judy*, 383 S.C. 1, 8, 677 S.E.2d 213, 217 (Ct. App. 2009), *aff’d*, 393 S.C. 160, 712 S.E.2d 408 (2011) (emphasis added); *see also Taylor v. Taylor*, 241 S.C. 462, 128 S.E.2d 910, 913 (1962) (“The doctrine of res judicata has been generally said to bar relitigation not only of issues actually decided in the former proceeding, but also of such issues as could have been there presented for decision.”).

“[A]ll questions which were actually litigated in the prior action and determined by the judgment are conclusive in any subsequent action between the parties, or their privies, regardless of whether the subsequent action involves the same or a different cause of action.” *Lowe v. Clayton*, 264 S.C. 75, 82, 212 S.E.2d 582, 585–86 (1975). Further, “simply seeking a different remedy in the second lawsuit for the same cause of action does not negate the identical nature of

the subjects of the two actions.” *Judy*, 393 S.C. at 172, 712 S.E.2d at 414 (citing *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 35, 512 S.E.2d 106, 109 (1999)).

“To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.” *Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 109. “A case that is dismissed ‘with prejudice’ indicates an adjudication on the merits and, pursuant to res judicata, prohibits subsequent litigation to the same extent as if the action had been tried to a final adjudication.” *RIM Assocs. v. Blackwell*, 359 S.C. 170, 182, 597 S.E.2d 152, 159 (Ct. App. 2004) (emphasis added).

### ANALYSIS

**1. Issue preclusion bars Shurwest’s Third-Party causes of action for breach of contract and breach of fiduciary duty.**

Third-Party Defendants move to dismiss the Third-Party Complaint on the ground that it is barred by res judicata because the parties, subject matter, and issues in Shurwest’s Third-Party Complaint are identical and indistinguishable from claims that were made the Arizona Lawsuit that was dismissed with prejudice. In its response, Shurwest argues that res judicata does not apply because the claims in the Third-Party Complaint are entirely different from the claims Shurwest previously asserted against Schule-Miller in the Arizona Lawsuit, arise out of a separate set of occurrences, and will require distinct and additional evidence at trial. Shurwest also contends that the claims it raises in the Third-Party Complaint relate to and arise out of Schulze-Miller and MJSM’s conduct with respect to consumers and their losses.

As discussed below in detail, applying the principles of res judicata set forth above, the Court finds that Shurwest’s Third-Party causes of action for breach of contract and breach of fiduciary duty are barred by res judicata because they were previously asserted (or could have been asserted) in prior litigation between the parties and were dismissed with prejudice in the Arizona

Lawsuit. Further, the Court finds that, as to these two claims, the parties share identity because Shurwest sued Schulze-Miller in both actions for her conduct and on behalf of MJSM. Finally, the Court finds that the subject matter is also identical, as Shurwest now seeks damages for injuries allegedly arising from Schulze-Miller’s violation of the Employment Agreement and fiduciary duties in promoting the FIP products to Plaintiffs through MJSM, which it also sought in the Arizona Lawsuit.

As noted above, the Arizona Complaint included causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty against Schulze-Miller—all arising from the Employment Agreement. A comparison of the allegations in Shurwest’s Third-Party Complaint for its breach of contract and breach of fiduciary duty claims and its allegations in the Arizona Lawsuit clearly illustrate that these claims concern the same conduct and are the same claims:

ARIZONA LAWSUIT	THIRD-PARTY COMPLAINT
<p>“Ms. Schulze-Miller materially breached the Employment Agreement by misusing Shurwest’s confidential information, including Client information, for her own selfish benefit and to Shurwest’s severe detriment, in violation of . . . the Employment Agreement.” (Mot. to Dismiss, Ex. 1 ¶ 27.)</p>	<p>“Schulze-Miller materially breached the employment agreement by misusing Shurwest’s confidential information for her own selfish benefit and to Shurwest’s detriment, in violation of the employment agreement’s terms.” (Third-Party Compl. ¶ 15.)</p>
<p>“Under Arizona law, Ms. Schulze-Miller owed a fiduciary duty to Shurwest as a Shurwest employee, which included duties of loyalty, utmost good faith, honesty and full disclosure.” (Mot. to Dismiss, Ex. 1 ¶ 38.)</p>	<p>“Schulze-Miller owed a fiduciary duty to Shurwest, including duties of loyalty, utmost good faith, honesty, and full disclosure. Schulze-Miller breached those duties by engaging in unauthorized business dealings with FIP through her undisclosed, separately created LLC while she was still employed by Shurwest, and concealing her actions from Shurwest knowing that Shurwest would not do business with FIP. She also</p>
<p>“Ms. Schulze-Miller breached her fiduciary duties of honesty and full disclosure to Shurwest by engaging in</p>	

business dealings with FIP on her own account while she was employed by Shurwest without disclosing her actions to Shurwest and knowing that Shurwest would not do business with FIP.” (Mot. to Dismiss, Ex. 1 ¶ 39.)

“Ms. Schulze-Miller breached her fiduciary duties of utmost good faith and loyalty by misusing Shurwest confidential information to personally profit at Shurwest’s expense and jeopardizing Shurwest’s business, reputation, and its relationship with Shurwest Clients. Ms. Schulze-Miller recklessly acted to benefit herself at the expense of Shurwest.” (Mot. to Dismiss, Ex. 1 ¶ 40.)

“Ms. Schulze-Miller’s actions damaged Shurwest’s reputation, perceptions of its integrity, and its business and client relationships by falsely suggesting that Shurwest approved, promoted, endorsed, distributed or was associated with FIP or its products.” (Mot. to Dismiss, Ex. 1 ¶ 41.)

breached those duties by misusing Shurwest confidential information to personally profit at Shurwest’s expense, jeopardizing Shurwest’s business, reputation, and its relationship with clients, and by recklessly acting to benefit herself at the expense of Shurwest.” (Third-Party Compl. ¶ 18.)

“Schulze-Miller’s actions damaged Shurwest’s reputation, perceptions of its integrity, and its business and client relationships by falsely suggesting that Shurwest approved, promoted, endorsed, distributed, or was associated with FIP or its products.” (Third-Party Compl. ¶ 19.)

Moreover, in the Arizona Lawsuit, Shurwest alleged that “Ms. Schulze-Miller further breached the implied covenant by secretly acting to personally profit at the expense of Shurwest and its Clients.” (Mot. to Dismiss, Ex. 1 ¶ 34). All of these claims arise from the same alleged conduct—injury and damages to Shurwest and its clients resulting from Schulze-Miller’s allegedly unauthorized actions regarding marketing and promoting the FIP products to Plaintiffs. Shurwest voluntarily dismissed the claims in the Arizona Lawsuit with prejudice. (*See* Mot. to Dismiss, Exs. 3 and 4.)

Here, *res judicata* bars the Third-Party Complaint because the claims in both actions are the same, arise out of the same underlying circumstances, and were conclusively adjudicated and

dismissed with prejudice in the prior Arizona Lawsuit. *See RIM Assocs.*, 359 S.C. at 184 (Ct. App. 2004) (“res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties”) (emphasis in the original)).<sup>2</sup>

Moreover, simply because Shurwest’s second claim for relief in the Arizona Lawsuit (bad faith) is not identical to its claims in the present action does not preclude application of res judicata because the same conduct was at issue. The primary claim that Schulze-Miller allegedly conducted unauthorized FIP activities and associated claims were raised in the Arizona Lawsuit and the action was dismissed with prejudice. *See Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C.

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<sup>2</sup>Shurwest argues that the law of Arizona, not South Carolina, applies when determining whether res judicata bars the Third-Party Complaint because a judgment is to be given the res judicata effect that the judgment would be afforded in the state in which it was rendered, which here was Arizona. Even applying Arizona law, however, the Third-Party Complaint would be barred by res judicata. Under Arizona law on res judicata, a final judgment on the merits is conclusive as to every point decided and “every point decided [in the first action] and also as to every point raised by the record which could have been decided” as to the parties and their privies in all other actions. *Fuller v. Hartford Accident & Indem. Co.*, 601 P.2d 1360, 362 (Ariz. Ct. App. 1979) (quoting *Hoff v. City of Mesa*, 344 P.2d 1013, 1014 (Ariz. 1959); *see also Pettit v. Pettit*, 189 P.3d 1102, 1105 (Ariz. Ct. App. 2008) (res judicata bars a new claim based not only upon the facts litigated in the first lawsuit but also upon all matters that might have been litigated). In deciding whether an action is the same cause of action for res judicata purposes, Arizona courts use the “same evidence” test. *Pettit*, 189 P.3d at 1105. Under this test, “the plaintiff is precluded from subsequently maintaining a second action based upon the same transaction, if the evidence needed to sustain the second action would have sustained the first action.” *Id.* (quoting Restatement of Judgments § 61 (1942)). Further, “[u]nlike issue preclusion, which applies only to issues that were actually litigated, a second claim is precluded ‘not only upon facts actually litigated but also upon those points which might have been litigated.’” *Id.* at 1106 (citing *Gilbert v. Bd. of Med. Exam’rs*, 745 P.2d 617, 622 (Ariz. Ct. App. 1987) (internal citations omitted)); *see also Best v. Ceja*, 2019 WL 4271848 (Ariz. Ct. App. Sept. 10, 2019). Here, all of Shurwest’s claims involve Schulze-Miller’s allegedly acting outside the scope of her employment by promoting and selling FIP products. The evidence needed to sustain the claims raised in the Third-Party Complaint would have sustained the claims raised in the Arizona Lawsuit. Moreover, because Schulze-Miller is the sole member of MJSM, LLC, there is privity between these parties. *See Eden v. Deublein*, 2017 WL 929747, \*3 (Ariz. Ct. App. Mar. 9, 2017).

467, 419 S.E.2d 217 (1992) (res judicata barred action arising from dispute over payment of insurance premiums because the trial court previously resolved the primary accounting issue).

Shurwest also contends that res judicata does not apply because MJSM was not a party to the Arizona Lawsuit and lacks privity. Shurwest cites to numerous cases that stand for the proposition that an LLC is a distinct legal entity from its members. However, “[f]or purpose of res judicata . . . the concept of privity rests not on the relationship between the parties asserting it, but rather on each party’s relationship to the subject matter of the litigation.” *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (citing *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986)); see also *Snavelly v. AMISUB of S.C., Inc.*, 379 S.C. 386, 665 S.E.2d 222, 228 (S.C. Ct. App. 2008) (holding that “while the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues.”). “The term ‘privity’, when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right.” *Richburg*, 290 S.C. at 434, 351 S.E.2d at 166. Schulze-Miller is the sole member of MJSM, LLC. As MJSM and Schulze-Miller represent the same legal interests, they were in privity for the purposes of Shurwest’s claims. See *James v. Wright*, C.A. No. 1:13-1438-TMC, 2014 WL 2612487, at \*4 (D.S.C. June 9, 2014) (finding individual defendant SCDC employees and the SCDC were in privity for res judicata purposes). Although MJSM was not involved in the first suit, it and Schulze-Miller were in privity, and therefore, MJSM’s legal interests were litigated in the first action.

In sum, because Shurwest’s breach of contract and breach of fiduciary duty claims in this action are substantially identical and arise from the same facts and circumstances as the claims it

asserted in the Arizona Lawsuit, res judicata precludes Shurwest from re-litigating these claims and allegations in this case. Therefore, the Court strikes Shurwest’s Third-Party causes of action for breach of contract and breach of fiduciary duty in their entirety as barred by res judicata. *See Pye v. Aycock*, 325 S.C. 426, 433, 480 S.E.2d 455, 458 (Ct. App. 1997). (“In a subsequent suit between the same parties on a different claim, the former judgment is conclusive as to those issues actually determined in the prior action.”) Doing so “effectuates the fundamental purpose of res judicata, which is to ensure that ‘no one should be twice sued for the same cause of action.’” *Judy*, 393 S.C. at 173, 712 S.E.2d at 414 (quoting *First Nat. Bank of Greenville v. U. S. Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945)).

Accordingly, Third-Party Defendants’ Motion to Dismiss is **GRANTED** as to Shurwest’s breach of contract and breach of fiduciary duty claims.

## 2. Shurwest’s Third-Party cause of action for equitable indemnification.

Third-Party Defendants Schulze-Miller and MJSM argue that the equitable indemnity claim is indistinguishable from the subject matter of the Arizona Lawsuit because it arises from the same alleged conduct—injury and damages to Shurwest resulting from Schulze-Miller’s allegedly unauthorized actions regarding the FIP products to Plaintiffs. Shurwest argues in opposition that the equitable indemnity claim survives the Motion to Dismiss because it did not exist at the time of the Arizona Lawsuit. Shurwest contends that this claim and all the facts relating to it arose in January 2019 after Plaintiffs brought their action against Shurwest.<sup>3</sup>

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<sup>3</sup>In its Third-Party Complaint, Shurwest cites to an order from a United States District Judge in Arizona entering summary judgment in a declaratory judgment action, *Landmark American Insurance Company v. Shurwest*, No. 2:19-cv-04743-SRB (D. Ariz.), and states that “[a] federal judge has ruled that, as a matter of law, Schulze-Miller acted on her own behalf and concealed her activities from Shurwest.” (Third-Party Compl. 1 ¶ 9). Schulze-Miller was not a party to the declaratory action and is not bound by any findings made there. The issues decided there—coverage under the Landmark American policy—are irrelevant to the issues before this Court.

The Court finds that the claim for equitable indemnification is to be severed, with that claim to be tried upon the issue becoming ripe for adjudication.

Neither side addressed in its moving papers the salient issue regarding Shurwest's claim for equitable indemnity, which is that the claim is not ripe for adjudication. "[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review." *Colleton County Taxpayers Ass'n v. Sch. Dist. Of Colleton County*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006). Here, Shurwest's indemnity claim is that it is not responsible for Plaintiffs' alleged damages in this action, and that Third-Party Defendants are liable to Shurwest for Plaintiffs' damages based on Third-Party Defendants' alleged conduct in dealing with Plaintiffs. Thus, an adjudication on Shurwest's indemnification claim is premature because it is contingent on the Plaintiffs successfully proving their claims against Shurwest.

Accordingly, it is **ORDERED** that Shurwest's claim for equitable indemnity is severed from this case, to be tried upon the issue becoming ripe for adjudication.

### **3. Attorneys' fees and costs.**

Pursuant to the South Carolina Frivolous Civil Proceedings Sanction Act ("FCPSA"), Third-Party Defendants Schulze-Miller and MJSM also request an award of their attorneys' fees and costs for having to bring this motion and respond to the precluded claims, which Shurwest knew were unwarranted based on its undisputed knowledge of the Arizona Lawsuit and its dismissal with prejudice. *See* S.C. Code Ann. § 15-36-10(A)(4). "The [FCPSA] provides for liability for attorney fees and costs of frivolous suits." *Ex parte Gregory*, 378 S.C. 431, 438, 663 S.E.2d 46, 50 (2008). The FCPSA provides:

Any person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party if:

(1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and

(2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

S.C. Code Ann. § 15-36-10. To be awarded attorney's fees and costs under the FCPSA, a litigant must show: "(1) the other party has procured, initiated, continued, or defended the civil proceedings against him; (2) the proceedings were terminated in his favor; (3) the primary purpose for which the proceedings were procured, initiated, continued, or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings; (4) the aggrieved person has incurred attorney's fees and court costs; and (5) the amount of the fees and costs set forth in item (4)." *Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 98, 637 S.E.2d 316 (Ct. App. 2006) (citing § 15-36-10). The FCPSA utilizes a reasonable attorney standard to determine whether sanctions are warranted. *See SE Site Prep. LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011).

Here, in its Third-Party Complaint, Shurwest alleges causes of action for the same conduct that was raised (or could have been) in the previous Arizona Lawsuit. Having granted Third-Party Defendants' Motion to Dismiss on the ground of res judicata as to the claims for breach of contract and breach of fiduciary duty, as well as severing Shurwest's claim for equitable indemnity for lack of a ripe justiciable controversy, Third-Party Defendants are entitled to an award of attorney's fees and costs under the FCPSA.

Further, it is inconceivable that Shurwest reasonably believed that its breach of contract and breach of fiduciary duty claims against Third-Party Defendants, which had previously been dismissed with prejudice, were valid. *See Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 98, 637 S.E.2d 316 (Ct. App. 2006) (finding sanctions were warranted

under the FCPSA against plaintiff for bringing frivolous causes of action “for the same complaint as in previous lawsuits”).

Accordingly, the Court will award Third-Party Defendants their attorney fees and costs. Third-Party Defendants are to file an affidavit setting forth the amount of such fees and costs within ten days of the filing of this Order.

### CONCLUSION

For these reasons, Third-Party Defendants’ Motion to Dismiss the Third-party Complaint based on res judicata is **GRANTED**. It is therefore **ORDERED** that Shurwest’s Third-Party causes of action for breach of contract and breach of fiduciary duty are stricken in their entirety on issue preclusion grounds, and Shurwest’s cause of action for equitable indemnity is severed from this case, to be tried upon the issue becoming ripe for adjudication.

February \_\_\_\_, 2021

\_\_\_\_\_  
The Honorable 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

S/R.LAWTON McINTOSH