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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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 Defendant / Respondent.

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 Defendant / Respondent.

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 Defendant / Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

I. Shurwest is organized under Arizona law and headquartered in Arizona. Is Shurwest subject to general personal jurisdiction in South Carolina?

II. Shurwest did not authorize an employee to promote FIP (which turned out to be a Ponzi scheme) and Plaintiffs' South Carolina-based financial advisor knew that this employee had created a separate company and email address to handle FIP's financial products. Did the employee have apparent authority that subjects Shurwest to specific personal jurisdiction in South Carolina?

III. Shurwest sued in an Arizona court the employee who, without Shurwest's permission and without Shurwest's knowledge, promoted FIP. That case settled. Arizona applies the same-evidence test to determine if there is an identity of claims for purposes of res judicata. The third-party claims Shurwest filed against that employee and her company here require evidence that was not required in the Arizona lawsuit. Does res judicata bar the third-party complaint?

IV. Any liability Shurwest has on Plaintiffs' claims is because of the employee's unauthorized promotion of FIP, and that employee is a key figure in Plaintiffs' complaint. Did the circuit court abuse its discretion in striking the third-party complaint?

INTRODUCTION

Like people around the country, Plaintiffs in these three consolidated cases invested in Future Income Payments, LLC's ("FIP") "structured cash flows." It turned

out that FIP was a Ponzi scheme. When that scheme came crashing down (as Ponzi schemes inevitably do), Plaintiffs cast a wide net in trying to recover their losses.

Snared in that net is Shurwest. Shurwest is an Arizona-based independent marketing organization that markets annuities and insurance products to financial planners and licensed insurance agents. Shurwest did not promote FIP, and Shurwest specifically rejected a request from one of its employees, Melanie Schulze-Miller, to promote FIP. But Schulze-Miller didn't listen. Instead, she went rogue, created her own company without telling Shurwest, and then began marketing FIP without Shurwest's knowledge.

Because Schulze-Miller—not Shurwest—promoted FIP, Shurwest sought to dismiss the case for lack of personal jurisdiction. The circuit court mistakenly rejected that argument, applying the wrong test for general jurisdiction and disregarding Schulze-Miller's lack of apparent authority in the specific-jurisdiction analysis.

After that motion was denied, Shurwest filed a third-party complaint against Schulze-Miller and her company. The circuit court granted motions to dismiss and strike the third-party complaint. This was another error, given that if Shurwest is liable to Plaintiffs, then Schulze-Miller is responsible too. She was, after all, the person promoting FIP without permission.

And this error is appealable, which is how this case is here now. This Court has held that it can consider a personal jurisdiction issue (which is not typically immediately appealable) on an interlocutory appeal of another order. The Court should do so in this case because the personal jurisdiction issue is dispositive of this

entire case. At the very least, if the Court determines to let the case proceed at this stage, the case should proceed with third-party claims as part of the litigation.

STATEMENT OF THE CASE

The FIP Ponzi scheme.

In 2019, the federal government indicted FIP and others in the District of South Carolina for running a Ponzi scheme that began in April 2011. *See* Indictment, *USA v. Kohn*, No. 6:19-cr-239 (D.S.C. Mar. 12, 2019), ECF 2. In short, FIP recruited pension holders who were in financial distress and enticed them to sell their monthly pension payments to FIP in exchange for a lump sum payment or loan. *See id.* FIP then solicited investors to purchase these monthly pension payments, representing that these "structured cash flows" would provide higher rates of return than other products. *See id.* at 3. FIP told investors that FIP had reserve accounts to protect against the risk of default by any pension holders. Eventually, FIP allegedly diverted investor funds flowing into its business to fund payments to earlier investors. *See id.*; (*see also* R. pp. 114 –115.)[1]

Plaintiffs adopt the Life Insurance Retirement Strategy.

Plaintiffs used Chris Dixon and Black Harbor Wealth Management, LLC for retirement-planning advice. (R. p. 122.) Founded in 2011, Black Harbor is a "holistic retirement planning shop." (R. p. 619, p. 17, ln. 20 - 22.)

[1] Each of these three appeals had its own docket below. Those filings are substantially identical, so for simplicity, this brief cites to the filings in *Ayers*. The Record on Appeal, however, contains the filings from all three cases.

On the recommendation of Dixon and Black Harbor, many Plaintiffs implemented what was called the Life Insurance Retirement Strategy, was also known as the IRA Reboot. (R. pp. 111, 122.) This strategy involved an indexed universal life insurance ("IUL") policy. (R. p. 123.) In an IUL policy, any premium payments above the cost of the insurance are put in an internal investment account by the insurance company, which creates a "cash value" for the policy. (R. p. 123.) The goal of an IUL policy was to fully fund it at the cash value an investor thought he needed for retirement, then use the case value for tax-free loans. (R. p. 123.) The policyholder wouldn't need to repay the loans, as the death benefit of the policy would take care of that. (R. p. 123.)

Many Plaintiffs fund their Life Insurance Retirement Strategy through FIP.

To make the Life Insurance Retirement Strategy work, an investor had to try to make the target amount of extra premium payments as quickly as possible. That requires extra cash.

Many Plaintiffs were encouraged to purchase FIP products to fund their IUL-policy strategy. (R. p. 124.) When the Ponzi scheme collapsed, these Plaintiffs lost money and could not fund their IUL policies.[2] (R. pp. 117, 125 –126.)

A rogue Shurwest employee promotes FIP.

The crux of this appeal and Plaintiffs' claims against Shurwest turn on what Shurwest did (or didn't do) regarding FIP.

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[2] At least one Plaintiff did not purchase an IUL policy, despite a recommendation to do so. (R. p. 126.) That shows the claims here are really about Plaintiffs' investment in FIP, not the IUL policy itself.

Shurwest is an Arizona-based independent marketing organization that markets annuities and insurance products to financial planners and licensed insurance agents. (R. pp. 435 – 436). Chris Dixon and Black Harbor did not work for, represent, or conduct business for Shurwest; Dixon and Black Harbor were the types of financial planners and licensed insurance agents to whom Shurwest marketed. (R. p. 436.) Everyone in this case agrees that Shurwest promoted IUL policies to Chris Dixon and Black Harbor. The dispute is over whether Shurwest promoted FIP as a way to fund those IUL policies.

Dixon learned about Life Insurance Retirement Strategy from another financial advisor during a conference in Las Vegas. (R. p. 622, p. 29, ln. 3 - 5.) Dixon began corresponding with Melanie Schulze-Miller, Shurwest's former director of life insurance and the third-party defendant in this case. (R. p. 622, p. 29, ln. 13 - 18.)

Dixon's correspondence with Schulze-Miller was about the same time that Schulze-Miller sought Shurwest's approval to market and promote FIP. (R. p. 436.) Shurwest executives expressed skepticism with FIP, (R. pp. 551 – 554), and told Schulze-Miller no, (R. pp. 436 – 437). Schulze-Miller has admitted that Shurwest told her no and never approved using FIP as a funding source of life insurance premium payments. (R. p. 440.)

Dissatisfied with Shurwest's answer, Schulze-Miller created her own company, MJSM Financial, LLC, to market FIP's products. (R. pp. 437, 440.) Schulze-Miller created a separate email account for her company. (R. p. 437.) Her goal with the new company was to separate her FIP-related activities from Shurwest. (R. p. 440.) MJSM

Financial established a relationship with FIP. (R. p. 441.) FIP made payments to MJSM Financial, not to Shurwest. (R. p. 441.) And Schulze-Miller included a disclaimer in her emails that the FIP products were *not* sold through Shurwest but rather through MJSM Financial. (R. p. 441.)

Schulze-Miller eventually told Dixon about FIP. (R. p. 624, p. 39, ln. 12 - 21.) Dixon knew that MJSM Financial was a separate company Schulze-Miller had formed. (R. p. 655, p. 161, ln. 8 -11.) And Schulze-Miller instructed Dixon to correspond to a different email address from her Shurwest email address regarding FIP. (R. p. 625, p. 42, ln. 15 - 16.)

In exchanges with Black Harbor, Schulze-Miller—even when improperly using her Shurwest email account, (R. pp. 441 - 442)—still made clear that "All Structured Cash flow Products process through MJSM Financial" and included her MJSM Financial email address, (R. p. 568). Schulze-Miller never told Dixon she was doing FIP business outside of Shurwest or that Shurwest had refused to do business with FIP; in fact, she lied and said Shurwest was "okay with" FIP. (R. pp. 650 – 651, p. 142, ln. 18 – 25; p. 146, ln. 1 – p. 147, ln. 2.)

In addition to email exchanges, Dixon had in-person meetings with Schulze-Miller and others at Shurwest. First, Schulze-Miller flew to South Carolina in May 2016, when Dixon was still considering whether to recommend FIP. (R. p. 627, p. 50, ln. 14 – ln. 21.) Although some people from Shurwest may have been in meetings when FIP was discussed, only Schulze-Miller was involved in all of these discussions. (R. p. 627, p. 51, ln. 7- 17.) Then, in August 2016, Dixon flew to Arizona to meet with

Schulze-Miller, Jim Maschek from Shurwest, and others. (R. pp. 629, 630, p. 60, ln. 23 – p. 62, ln. 22.) These meetings were primarily about annuities and life insurance. (R. p. 630, p. 62, ln. 1-22.) Dixon never asked anyone at Shurwest other than Schulze-Miller about FIP.

Although Plaintiffs contend FIP had allegedly solicited Shurwest's business for some time, Shurwest never approved the sale, marketing, or promotion of FIP. (R. p. 436.) Accordingly, Shurwest never provided any education, advice, or training to Dixon or Black Harbor about FIP. (R. p. 436.) When training Dixon on how to complete the Minnesota Life insurance forms that were used as part of the Life Insurance Retirement Strategy, Shurwest told Dixon to include clients' income and other assets, without ever saying anything about FIP. (R. p. 652, p. 150, ln. 3 - 8.) And Shurwest has never made any payments to or received any payments from FIP. (R. p. 437.)

Shurwest knew nothing about Schulze-Miller promoting FIP. (R. pp. 437, 441.) Shurwest did not know Schulze-Miller inadvertently used her Shurwest email for MJSM Financial business or at times had Shurwest employees under her perform clerical tasks for MJSM Financial. (R. pp. 441 – 442.) One such employee, Michael Seabolt, has stated that MJSM Financial paid him commissions and Schulze-Miller told him that Shurwest did not approve of, offer, or sponsor FIP products. (R. p. 2052.) Seabolt's activities related to FIP were not part of his Shurwest job responsibilities, and when financial advisors asked about FIP, Seabolt referred these advisors to Joe Hipp at FIP. (R. p. 2053.)

As soon as Shurwest learned what Schulze-Miller was doing, Shurwest fired her. (R. p. 437.)

Plaintiffs sue Shurwest and others.

After the FIP Ponzi scheme collapsed, Plaintiffs sued Shurwest and others. Specific to Shurwest, Plaintiffs alleged claims for negligence, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty, (R. pp. 126 – 128.)

Shurwest moved to dismiss for lack of personal jurisdiction. (R. p. 408.) The circuit court denied that motion, concluding that Shurwest is subject to both general and specific personal jurisdiction in South Carolina. (R. pp. 1 – 8.)

In addition to answering Plaintiffs' complaint (R. pp. 146 – 164), Shurwest also filed a third-party complaint against Schulze-Miller and MJSM Financial, (R. pp. 167 – 173). That complaint asserted claims for equitable indemnification, breach of contract, and breach of fiduciary duty, on the theory that if Shurwest was liable to Plaintiffs, Schulze-Miller and MJSM Financial were liable to Shurwest. (R. pp. 170 – 171.) Plaintiffs moved to strike, or alternatively, to sever the third-party complaint. (R. pp. 725 – 733.) Meanwhile, Schulze-Miller and MJSM Financial moved to dismiss the third-party complaint, based on a settlement Schulze-Miller and Shurwest reached in an Arizona lawsuit. (R. pp. 758 – 810.) The circuit court granted the motion to strike, (R. pp. 25 – 31), and the motion to dismiss,[3] (R. pp. 9 – 24.)

Shurwest timely appealed. (R. p. 1923.)

[3] The circuit court later "rescinded" the portion of this order related to attorney's fees. (R. p. 32). This change to the order is not relevant to this appeal.

STANDARD OF REVIEW

A circuit court's decision on personal jurisdiction will be reversed whenever it is unsupported by the evidence or influenced by an error of law. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). Pretrial, a plaintiff must make a prima facie showing of jurisdiction in the complaint or affidavits. *Id.*

This Court reviews a circuit court's decision to dismiss a complaint de novo. *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). This Court reviews a motion to strike a pleading for abuse of discretion. *Beach v. Hudson*, 298 S.C. 424, 426, 380 S.E.2d 869, 871 (Ct. App. 1989.)[4]

ARGUMENT

I. Shurwest is not subject to personal jurisdiction in South Carolina.

The circuit court concluded Shurwest was subject to both general and specific jurisdiction in South Carolina. On both fronts, the circuit court erred. Because Shurwest is not subject to personal jurisdiction, this entire case should be dismissed.

South Carolina's long-arm statute extends as far as due process allows, so the traditional two-step inquiry for personal jurisdiction collapses into a single due

[4] Given this is an interlocutory appeal, it's worth briefly confirming the Court's jurisdiction. The dismissal of a complaint is, of course, appealable, *see, e.g.*, *Flateau v. Harrelson*, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct. App. 2003), as is an order that "strikes out . . . any pleading in any action," S.C. Code Ann. § 14-3-330(2)(c); *see also Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). Although orders denying motions to dismiss for lack of personal jurisdiction are typically not immediately appealable, the personal jurisdiction question "can be considered when other appealable issues are presented to an appellate court." *QZO, Inc. v. Moyer*, 358 S.C. 246, 252, 594 S.E.2d 541, 545 (Ct. App. 2004). This Court therefore has jurisdiction over all of the issues raised in this appeal.

process question. *See S. Plastics Co. v. S. Com. Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 130 (1992). Personal jurisdiction under the Due Process Clause comes in two forms: general and specific. *See Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1779–80 (2017). General jurisdiction allows a court "to hear any and all claims against" a defendant, and it requires a defendant be "essentially at home" in that forum. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Specific jurisdiction, by contrast, is more limited in scope, "focus[ing] on the relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 571 U.S. 277, 284 (2014).

A. Shurwest is not subject to general jurisdiction in South Carolina.

Concluding that general jurisdiction does not exist here should be easy. In two recent decisions, the U.S. Supreme Court has clarified that general jurisdiction exists only when a defendant is "essentially at home in the forum state." *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014). The "paradigm" examples of being at home for a corporate entity are its state of incorporation and principal place of business. *Id.* at 137. This means that the "enduring relationship" test the circuit court applied is not the correct legal standard. (*See* R. p. 5.)

Instead of applying the "at home" test, the circuit court relied on the fact that Shurwest is registered to do business in South Carolina to conclude that Shurwest is subject to general jurisdiction in South Carolina. (*See* R. p. 5.) That reasoning is incompatible with *Daimler AG*. Given that states virtually always require an entity to register to do business there, this registration rationale would eviscerate the "at

home" rule by making entities subject to general jurisdiction everywhere they do business. The U.S. Supreme Court rejected such a sweeping scope for general jurisdiction. *See Daimler AG*, 571 U.S. at 153–56 (Sotomayor, J., concurring) (arguing for a broader scope for general jurisdiction and explaining her disagreement with Justice Ginsburg's majority opinion); *see also Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021) (noting that general jurisdiction exists in only a "select" set of forums). And both the Fourth Circuit and the District of South Carolina have rejected the argument that registering to do business in South Carolina means a defendant has consented to general jurisdiction in this State. *See, e.g.*, *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 138 (4th Cir. 2020); *Nat'l Beverage Screen Printers, Inc. v. DALB, Inc.*, No. 1:16-CV-03850-JMC, 2018 WL 2718035, at *3 n.7 (D.S.C. June 6, 2018). Such a result is compelled by U.S. Supreme Court precedent, and the circuit court erred when it reached the opposite conclusion.

Under the U.S. Supreme Court's "at home" test, Shurwest is not subject to general jurisdiction in South Carolina. Shurwest is organized under Arizona law, and it is headquartered in Arizona. (*See* R. p. 436.) Shurwest is thus not at home in South Carolina.

B. Shurwest is not subject to specific jurisdiction in South Carolina.

Specific jurisdiction, again, looks at "the relationship among the defendant, the forum, and the litigation." *Walden*, 571 U.S. at 284. The type of personal jurisdiction requires a defendant have "certain minimum contacts" with the forum state so that being sued there "does not offend traditional notions of fair play and substantial

justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The contacts a defendant has with the forum must be ones it creates. *Walden*, 571 U.S. at 284. The contacts must be with the forum itself, not just with the plaintiff. *Id.* at 285. This analysis involves a two-step inquiry: (1) whether the defendant has sufficient contacts with the forum, and (2) whether exercising jurisdiction is reasonable. *See Cribb v. Spatholt*, 382 S.C. 490, 499, 676 S.E.2d 714, 719 (Ct. App. 2009).

The circuit court below based its specific-jurisdiction conclusion on four things: (1) Shurwest is registered to do business in South Carolina, (2) Dixon traveled to Arizona to meet with Shurwest and Schulze-Miller, (3) Schulze-Miller traveled to South Carolina to meet with Dixon, and (4) Schulze-Miller continued corresponding with Dixon. (*See* R. pp. 5 – 6.)

The first thing (Shurwest's registration to do business in this State) can quickly be put aside as irrelevant. Simply registering to do business in South Carolina is not related to this particular case. Indeed, to do anything in this State, Shurwest must register. *See* S.C. Code Ann. § 38-5-10 *et seq*. That does not help with the specific jurisdiction analysis.

That leaves the interactions Shurwest and Schulze-Miller had with Dixon. At this point, it's important to be precise in what this case is about and what this case is not about. Plaintiffs' claims are, at their core, about their investment in FIP products. They are not about the Life Insurance Retirement Strategy. We know this because at least one Plaintiff admitted she never purchased an IUL policy as part of the Life Insurance Retirement Strategy, but instead purchased only a FIP product.

(*See* R. p. 126.) If this suit were actually about Life Insurance Retirement Strategy, then this person could not possibly be a plaintiff. But she is—making clear that this case is about FIP.

The distinction between IUL policies and FIP is critical here, and it is a distinction the circuit court failed to draw. If this case were about IUL policies, Shurwest would be subject to personal jurisdiction in South Carolina. Shurwest did recommend that investment strategy to Dixon, who in turn recommended it to Plaintiffs.

This case, however, is not about the IUL policies. It's about FIP. To be sure, Schulze-Miller recommended FIP to Dixon. But she did not recommend it on behalf of Shurwest. Both Shurwest and Schulze-Miller have said as much. (*See* R. pp. 436 – 437, 440). Or as one federal court put it, "Schulze-Miller went rogue and tried to hide the scope of her rogue activities." *Landmark Am. Ins. Co. v. Shurwest LLC*, No. CV-19-04743-PHX-SRB, 2020 WL 5434550, at *15 (D. Ariz. July 23, 2020).

The only way Dixon could have attributed Schulze-Miller's recommendation of FIP to Shurwest (and that in turn Plaintiffs could rely on it to establish that Shurwest is subject to specific jurisdiction) is if Schulze-Miller had apparent authority from Shurwest. As this Court has explained many times, "[a]pparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." *Froneberger v. Smith*, 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013)

(emphasis omitted). For an agent to have apparent authority, the principal must either intend for the third party to believe the agent has authority or the principal should realize its conduct is likely to create such belief. *Id.*

In this case, only that second prong is relevant because Shurwest did not intend for anyone to believe that Schulze-Miller had authority to promote FIP. On the second prong, the third party's belief must be reasonable, and that belief must be based on the acts of the principal, not the agent. *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 118 (Ct. App. 2000); *see also id.* at 434, 540 S.E.2d at 118 (explaining that the third party's reliance must be "in the exercise of reasonable prudence"). Thus, in this case, the question becomes what did Shurwest do to convey to Dixon, in his exercise of reasonable prudence, that Schulze-Miller had authority to promote FIP.

In short, nothing. Of course, Schulze-Miller was a Shurwest employee. And at times, she sent emails about FIP from her Shurwest account. But such surface-level observations do little to establish apparent authority in this context. Dixon has "been in finance [his] entire life." (R. p. 619, p. 18, ln. 13 -14.) He knew that Schulze-Miller had formed a separated company—MJSM Financial—about the time Schulze-Miller started promoting FIP. (R. p. 655, p. 161, ln. 8 - 11.) He knew Schulze-Miller told him to correspond with a different (*i.e.*, non-Shurwest) email address. (R. p. 625, p. 42, ln. 1 - 16.) Those things should have sent up proverbial red flags.[5]

[5] In a federal case raising issues of what Shurwest knew about FIP and Schulze-Miller's attempts to hide her activities, a district court cited an email from Schulze-Miller to a South Carolina-based insurance broker (not Dixon) responding to

Indeed, Dixon was clearly skeptical about FIP and kept trying to learn about it, given that it was not a large, well-established institution everyone in his field knew. Dixon kept asking Schulze-Miller for information, and he ultimately spoke with Joe Hipp at FIP. (R. pp. 624 – 628, p. 40, ln. 3 – p. 53, ln. 22.) Eventually, Dixon even asked Schulze-Miller directly if the top executives at Shurwest were "okay with" FIP. (R. p. 651, p. 146, ln. 1 - 2.) Schulze-Miller lied and said they let her promote FIP. (R. p. 651, p. 146, ln. 3 – p. 147, ln. 2.) Schulze-Miller's statement is irrelevant to the apparent-authority analysis.[6] *See Thompson v. Pruitt Corp.*, 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016) ("an agency may not be established solely by the declarations and conduct of an alleged agent").

Ultimately, what Dixon did not do is fatal to any apparent-authority argument: ask Schulze-Miller's superiors at Shurwest about FIP. Dixon spoke with both Jim Maschek (the manager and head of distribution) and Ron Shurts (the president) of

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an inquiry about Shurwest's relationship with FIP by saying, "I guess [insurance agent] wants to throw Shurwest into the suit because I introduced him to FIP. This has nothing to do with Shurwest . . . ." *Landmark Am. Ins. Co.*, 2020 WL 5434550, at *4. In that case, the district court concluded that, despite having conducted discovery, the plaintiff had "not met its burden to create a genuine dispute of material fact as to whether Schulze-Miller and MJSM were acting in concert with Shurwest in marketing and promoting FIP's products." *Id.* at *11.

[6] The Court can also reject any contention that Schulze-Miller was acting within the scope of her employment. Her employer expressly told her it would not approve promoting FIP. (*See* R. pp. 436 – 437). Schulze-Miller, not Shurwest, made money off of FIP. (*See* R. pp. 437, 441.) In such a situation, the employee is not acting within the scope of employment. *See Young v. F.D.I.C.*, 103 F.3d 1180, 1190 (4th Cir. 1997) (applying South Carolina law and explaining "an act falls within the scope of employment only if the employee acted with the purpose of benefiting the employer," so if "the employee acted for some independent purpose of his own, the conduct falls outside the scope of his employment").

Shurwest at various points during his due diligence. (R. pp. 627, 630, p. 50, ln. 14 – 25; p. 63, ln. 9 - 15.) Yet—for some unexplained reason—Dixon never asked either man about FIP.

This failure, when combined with what Dixon knew about Schulze-Miller creating a separate company and telling him to use a different email address, makes any reliance Schulze-Miller being a Shurwest employee to conclude Shurwest authorized Schulze-Miller to promote FIP unreasonable as a matter of law. Dixon could have easily confirmed whether Shurwest supported Schulze-Miller's FIP promotion. He simply failed to do so. Shurwest therefore did not give Schulze-Miller apparent authority. Without that apparent authority, Shurwest cannot be subject to specific jurisdiction in this case. The entire case should thus be dismissed.

II. The circuit court was wrong to dismiss and strike the third-party complaint.

Even if Shurwest can be sued in South Carolina, the circuit court nevertheless mishandled the third-party complaint. It wrongly dismissed the third-party complaint based on res judicata, and it wrongly struck the third-party complaint as not derivative and overly complicating this litigation. In fact, the third-party claims were not part of the settlement in the first lawsuit between Shurwest and Schulze-Miller, and having Schulze-Miller and MJSM Financial as parties in this case will not complicate the litigation, given the agreement Plaintiffs' counsel already has with the federal receiver that is trying to recover money from the FIP Ponzi scheme.

A. The circuit court erred in dismissing the third-party complaint.

The circuit court dismissed Shurwest's breach of contract and breach of fiduciary duty claims against Schulze-Miller based on res judicata[7] and severed Shurwest's equitable indemnification claim as unripe (because Shurwest right now is not liable to Plaintiffs). This section focuses only on the two claims that were dismissed.[8]

As a starting point, the Court must determine whether South Carolina law or Arizona law applies to this claim. The circuit court applied South Carolina law. (*See* R. p. 18.) This was error. Under the Full Faith and Credit Clause, *see* U.S. Const. art. IV, § 1, and the Full Faith and Credit Act, 28 U.S.C. § 1738, state courts are bound to give full effect to the judgment of courts in other states. In other words, South Carolina courts must give the order of dismissal with prejudice from Arizona the same effect in South Carolina courts that the order of dismissal would have in Arizona courts. *See M Seven Sys. Ltd. v. Leap Wireless Int'l, Inc.*, No. 12-CV-1424-CAB (RBB), 2014 WL 12026065, at *3 (S.D. Cal. June 4, 2014) ("If the prior judgment came from

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[7] The heading in the circuit court's order on the motion to dismiss cites issue preclusion as the basis for dismissal, (*see* R. p. 15), but that appears to be a mistake. Issue preclusion is the same thing as collateral estoppel, and it "prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). The circuit court's discussion focuses on res judicata (or claim preclusion), which, under South Carolina law, "bars plaintiffs from pursuing a later suit where the claim (1) was litigated or (2) could have been litigated." *Catawba Indian Nation v. State*, 407 S.C. 526, 537, 756 S.E.2d 900, 906 (2014).

[8] Shurwest does not challenge in this appeal the circuit court's decision to sever that one particular claim.

a state court, that state's claim-preclusion law would apply." (citing 28 U.S.C. § 1738)); *see also Hosp. Mgmt. Assocs., Inc. v. Shell Oil Co.*, 356 S.C. 644, 653, 591 S.E.2d 611, 616 (2004).

Determining which law applies is important because Arizona and South Carolina law on res judicata differs on the identity-of-claim element. Under Arizona law, res judicata has three elements: "(1) an identity of claims in the suit in which a judgment was entered and the current litigation, (2) a final judgment on the merits in the previous litigation, and (3) identity or privity between parties in the two suits." *In re Gen. Adjudication of All Rts. to Use Water In Gila River Sys. & Source*, 127 P.3d 882, 887–88 (Ariz. 2006).

Here, Schulze-Miller and MJSM Financial have two problems with Arizona's test. *First*, MJSM Financial cannot show privity of parties. Arizona courts have observed that "[e]xamples of persons in privity include employers and employees, principals and agents, and indemnitors and indemnitees." *Corbett v. ManorCare of Am., Inc.*, 146 P.3d 1027, 1039 (Ariz. Ct. App. 2006). Schulze-Miller and MJSM Financial have no such relationship. To hold that they are in privity simply because Schulze-Miller is the sole member of MJSM Financial would be to undermine the long-established legal rule that corporate entities and their members are legally distinct. *See, e.g.*, *Deutsche Credit Corp. v. Case Power & Equip. Co.,* 876 P.2d 1190, 1195 (Ariz. Ct. App. 1994).

The circuit court (again, wrongly applying South Carolina law and citing a case from the District of South Carolina in which the plaintiff did not challenge privity,

see James v. Wright, No. CIV.A. 1:13-1438-TMC, 2014 WL 2612487, at *4 (D.S.C. June 9, 2014)) asserted that Schulze-Miller and MJSM Financial are in privity because they "represent the same legal interests." (R. p. 19.) The circuit court never explained why this is so. In fact, the circuit court never engaged with the rule that a limited liability company and its members are distinct. This rule provides great benefits to companies and their members. But with those benefits also come costs—and one of those costs is legally distinct interests. MJSM Financial thus cannot claim the benefits of settlement involving its member. Therefore, at the very least, the claims against MJSM Financial were wrongly dismissed.

Second, Schulze-Miller and MJSM Financial cannot show an identity of claims to satisfy the first element of the Arizona test. Arizona applies the "'same evidence' test," which bars claims in a second lawsuit only if "no additional evidence is needed to prevail in the second action than that needed in the first."[9] *Lawrence T. v. Dep't of Child Safety*, 438 P.3d 259, 264 (Ariz. Ct. App. 2019).

The circuit court's error in this analysis stemmed from applying South Carolina law, rather than Arizona law. That court looked only at whether the claims in the third-party complaint "concern the same conduct" as the claims in the Arizona lawsuit. (R. p. 16.) It never analyzed whether any additional evidence would be

[9] This is different from South Carolina law, which bars claims in a second lawsuit whenever the claims in the second lawsuit "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). Arizona has explicitly noted that its same-evidence test is different from the same-transaction test. *See Lawrence T.*, 438 P.3d at 264.

needed to prove Schulze-Miller and MJSM Financial liable in this case than would have been necessary to prove Schulze-Miller liable in the Arizona case. (*See* R. pp. 9 – 24.) Rather, in a footnote, the circuit court summarily said the same-evidence test would bar Shurwest's third-party claims here. (*See* R. p. 18.)

The problem with this conclusion is that it gets the same-evidence test backward. According to the circuit court, the analysis starts with the second case, and if the evidence needed in the second case would have been sufficient to establish liability in the first case, the test is met. (*See* R. p. 18.) Arizona's test actually works the other way: Start by looking at the evidence needed in the first case. Then look at the second case. If any additional evidence is needed to prove liability in the second case, res judicata does not apply. *See Lawrence T.*, 438 P.3d at 264.

With Arizona law clarified, look now at the first lawsuit (the one in Arizona between Shurwest and Schulze-Miller). The parties agreed to settle their case by dismissing the claims and counterclaims with prejudice. (*See* R. pp. 837 – 838.) This Court must accordingly look to the evidence that would have been necessary for Shurwest to prevail on those claims in applying Arizona's same-evidence test. *See In re Gen. Adjudication of All Rts. to Use Water In Gila River Sys. & Source*, 127 P.3d at 891. In the Arizona lawsuit, Shurwest asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty. (*See* R. pp. 773 – 775.) Those claims were based on Schulze-Miller's misuse of Shurwest's confidential client information to surreptitiously promote FIP; it did not matter which specific client was involved—any client would do. (*See* R. pp. 769 – 775.)

Shurwest had to prove that it was harmed by Schulze-Miller's conduct; whether anyone else was harmed was not at issue. (*See* R. pp. 774 – 775) (seeking compensatory damages and injunctive relief).) That's it. If Shurwest produced evidence on those points that a trier of fact found convincing, Shurwest would have prevailed in the Arizona case.

Now, turn to the third-party complaint. To prevail on the breach of contract and breach of fiduciary duty claims here, Shurwest will have to show that Schulze-Miller and MJSM Financial wrongly used *Plaintiffs'* information (not just any Shurwest's client's information). Shurwest will also have to prove that that misuse of Plaintiffs' information harmed Plaintiffs (not just harmed Shurwest). (*See* R. pp. 167 – 172.)

To be sure, both the Arizona case and the third-party complaint involve Schulze-Miller's clandestine promotion of FIP and improper use of Shurwest's information. It should be no surprise then that the two complaints contain similar allegations, as the circuit court showed in a side-by-side comparison. (*See* R. pp. 8 – 9.) The circuit court gave these similarities great weight because it was applying South Carolina, rather than Arizona, law. Under Arizona's same-evidence test, the similarities of the allegations are of no moment. What matters is that more evidence is needed for Shurwest to prevail in the third-party claims than was needed for Shurwest to prevail in the Arizona case. Therefore, res judicata does not bar the third-party claims. The circuit court erred in dismissing them.

B. The circuit court abused its discretion in striking the third-party complaint.

In addition to res judicata,[10] the circuit court granted the motion to strike because it said the third-party claims were not derivative of Plaintiffs' claims and would complicate the case. (*See* R. pp. 27 – 28.) Both of these conclusions are wrong.

Starting with whether the third-party claims are derivative, under this State's third-party practice rule, a defendant "may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against" the defendant. Rule 14(a), SCRCP. Our supreme court explained that "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). Or, as the Supreme Court framed the inquiry: "[I]s the [third-party defendant] subject to liability to [the third-party plaintiff] for all or part of [the original plaintiff's] claim against [the third-party plaintiff]?" *Id.*

In this case, the answer is "yes." If Shurwest is liable to Plaintiffs for promoting FIP to Dixon, then Schulze-Miller and her company are liable to Shurwest because Schulze-Miller, through her company, violated Shurwest's express instruction not to promote FIP. (*See* R. p. 440.) In other words, Shurwest's third-party claims amount to, "Not me. But if me, then [her], too." *Thompson v. UFP E. Div., Inc.*, No. 2:11-CV-1170, 2012 WL 3686064, at *2 (D.S.C. Aug. 24, 2012).

[10] The circuit court again wrongly cited issue preclusion in its order on the motion to strike. (*See* R. p. 28.)

The circuit court reached the opposite result by characterizing Shurwest's third-party complaint as "It was [her], not me." (R. p. 27.) That is certainly Shurwest's argument on specific jurisdiction. *See supra* Part I.B. It is not, however, Shurwest's argument on the third-party complaint. Here, the argument is that if Plaintiffs were harmed by Shurwest promoting FIP, then that harm was also caused by Schulze-Miller—a Shurwest employee who exceeded her authority in promoting FIP—and her secret (at least secret from Shurwest) company. Indeed, it is illogical to conclude that Schulze-Miller's actions can subject Shurwest to specific jurisdiction but cannot be the basis for derivative claims.

Turning to whether the third-party claims will unduly complicate this litigation, the circuit court incorrectly said they would. No one can credibly claim that even if Schulze-Miller were not a party to this litigation, she would still figure prominently in it. Indeed, she is referenced more than 70 times in the complaint. (*See* R. pp. 110 – 141.) The circuit court instead said the complication would come due to the stay of the FIP receivership. That concern was unfounded. Plaintiffs' counsel explained to the federal district court in the receivership action that counsel had an agreement with the receiver (for these cases and others) to "preserve and assign a priority interest in the recovery of Assets of financial agents/entities subject to the [Receivership] Order," which includes Schulze-Miller and MJSM Financial. Mot. to Clarify 5, *In re Receivership for Scott A. Kohn*, No. 6:19-cv-1112 (D.S.C. Jan. 6, 2020), ECF 30. That agreement therefore can ensure that any judgment in this case does

not interfere with the receivership action. That means that Schulze-Miller and MJSM Financial being third-party defendants does not complicate this case.

CONCLUSION

The circuit court's orders denying the motions to dismiss should be reversed and the claims against Shurwest dismissed for lack of personal jurisdiction. Alternatively, the circuit court's orders granting the motions to strike and to dismiss the third-party complaint should be reversed and the cases remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This final brief complies with Rules 208(b) and 211, SCACR.

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