THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2020-000182

Case No. 2019-CP-04-00752

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/Respondents,

v.

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

of whom Shurwest, LLC, is the .... Appellant.

and

Shurwest, LLC, ... Third-Party Plaintiff/Appellant,

v.

MJSM Financial, LLC, and Melanie Schulze-Miller, ... Third-Party Defendants/Respondents.

And

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2020-000187

Case No. 2019-CP-04-02151

William and Karen Rich,..Plaintiffs/Respondents,

v.

J. Christopher Dixon, Christopher J. Dixon, Black Harbor
Wealth Management, LLC, and Shurwest, LLC, ... Defendants,

of whom Shurwest, LLC, is the .... Appellant.

and

Shurwest, LLC,.....................................Third-Party Plaintiff/Appellant,

v.

MJSM Financial, LLC, and Melanie
Schulze-Miller,.....................................Third-Party Defendants/Respondents.

And

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2020-000188

Case No. 2019-CP-04-00479

Elizabeth Billings, Pamela Bott, Devon and Barbara Corley, Thomas Dantzler, Jane Downing, Thomas and Laura Eliason, Dennis Ellis, Bobby Floyd, Steven Ganley, Stanley Hix, Suzanne Hofford, Robert Johnson, Jerome and Robin Karnowski, Jerry and Kerry Kelley, Christine Lawson, Robert Manning, Diane Mayfield Kelley McGraw Gray, Jeff Mitchell, Fred Myette, Mary Orem, Drucilla Perry, Dennis and Maxine Pierson "Dennis and Maxine Pierson Living Trust," Earl Switzer, Alan Weeks, John and Mary Wendorf, and
Virginia Howard, ... Plaintiffs/Respondents,

v.

Chris Dixon, Black Harbor Wealth Management, LLC, Faw Casson & Co., LLP, and Shurwest, LLC, ... Defendants,

of whom Shurwest, LLC, is the .... Appellant.

and

Shurwest, LLC, ... Third-Party Plaintiff/Appellant,

v.

MJSM Financial, LLC, and Melanie Schulze-Miller, ... Third-Party Defendants/Respondents.

INITIAL BRIEF OF THIRD-PARTY DEFENDANTS/RESPONDENTS MJSM FINANCIAL, LLC, AND MELANIE SCHULZE-MILLER

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STATEMENT OF ISSUES ON APPEAL

I. Whether the circuit court erred in denying Shurwest's motion to dismiss and finding that Shurwest is subject to general personal jurisdiction in South Carolina?

II. Whether the circuit court erred in denying Shurwest's motion to dismiss when Plaintiffs allege Shurwest's employee had apparent authority which would subject Shurwest to specific personal jurisdiction in South Carolina?

III. Whether the circuit court erred in granting Third-Party Defendants/Respondents' motion to dismiss based on res judicata?

IV. Whether the circuit court erred in granting Plaintiffs' motion to dismiss or strike the Third-Party Complaint?

STATEMENT OF THE CASE[1]

This is a civil action arising out of a multi-million-dollar nationwide Ponzi scheme. In 2019, the federal government indicted Future Income Payments ("FIP") and its owner and operator, Scott Kohn ("Kohn"), in the District of South Carolina for running a Ponzi scheme. *Id.*[2] In 2011, Kohn began operating a business where pension holders, including many veterans, received a lump sum payment or loan with an exorbitant interest rate that often exceeded 100% in exchange for monthly payments to FIP. (R. - *United States v. Kohn*, No. 6:19-cr-239-BHH (D.S.C. Mar. 12, 2019) (Indictment, ECF No. 2 ¶¶ 3, 5, 9). FIP then

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[1]Despite Rule 208 of the South Carolina Appellate Court Rules, Appellant's Initial Brief, in particular on pages 5-8, contains numerous contested issues of fact. Rule, 208(b)(1)(C), SCACR ("The statement shall not contain contested matters . . . ").

[2]This appeal consolidates three separate cases below. Because the filings are substantially identical, in its brief, Appellant cite to only the filings in *Ayers* and note that the Record on Appeal includes the filings from all three cases. (App. Br. at 3 n.1). For consistency and ease of review, Respondents likewise cite to only *Ayers*.

solicited investors to purchase these monthly pension payments as structured cash flows, which provided a high rate of return between 6.5% and 8%. *Id.* at ¶ 6. Funds from new investors were diverted to pay earlier investors, the classic hallmark of a Ponzi scheme. *Id.* at ¶ 9. Eventually, however, FIP failed to obtain enough new investors to continue the scheme, and, in 2018, FIP ceased operating leaving investors owed millions. *Id.* at ¶ 12. FIP is connected to the instant lawsuit because it was used as a funding mechanism for the purchase of life insurance policies and as an investment strategy. On August 11, 2020, the government filed its Second Superseding Indictment in the criminal action bringing a separate conspiracy charge against Schulze-Miller on separate counts for wire and mail fraud involving insurance applications. (R. p. - Superseding Indictment in *Kohn*, No. 6:19-239 (ECF No. 239). Importantly, Schulze-Miller was not indicted for the FIP conspiracy. *Id*

On April 17, 2019, Plaintiffs 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 (collectively "Plaintiffs"), consumers who had invested in the FIP structured cash flows and lost their investment when FIP folded, filed the instant action alleging claims against the insurance agents who sold them the life insurance policies and the FIP product, Chris Dixon and Samuel J. Dixon, and their company Black Harbor Wealth Management, LLC, (collectively "Dixon") and the carrier of the life insurance policies that were funded using the fraudulent FIP product, Minnesota Life Insurance Company and Pacific Life Insurance Company. (R. p. - Plaintiffs' Complaint). Plaintiffs also named Schulze-Miller, MSJM, and Shurwest, LLC ("Shurwest"), an independent marketing organization based in Arizona that markets annuities and insurance products to financial planners and licensed insurance agents. (R. p.) (Third-Party Compl.). Plaintiffs allege that Schulze-Miller "was an employee and/or agent of

Shurwest" and that at "all times complained of herein acted within the scope pf her employment as National Sales director for Life Insurance for Shurwest." (R. - Plaintiffs' Compl. ¶¶ 3, 68, 69). On September 30, 2019, Plaintiffs dismissed Defendants Schulze-Miller and MJSM from this suit without prejudice. (R. p. –(Stipulation for Dismissal of Schulze-Miller and MJSM filed Sept. 30, 2019).

In their Complaint, Plaintiffs specifically allege that Dixon, with the advice, recommendation, and education provided by Shurwest and Schulze-Miller, failed to conduct proper due diligence in recommending the purchase of indexed universal life ("IUL") insurance policies and further in recommending a certain funding mechanism, which Plaintiffs refer to as the "Life Insurance Retirement Strategy" or "IRA Reboot Program" (the "Program"). (R. p.) (Plaintiffs' Compl. ¶¶ 3-5, 84-87). With an IUL policy, any premium payments above the cost of insurance are placed into an internal investment account by the insurance company, and the value of this investment account considered the "cash" value of the policy. *Id.* at 75. Once IUL policies are fully funded, the cash value is available for the policyholders to use to take out tax-free loans which can be used to supplement a policyholder's retirement income. (R. p.- Plaintiffs' Compl. ¶¶ 76-77). The Program advised buying IUL insurance policies with the premiums being funded by the purchase of FIP products. (R. p. Plaintiffs' Compl. ¶¶ 75, 76).

Shurwest moved to dismiss Plaintiffs' complaint based on lack of personal jurisdiction. (R. p. - Mot. to Dismiss). The circuit court denied that motion finding that Shurwest was subject to both general and specific personal jurisdiction in South Carolina. (R. pp. –(July 24, 2020 Order). On July 27, 2020, Shurwest filed a Third -Party Complaint against Third-Party Defendants/Respondents Schulze-Miller and MJSM alleging that they are responsible for the damages claimed against Shurwest by the Plaintiffs in this action arising from Plaintiffs'

investments with FIP. (R. p.) (Third-Party Compl. ¶ 1.) Shurwest acknowledges that it promoted IUL policies. (Appellant's Brief p. 5). However, it contends that it did not promote FIP as a way to fund those IUL policies. *Id.* at 14. Shurwest alleges that it rejected Schulze-Miller's request to promote FIP products to Shurwest clients, but that Schulze-Miller without its knowledge formed MJSM and began marketing FIP products to agents, including Dixon. (R. p. -Third-Party Compl. at ¶ 7).

Shurwest asserts three causes of action in its Third-Party Complaint: 1) equitable indemnification against Schulze-Miller and MJSM; 2) breach of contract against only Schulze-Miller; and 3) breach of fiduciary duty against only Schulze-Miller. In its first claim, Shurwest seeks equitable indemnification of any of Plaintiffs' alleged damages, which arise from Schulze-Miller's conduct in dealing with Plaintiffs, Dixon, and others. (R. p. -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. (R. p. - Third-Party Compl. ¶ 15.) In its third claim, Shurwest alleges that Schulze-Miller breached a fiduciary duty owed to Shurwest by engaging in and concealing her unauthorized business related to FIP through MJSM, resulting in harm to Shurwest's reputation and business. (R. - Third-Party Compl ¶¶ 18-20.)

Plaintiffs moved to strike, or alternatively, to sever the Third-Party Complaint. (R. pp. – (Mot. to Strike). And Schulze-Miller and MJSM Financial moved to dismiss the Third-Party Complaint on the ground that it was barred by res judicata because of a prior Arizona action. In the Arizona action, Schulze-Miller and Shurwest had reached a settlement in the Arizona lawsuit, and the action was dismissed with prejudice. (R. pp. – (Mot. to Dismiss and Exhibits). The circuit court granted the motion to strike, (R. pp. – (3:39 PM Feb. 3, 2021 Order)), and the motion to dismiss (R. pp. – (3:38 PM Feb. 3, 2021 Order).)

Shurwest appeals several rulings from the circuit court, including the denial of Shurwest's motion to dismiss for lack of personal jurisdiction, the granting of Schulze-Miller and MJSM's motion to dismiss the Third-Party Complaint based on res judicata, and the granting of Plaintiff's motion to strike the Third-Party Complaint.

STANDARD OF REVIEW

An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP. *See Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (discussing the standard of review of a motion to dismiss under Rule 12(b)(6), SCRCP).

> When reviewing a motion to dismiss for failure to state facts sufficient to constitute a cause of action, the pleadings must be construed liberally, and all well pled facts must be presumed true. *Charleston County School Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011). However, the interpretation of a judgment is a question of law for the court. 46 Am. Jur.2d Judgments § 73. Questions of law are reviewed de novo. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

Doe v. Bishop of Charleston, 407 S.C. 128, 134, 754 S.E.2d 494, 497 (2014). "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). Accordingly, on appeal, the Court reviews the granting of such a motion for an abuse of discretion. *Id.*

ARGUMENT

I. The trial court correctly denied Shurwest's motion to dismiss as it is subject to both general and specific personal jurisdiction in South Carolina.

While this issue addresses the denial of Shurwest's motion to dismiss for lack of personal jurisdiction and Schulze-Miller was not a party to that motion, Schulze-Miller makes the following argument as a ruling on this motion could impact potential factual disputes between Shurwest and Schulze-Miller.

Shurwest moved to dismiss on the ground that it is not subject to personal jurisdiction in South Carolina pursuant to Rule 12(b)(2). Shurwest contends that the only way it could be subject to personal jurisdiction in South Carolina is if Schulze-Miller had apparent authority from Shurwest to act on its behalf in regard to FIP. (Appellant's Brief p. 14). First, Shurwest contends that this case is not about the IUL policies, but rather solely about FIP. *Id.* Importantly, Shurwest acknowledges that if this case were about IUL policies, Shurwest would be subject to personal jurisdiction. *Id.* Reviewing the allegations in the Complaint, however, Plaintiffs allege that Shurwest and Dixon improperly recommended IUL policies in the first place, (R. p. -Complaint ¶¶ 63-66)), **and** additionally recommended funding the IUL policies through the FIP product (R. p. – Complaint ¶ 70 ("Another feature of the Life Insurance Strategy a/k/a IRA Reboot Program recommended by Dixon, Miller, and Shurwest was the advice that Plaintiffs utilize funding mechanisms administered by third parties to achieve the target value of their life insurance policies."). Thus, while Plaintiffs' Complaint is about FIP, it is also very much about the IUL policies, and as Shurwest acknowledges subjects them to personal jurisdiction.

Second, Shurwest acknowledges that Schulze-Miller recommended FIP to Dixon, but it argues that she did not recommend it on behalf of Shurwest. Specifically, Shurwest

contends that Schulze-Miller was a "rogue employee" who was acting without authority.[3] (Appellant's Brief p. 14). Shurwest argues this point as if it is undisputed. *Id.* at 14-16. However, as Plaintiffs argued in response to Shurwest's motion to dismiss, this issue is hotly disputed. (R. p. – Plaintiffs' Mem. Opp' Mot. to Dismiss at 3-6). And, as the circuit court noted "Plaintiffs are simply required to make a prima facie showing of jurisdiction when challenged by a Motion to Dismiss under Rule 12(b)(2)." (R. p. -Order of July 24, 2020, at 7). *See, e.g., Cockrell v. Hillerich & Bradbury Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005) ("At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits."). Without making any binding findings of fact, the circuit court correctly determined based on the allegations in the complaint that Plaintiffs have made a prima facie showing that Shurwest is subject to personal jurisdiction in South Carolina. (R. p. – Order on Shurwest's Motion to Dismiss at 7).

Moreover, to the extent that the determination of jurisdiction is inextricably intertwined with the determination of whether Schulze-Miller was acting within the scope of her employment, a court should reserve such a final determination for the jury at trial. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (noting that, "where the jurisdictional facts are intertwined with the facts central to the merits of the dispute," deferring resolution of that factual dispute to a proceeding on the merits "is the better view")). *See also Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989) (holding that "[i]f

[3] Shurwest cites to an order from a federal district judge in which she states "Schulze-Miller went rogue and tried to hide the scope of her rogue activities." (Appellant's Brief p. 13-14 n. 5) (citing *Landmark Am. Ins. Co. v. Shurwest LLC*, No. CV-19-04743-PHX- SRB, 2020 WL 5434550, at *15 (D. Ariz. July 23, 2020)). However, as the circuit court found in its order," Schulze-Miller was not a party to that declaratory action and is not bound by the findings made there." (R. p. Order at 13 n. 3). Shurwest has not argued that circuit court erred in making this determination.

the existence of jurisdiction turns on disputed factual questions the court . . . may defer ruling pending receipt at trial of evidence relevant to the jurisdictional question."). Accordingly, this Court should affirm the denial of Shurwest's motion to dismiss.

II. The circuit court correctly determined that res judicata bars Shurwest's Third-Party Complaint.

Res adjudicata "had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action." *First Nat'l Bank v. United States Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945). Res judicata is specifically intended to preclude multiple lawsuits litigating the same causes of action. It promotes judicial economy and efficiency, the stability of final judgments, and fairness to litigants. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980).

Schulze-Miller and MJSM moved to dismiss Shurwest's third-Party Complaint on the ground that it was barred by res judicata based upon the prior Arizona lawsuit. The circuit court agreed, granted the motion in part, and dismissed the claims for breach of contract and breach of fiduciary duty. (R. p. – Third-Party Compl. at 15-16). The circuit court severed the remaining claim for equitable indemnification to be tried later if the issue became ripe for adjudication. (R. p. -Third-Party Compl. at 16). In granting the motion to dismiss, while the circuit court applied South Carolina law on res judicata, the court specifically stated that the result would be the same under Arizona caselaw. (R. p. – Third Party Compl. 10-11, n. 2).

Shurwest states that as a starting point, the Court must determine whether South Carolina or Arizona law applies to these claims. It states that the circuit court erred in applying South Carolina law. Importantly, while the circuit court applied South Carolina law, it also specifically held that, under Arizona law, these claims are also barred by res judicata. (*See* R. p.

(3:38 PM Feb. 3, 2021 Order at 10 n. 2). Thus, even if the Court were to determine the circuit court erred in applying South Carolina law, the circuit court correctly determined that res judicata under Arizona law also bars these claims. Schulze-Miller and MJSM submit under either test, these claims are barred by res judicata.

Under South Carolina law, "[r]es 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 those parties." *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). If res judicata applies, a litigant is barred from raising any issues which were or might have been adjudicated in the former suit. *Id.* To establish res judicata, the defendant must prove three elements: "(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 419 S.E.2d 217 (1992)).

Under Arizona law, three elements are required for res judicata to apply: (1) the two suits involve the same parties; (2) the first suit resulted in a final judgment on the merits; and (3) the suits involve the same claim. *See Dressler v. Morrison*, 130 P.3d 978, 981 (Ariz. 2006) (en banc). Shurwest argues that "Schulze- Miller and MJSM have two problems with Arizona's test" - they cannot show privity and identity of claims. (Appellant's Brief p. 19).[4] As discussed below, there is both privity and identity of claims between the Arizona lawsuit and the claims of breach of contract and breach of fiduciary duty claims alleged in the Third-Party Complaint.

[4]Schulze-Miller and MJSM have not argued any error regarding the third element, whether the prior suit resulted in a final judgment. Thus, as this issue is undisputed, Schulze-Miller and MJSM do not address this issue herein.

A. Privity

First, Shurwest argues that MJSM cannot show privity between the parties. This argument is without merit. The claims which were dismissed with prejudice in the Arizona lawsuit (breach of the employment contract and breach of fiduciary duty) were brought solely against Schulze-Miller and not MJSM – and likewise, here, the breach of contract and breach of fiduciary claims are brought against only Schulze-Miller and not MJSM. Thus, as for these particular claims, there is clearly privity as Shurwest is bringing these Third-Party claims only against Schulze-Miller – just as it did previously in Arizona. And Shurwest cannot argue a lack of privity based on MJSM as to these claims.

Even if privity between MJSM and Schulze-Miller was somehow necessary, which it is not, the cases cited by Shurwest do not support a finding of lack of privity between MJSM and Schulze-Miller. Shurwest cites a case noting that ordinarily a corporation and its members are legally distinct, *Deutsche Credit Corp. v. Case Power & Equip. Co.,* 876 P.2d 1190, 1195 (Ariz. Ct. App. 1994). However, in *Deutsche* the court was addressing piercing the corporate veil doctrine, an entirely different legal concept. Further, in the other case cited by Shurwest, *Corbett v. ManorCare of Am., Inc.*, 146 P.3d 1027, 1039 (Ar. Ct. App. 2006), the court listed three examples of persons in privity. This list was non-exhaustive and does not preclude a court from finding privity between an LLC and its sole member. Shurwest does not address the case cited by the circuit court, *Eden v. Deublein*, 2017 WL 929747, *3 (Ariz. Ct. App. Mar. 9, 2017). (Order p. 10 n 2). In *Eden*, the court held that there was privity between an LLC and its member because "[p]rivity exists . . . if there is substantial identity of interests and a working or functional relationship by which the interests of the party and the putative privy are presented and protected by the party in

the litigation." *Id.* at *3 (citation and internal quotation marks omitted). MJSM and Schulze-Miller were in privity. Schulze-Miller was the sole member of MJSM and their interests were the same. Accordingly, the privity prong of the re judicata test is clearly met.

B. Identity of Claims

Second, Shurwest contends that Schulze-Miller and MJSM cannot show an identity of claims to satisfy the first element of the Arizona test. As discussed below, there is clearly identity between the breach of contract and breach of fiduciary duty claims previously raised and litigated in the Arizona lawsuit and the breach of contract and breach of fiduciary duty claims Shurwest has alleged in the Third-Party Complaint.

In determining whether a second action is the same as the first action (i.e. identity of claims), Arizona applies the "same evidence test." *Pettit v. Pettit*, 189 P.3d 1102, 1105 (Ariz. Ct. App. 2008). Under this test, a 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)). A cause of action is the same if "no additional evidence is needed to prevail in the second action than that needed in the first." *Phoenix Newspapers, Inc.*, 934 P.2d at 804. *See also Rousselle v. Jewett*, 421 P.2d 529, 532 (Ariz. 1966) ("The relevant test is not whether there has been a prior lawsuit, but whether the same cause of action, or one so closely related that its proof depends on the same facts, has once been litigated."). Stated differently, under this test, "[i]f no additional evidence is needed to prevail in the second action than that needed in the first, then the second action is barred." *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 934 P.2d 801, 805-06 (Ariz. Ct. App. 1997).[5] Further, in Arizona, under the doctrine of res judicata, a court's final judgment on the

[5]Interestingly, some Arizona courts have been critical of Arizona's continued application of the same evidence test. *See,*

merits of an action is conclusive as to all matters that were actually litigated and all matters that might have been litigated as to the parties in all other actions. *Hall v. Lalli*, 977 P.2d 776, 779 (Ariz. 1999).

Shurwest contends that if any additional evidence is needed to prove liability in the second case, res judicata does not apply. *Lawrence T. v. Dep't ofChild Safety*, 438 P.3d 259, 264 (Ariz. Ct. App. 2019). Shurwest acknowledges that the claims alleged in both the Arizona case and the Third-Party Complaint contain similar allegations. (Appellant's Brief p 22). Shurwest argues, however, under Arizona's same-evidence test, the similarities are of no moment. *Id.* Specifically, Shurwest contends that in the Arizona lawsuit, it asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty based on Schulze-Miller's misuse of Shurwest's confidential client information. *Id.* Shurwest argues that in the Arizona lawsuit it did not matter which specific client was involved and that it only had to prove that it was harmed by Schulze-Miller's conduct. *Id.* Shurwest argues here, however, in the Third-Party Complaint, it "will have to show that Schulze-Miller and MJSM Financial wrongly used *Plaintiffs'* information (not just any Shurwest's client's information)" and that this "misuse of Plaintiffs' information harmed Plaintiffs (not just harmed Shurwest)." *Id.*

Basically, Shurwest argues that these specific Plaintiffs suffered damages and that this distinction somehow precludes the application of res judicata. (Appellant's Brief at 22). Shurwest cannot seriously be arguing that it can bring this action (and apparently many more

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e.g., Phoenix Newspapers, 934 P.2d at 804 (holding that "[p]art of the difficulty is that most Arizona cases apply an antiquated "same evidence" test for defining the "same cause of action."). And in "*Heinig v. Hudman*, 865 P.2d 110 (Ariz. Ct. App.1993), a different panel of the Arizona Court of Appeals from the panel which decided *Phoenix Newspapers* applied the "transactional test" under which a prior final judgment bars "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Id.* at 115 (internal quotation marks and citation omitted).

in the future as long as it contends that different clients are damaged) alleging breach of contract and breach of fiduciary duty as long as it asserts that there are different clients involved. To allow such piecemeal litigation goes against the fundamental principles of res judicata. "The doctrine of res judicata originates from the principles that public interest requires an end to litigation and that no one should be sued twice for the same cause of action." *Wright v. Marlboro Cty. Sch. Dist.*, 317 S.C. 160, 163, 452 S.E.2d 12, 14 (Ct. App. 1994). *See also Pettit*, 218 Ariz. 529, 531, ¶ 4 (App. 2008) (claim preclusion "binds the same party standing in the same capacity in subsequent litigation on the same cause of action, not only upon facts actually litigated but also upon those points which might have been litigated") (emphasis added).

Moreover, reviewing these claims in the Third-Party Complaint, Shurwest is not alleging a claim for Plaintiffs' harms.[6] Shurwest has specifically alleged under the breach of contract claim that "[a]s a direct and proximate result of Schulze-Miller's breaches, **Shurwest** has suffered, and is continuing to suffer, damages in an amount to be determined at trial." (R. - Third-Party Compl. ¶ 18) (emphasis added). Likewise, in the breach of fiduciary duty, Shurwest alleges that Schulze-Miller owed Shurwest a fiduciary duty, that she breached that duty, and that "[a]s a direct and proximate result of Schulze-Miller's conduct, **Shurwest** has suffered and is continuing to suffer, damages in an amount to be proven at trial. (*See also* R. - Third-Party Compl. ¶¶ 20, 22.)(emphasis added). Shurwest "would have to prove the same material facts previously adjudicated" in the prior action, and thus these claims are precluded. *See Stirling Bridge, LLC. v. Porter*, No. 1 CA-cv-08-0348, 2009 WL 2603122, *6 (Ariz. Ct. App. Aug. 25, 2009) (Mem. Decision).

In sum, res judicata bars Shurwest's breach of contract and breach of fiduciary claims

[6] And, in any event, Shurwest could not bring a breach of contract or fiduciary duty claims for *Plaintiffs'* damages.

alleged in its Third-Party Complaint because there is privity and identity of claims. In the prior Arizona action, Shurwest alleged breach of contract and breach of fiduciary claims against Schulze-Miller arising from her employment with Shurwest. In its Third-Party Complaint, Shurwest asserts claims of breach of contract and breach of fiduciary against only Schulze-Miller arising from Schulze-Miller's employment with Shurwest. Further, the evidence needed to sustain Shurwest's Third-Party claims would have sustained the same claims it raised in the Arizona lawsuit. Thus, res judicata bars the claims of breach of contract and breach of fiduciary duty raised in the Third-Party Complaint because these claims are the same claims that were conclusively adjudicated against Schulze-Miller and dismissed with prejudice in the prior Arizona lawsuit. Accordingly, the circuit court did not err in granting Schulze-Miller and MJSM's motion to dismiss these claims.

Even if Court were to somehow determine that the breach of contract and breach of fiduciary claims in the Third-Party Complaint are not barred by res judicata, these clams should still be dismissed on the ground that they are not independent claims, but rather claims for equitable indemnification. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground . . . appearing in the Record on Appeal."); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("[A] respondent . . . may raise on appeal any additional reasons the appellate court should affirm the [circuit] court's ruling, regardless of whether those reasons have been presented to or ruled on by the [circuit] court."). "Under South Carolina law, a third-party plaintiff cannot proceed with claims that are merely disguised claims for equitable indemnity." *Hampton Hall, LLC, Chapman Coyle Chapman Assoc. Architects AIA, Inc.*, No. 9:17-cv-1575-RMG, 2018 WL 3475472, *2 (D.S.C. July 19, 2018). See also *Stoneledge v. Builders FirstSource-SE*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) (affirming the grant

of summary judgment on breach of contract and breach of warranty cross-claims because they were not independent causes of action from the equitable indemnity claim).

As Shurwest acknowledged at the hearing on this motion, all three claims raised in the Third-Party Complaint are "unquestionably" derivative claims or indemnification claims. (R. – Transcript from Jan. 20, 2021 hearing at 21-22). And the only way Schulze-Miller or MJSM is liable for any of Plaintiffs' damages is through the claims raised in the Third-Party Complaint and only if Shurwest is first found liable to Plaintiffs on their claims. *Id.* at 20. Further, Shurwest argues in this appeal that the circuit court "wrongly struck the third-party complaint as *not* derivative." (Appellant's Brief at 17). Shurwest itself has stated or acknowledged – repeatedly – that these claims are derivative and, as such, they should be dismissed. *Id.* Importantly, the circuit court did not dismiss the equitable indemnification claim; the court severed it to be tried upon the issue becoming ripe for adjudication, and Shurwest has specifically stated that it is not challenging the circuit court's decision to sever the indemnification claim. (Appellant's Brief p. 18 n.8). Accordingly, the Court should affirm the dismissal of the breach of contract and breach of fiduciary claims as they are unquestionably disguised claims for equitable indemnification.

III. The circuit court did not abuse its discretion in striking the Third-Party Complaint as its inclusion would unduly complicate the instant litigation.

Shurwest also argues that the circuit court erred in granting Plaintiffs' motion to strike based on the finding that the third-party claims were not derivative of Plaintiffs' claims and would complicate the case. (*See* R. p. – (3:39 PM Feb. 3, 2021 Order 3–4).) Pursuant to Rule 14(a), SCRCP, "a non-party is subject to impleader only if there is a basis to assert he is liable to the named defendant(s) for all or part of the plaintiff's claim." *Smith v. Tiffany*,

419 S.C. 548, 560, 799 S.E.2d 479, 486 (2017). The circuit court did not abuse his discretion in determining that the breach of contract and fiduciary duty claims would unduly complicate this litigation. *See Beach v. Hudson*, 298 S.C. 424, 426, 380 S.E.2d 869 (1989) ("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).

CONCLUSION

Based on the foregoing, the circuit court's orders granting the motion to dismiss the Third-Party Complaint should be affirmed.

Respectfully submitted,

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