

IN THE SUPREME COURT OF MISSOURI

Appeal No. SC84445

RICHARD ROMEO AND DARLENE ROMEO
Appellants,

v.

ROBERT E. JONES, ET AL
Respondents.

Appeal from the Circuit Court for the County of St. Louis, State of Missouri
Honorable John F. Kintz, Circuit Judge

SUBSTITUTE BRIEF OF RESPONDENTS

On Transfer from the Eastern District
of the Missouri Court of Appeals

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JURISDICTIONAL STATEMENT

Appellants Richard and Darlene Romeo (the "Romeos" or "Appellants") appeal from the trial court's Order of March 12, 2001 granting Respondents Robert E. Jones, Alan Farkas, Robert C. Jones, David Korum and David Waltrip's (collectively known as the "Lawfirm" or "Respondents") joint Amended Motion for Summary Judgment. **L.F. at 716.** In their Petition, Appellants generally assert a claim for abuse of process against Respondents pursuant to legal representation provided by Respondent attorneys Robert E. Jones and Alan Farkas, to a third party in litigation against the Appellants. Following entry of judgment in favor of Respondents, Appellants previously filed an appeal with the Missouri Court of Appeals for the Eastern District. On February 5, 2002, the Eastern District Court of Appeals reversed the trial court's grant of summary judgment and subsequently denied Respondents' Application for Transfer/Motion for Rehearing.

Respondents subsequently made timely Application for Transfer to this Court pursuant to Missouri Supreme Court Rule 83.04. Transfer to this Court was appropriate because the Opinion issued by the Eastern District Court of Appeals created two questions of either general interest, importance, or conflict within the appellate courts of this state, requiring review by this Court. First, the holding that Respondents could not meet the privity requirement for establishing a res judicata defense is inherently in conflict with prior decisions of that Appellate Court, and of the Missouri Court of Appeals for the Western District. Furthermore, the decision by the Appellate Court permits a party to litigate a claim against a defendant to finality demonstrated by a

settlement, dismissal for failure to prosecute and abandonment of that cause of action; and then bring the exact same claim against a party in privity with the first defendant, thereby obviating the stated purpose of the judicially created doctrine of res judicata - to inhibit multiplicity of lawsuits.

Consequently, transfer to this Court was appropriate pursuant to Missouri Rule of Civil Procedure 83.04. Accordingly, jurisdiction lies with this Court pursuant to Article V, §10 of the Missouri Constitution.

STATEMENT OF FACTS

A. Introduction

Respondents are not satisfied with Appellants' recitation of the Statement of Facts. Consequently, and pursuant to Rule 84.04(f), Respondents provide the following Statement of Facts.

Appellants assert that attorneys Robert E. Jones and Alan Farkas ("the Attorneys") committed the tort of abuse of process during representation of their client, R.J. DeRouin Homes, Inc. **L.F. 6-15.** That litigation took place in the St. Louis County Circuit Court and was styled, R.J. DeRouin Homes, Inc. v. Darlene Romeo and Richard Romeo, Cause No. 666715 (hereinafter "*DeRouin v. Romeo*").¹ **L.F. 6-15, 187-190, 197-202.**

B. Substantive Background

The *DeRouin Homes v. Romeo* lawsuit arose out of the purchase of a home by the Romeos. **L.F. 187.** A review of the events preceding *DeRouin Homes v. Romeo* is essential in understanding the actions taken by Respondents during *DeRouin Homes v. Romeo* and, consequently, their Amended Motion for Summary Judgment, granted by the trial court, and from which this appeal arose.

In 1990, the Appellants purchased a newly constructed home, located in a residential development in St. Louis County known as, "Carriage Crossing." Deposition

¹ For the sake of ease of reference between Appellants' and Respondents' briefs, Respondents shall use the same designation of the various underlying lawsuits, as was used by Appellants in their brief.

of Darlene Romeo (6/4/97) L.F. 41, 44; Residential Sale Contract. L.F. 61-62. The seller was a corporation known as Dell Jones and Associates. L.F. 61, 95-96. The Romeos negotiated the purchase and construction of their home with two real estate agents whom Appellants knew were acting on behalf of Dell Jones and Associates. L.F. 50. When the Romeos purchased their home, the sole officer of Dell Jones and Associates was a man by the name of Donald R. Jones. L.F. 233-236. He signed the sale contract on behalf of Dell Jones and Associates. L.F. 61-62.

The Romeos were dissatisfied with their home's construction. Darlene Romeo Deposition (6/4/1997). L.F. 44. The details of the problems, as set forth in Appellants' Statement of Facts, are not pertinent to this appeal. App. Brf. 11-12. The Romeos discussed their complaints with a representative of Dell Jones and Associates. They first discussed problems with their real estate agents, and also with Donald R. Jones, their builder and seller. L.F. 50, 476-477, 479-480. A man named Jack Elmo then took over discussions to correct these deficiencies. L.F. 50, 482-483. Finally, in August 1991, almost one year after the Romeos had moved into their home, they met for the very first time, Ronald J. DeRouin. L.F. 50, 482-483. Various efforts were made by Mr. DeRouin, on behalf of Dell Jones and Associates to correct the claimed deficiencies. L.F. 49-51, 483-488, 139-141. The Romeos were never satisfied with the efforts. L.F. 175-176, 481.

In February 1994, Appellant Darlene Romeo then began handing out packets of information, criticizing the construction of her home and complaining of the workmanship. Packet of Materials Styled "Substantial Features." L.F. 63-82. These materials contain multiple statements alleging poor workmanship set out in pages

entitled, "Substandard Features." **L.F. 65-67.** Appellant Richard Romeo was fully aware of his wife's activities in handing out these materials, including the contents of the materials being handed out, and he agreed with her doing those activities. Depositions of Richard Romeo. **L.F. 120-121, 127-128, 269-270.**

In addition to these allegations of poor workmanship, the packet contains misleading information as to the party responsible for the workmanship. In the cover letter, the Romeos direct the letter to Ronald J. DeRouin at "Dell Jones and Associates," and go on to state they will hand this out in areas where "you are building," thereby implying she will hand out materials where Dell Jones & Associates is building. **L.F. 64** Yet, Appellants never handed these clearly derogatory materials out at locations where the company who built their home, Dell Jones and Associates, was building homes.

Instead, in February 1994, Appellant Darlene Romeo began handing these materials out at a new subdivision development, "Rockwood Forest," still under construction, located in an area distant from the subdivision where Appellants' home was built, and constructed by a company known as R.J. DeRouin Homes, Inc. (hereinafter "DeRouin Homes"). **L.F. 88-89, 93, 104, 115-117.** Rockwood Forest was owned by DeRouin Homes. **L.F. 150.** Darlene Romeo then handed out the same documents at yet another subdivision development, also still under construction and also in a different location than where her own home was built, known as "Crystal Creek." Darlene Romeo Interrogatory Answers, **L.F. 115-117**; Darlene Romeo Deposition, **L.F. 48, 50-51.** The homes in Crystal Creek were being built by a corporation solely owned by Ronald J. DeRouin, known as D.R. Jones & Associates. **L.F. 146-147.**

Appellant Darlene Romeo handed out these materials to potential buyers at these different subdivision developments with the intention that these potential buyers would take the "inference" that the builder at Rockwood Forest and at Crystal Creek was the same builder that constructed the Romeo's house. **L.F. 96-99.** This was a misstatement because the builder was different. Mrs. Romeo testified that she wanted potential buyers at these two developments to make the inference they would get the same quality of workmanship provided during the construction of Appellants' home. **L.F. 97.**

Mrs. Romeo hoped that by passing out this information packet to potential buyers at subdivisions being built by DeRouin Homes, these potential buyers would believe that the workmanship on any home they bought would have the same workmanship as on the Romeo's home. **L.F. 98.** Mrs. Romeo wanted these potential home buyers, and clients of R.J. DeRouin Homes, Inc. to believe that if they purchased a home from a company owned by Ron DeRouin, then they would have the same problems that the Romeos had with their home. **L.F. 98-99.**

In addition to handing out these materials, Darlene Romeo would display a sign at the entrance to these other subdivision developments with the words, "Dell Jones & Assoc., Inc." at the top, and then a listing of items such as no buyer's satisfaction. **L.F. 53-54, 104.**

Ronald J. DeRouin, the focus of Appellants picketing activities, was not, however, involved with the construction of the Romeos' home. **L.F. 135-138, 140, 168, 172-173, 342, 347.** Mrs. Romeo stated that the reason she was passing out the materials at the various subdivisions under construction was because Ron DeRouin was "one of the

builders" of their home. **L.F. 97-99.** Appellants, however, had no evidence to support that. When asked if she knew whether Ron DeRouin had any specific duties in supervising the construction of the Romeos' home, or actively participating in the construction, Mrs. Romeo testified, "I wasn't aware of anything except that we knew him as a trustee." **L.F. 166.** When asked what were his duties as trustee, Mrs. Romeo replied, "I don't know." **L.F. 167.** When asked again what knowledge she had concerning Ron DeRouin's involvement with the alleged deficiencies in the construction of their home, Mrs. Romeo replied, "I don't know what his participation was at that point." **L.F. 171.** Mrs. Romeo then proceeded to say that she did "know" he was one of three individuals considered as "builder or developer" but could not identify where she had obtained such information. **L.F. 171-172.**

At the time the Romeo's house was built, in 1990, the only officer of Dell Jones and Associates was Donald R. Jones. Secretary of State Corporate Records. **L.F. 233-238.** The board of directors was composed of Don Jones, Jack Elmo, and Ronald DeRouin. **L.F. 233-238.** When the Romeos' home was built, Mr. DeRouin's involvement with Dell Jones and Associates was solely in the business office to help with financing. Deposition of Ron DeRouin (11/30/94). **L.F. 140.** He was not involved with the construction of homes, including the Appellants. **L.F. 135-138, 140.**

Mr. DeRouin had absolutely no involvement in the design or construction of the Appellants' home. **L.F. 135-138, 140.** He had absolutely no involvement in the discussions which took place before August 1991 concerning problems with the Appellants' home. **L.F. 476-480.** Until that time a man named Jack Elmo had been

handling “callbacks” to the homes built by Dell Jones, including the Appellants. **L.F. 138-139, 482-483.** Callbacks are complaints by homebuyers with the construction of their home, and efforts by the homebuilder to correct those problems. **L.F. 138-139.** In August 1991, Mr. Elmo had a heart attack and, therefore, Ron DeRouin volunteered to take over. **L.F. 138-139.** In doing so, he first came in contact with the Romeos and their alleged home problems. **L.F. 135.** The very first time the Romeos became aware of Ron DeRouin's name in any terms of his having an interest in the Appellants' home is when he showed up in August 1991 trying to do this follow-up work. **L.F. 172.**

The Romeos focused their protests solely on subdivisions other than their own, and those which were being developed and built by companies solely owned by Ronald J. DeRouin. **L.F. 104, 113-115, 174-184.** The first subdivision development picketed by Appellants, Rockwood Forest, was being built by R.J. DeRouin Homes, Inc. Ron DeRouin Deposition (6/3/98). **L.F. 150.** The Crystal Creek subdivision was being built by a company called D.R. Jones, which was also owned solely by Ronald J. DeRouin. **L.F. 146.** Finally, in August 1994, the Romeos distributed their materials at a subdivision development known as Carriage Crossing Phase II. **L.F. 104, 149-150.** These homes were being built by DeRouin Homes. **L.F. 150.**

Appellants wanted to contact persons who were thinking of buying a home from Ron DeRouin, and she wanted those persons to believe that the workmanship on their home would be the same as that on the Romeos' home. **L.F. 97-98.** The materials containing the Romeos' description of such workmanship were derogatory. **L.F. 63-82.** For example, the cover page is styled, "Substandard Features." The pages contain

multiple references to "poor workmanship," "substandard features," "poor drywalling," etc. Moreover, in the letter and on the very first page after the cover page, Appellants state, "We plan to immediately dispense this packet to perspective [sic] buyers in this areas and other areas that you are building." **L.F. 64.**

At that time, Ronald J. DeRouin, the sole shareholder and officer of R.J. DeRouin Homes, Inc., requested advise from his attorney, Respondent Robert E. Jones, concerning what action to take in response to the Romeos' efforts. **L.F. 147.** As a result, on April 25, 1994, Robert E. Jones sent a letter to Appellants explaining they were picketing areas which were being developed by Ronald DeRouin and another corporation which was unrelated to Dell Jones and Associates. Letter from Jones, Korum and Jones; Affidavit of Robert E. Jones. **L.F. 157-160.** On the day she received this letter, Mrs. Romeo spoke with Bob Jones on the telephone and was again told that the subdivision developments she was picketing were being built by companies different from the one which built her home. Darlene Romeo Deposition (10/5/2000). **L.F. 179-180.** Appellants chose not to believe Bob Jones. **L.F. 177-178.** Despite the statements made in the letter from Robert E. Jones, Appellants never investigated the builders' identities in any of the subdivisions. Darlene Romeo Deposition. **L.F. 52-53.**

For the next two months, Appellants did not hand out any more of these materials at Rockwood Forest or at Crystal Creek. This was allegedly because the subdivision trustees asked Appellants not to do this anymore. **L.F. 182.** As promised, the Romeos did, however, contact various consumer investigative reporters from newspapers and

television stations about the perceived inadequate construction. **L.F. 46-47, 52, 55-56, 240-242.**

In August, 1994, the Romeos resumed their picketing activities and picketed the new subdivision development, "Carriage Crossing - Phase II." **L.F. 114.** The Carriage Crossing - Phase II subdivision was being built and developed by R.J. DeRouin Homes, Inc., and not the builder who constructed the Appellants' home. Ron DeRouin Deposition, **L.F. 150**; Ronald J. DeRouin Affidavit, **L.F. 185.** Despite having discovered this information, however, Appellants continued to picket the Carriage Crossing Phase II subdivision. Darlene Romeo Deposition. **L.F. 51, 56-57.**

Ronald DeRouin again contacted his attorney, Robert E. Jones. He was concerned that these picketing activities would result in lost sales of homes. Ronald J. DeRouin Affidavit, ¶ 6, **L.F. 158-160**; Ronald DeRouin Deposition (11/30/94), **L.F. 437-442**; Ronald DeRouin Deposition (6/3/98), **L.F. 152.** Such actions threatened the business of R.J. DeRouin Homes, Inc. After consultation with Robert E. Jones, and with good faith reliance on the advice of counsel and belief of the truth of the facts asserted in the Petition, R.J. DeRouin Homes, Inc. initiated *DeRouin Homes v. Romeo* against the Romeos. Ronald J. DeRouin Affidavit, ¶ 6, **L.F. 158-160.**

C. "DeRouin Homes v. Romeo" Suit for Injunctive Relief and Damages

On August 23, 1994, R.J. DeRouin Homes, Inc., a corporation acting through its attorneys, Respondents Robert E. Jones and Alan Farkas, filed an equitable action seeking a Temporary Restraining Order, a Preliminary Injunction, and a Permanent Injunction. **L.F. 187-190.** DeRouin Homes requested the Romeos be enjoined from

“making any public statements concerning [DeRouin Homes’] professional aptitude and/or any public statements which tend to suggest that [DeRouin Homes] is in any way responsible for any alleged defects in [the Romeos’ home] and that [the Romeos] be ordered to refrain from coming within one hundred feet of any real property owned by or developed by [DeRouin Homes]” **L.F. 189**

Appellant Darlene Romeo was free to carry on picketing her homebuilder, Dell Jones and Associates. The Petition did not request injunctive relief to prevent Appellants from publicly commenting on the construction of their home or publicly commenting on the builder of their home, Dell Jones and Associates. **L.F. 187-190.**

The hearing on the request for this TRO took place that same date, and the Court granted that Petition. **L.F. 191-192.** Appellant Darlene Romeo was present for that hearing. **L.F. 54.** In chambers, Hon. Robert Campbell informed Mrs. Romeo that Appellants were picketing the wrong individual and entered a Temporary Restraining Order. **L.F. 54.**

Appellants retained attorney Richard Witzel, their attorney in this matter, and then filed a motion to dismiss the Petition, which had requested equitable relief. **L.F. 193-195.** In doing so, the Romeos asserted that the allegations, and the Temporary Restraining Order, violated their First Amendment rights under the United States Constitution as well as under Article I, section 8 of the Missouri Constitution. **L.F. 193-195.** On September 7, 1994, the Court granted that motion and at the same time gave DeRouin Homes thirty days to file an amended petition because the action then sounded in damages rather than equitable relief.

On October 7, 1994, R.J. DeRouin Homes, Inc., through its attorneys Robert E. Jones and Alan Farkas, filed its Amended Petition in *DeRouin Homes v. Romeo*, now alleging libel and slander. Amended Petition, **L.F. 197-202**. Standard civil discovery proceeded in that suit over the next 13 months. The parties exchanged written discovery. **L.F. 100-115, 224-229**. This written discovery, the subject of further discussion in Appellants brief, was responded to without objection. **L.F. 224-229**. The Amended Petition in *DeRouin Homes v. Romeo* alleged Appellants had made public statements concerning the responsibility of R.J. DeRouin Homes, Inc. for alleged defects in Appellants' home, and that such allegations were untrue. **L.D. 197 – 200**. The discovery which Appellants claim constituted abuse of process requested documents containing statements by Appellants of these alleged defects, and documents referenced by Appellant Darlene Romeo in her depositions. **L.F. 224-229**. The depositions of the parties were also taken. **L.F. 83-89, 130-142, 337-471, 472-506, 507-510**.

As the *DeRouin Homes v. Romeo* lawsuit progressed, the homes in the Carriage Crossing Phase II, Rockwood Forest, and Crystal Creek developments continued to be sold, which thereby reduced the potential damages recoverable in *DeRouin Homes v. Romeo*. **L.F. 155**. As of April 11, 1995, 18 of 22 lots in Carriage Crossing Phase II were sold or under contract; and 41 of 42 lots in Rockwood Forest had been developed and sold. **L.F. 546-551**.

On December 20, 1994, prior to the complained of discovery having taken place, attorney Richard Witzel sent a letter to Respondent Alan Farkas demanding \$75,000 or

Appellants would pursue claims for abuse of process and malicious prosecution. **L.F. 271-272.**

On November 17, 1995, after it became apparent the recoverable damages would be minimal, DeRouin Homes, by and through their Attorneys, filed a dismissal, without prejudice. **L.F. 203.**

D. "Romeo v. DeRouin Lawsuit" for Abuse of Process Against DeRouin Homes

The instant matter is not the first suit for abuse of process brought by Appellants out of *DeRouin Homes v. Romeo* lawsuit. Shortly after the dismissal of the *DeRouin Homes v. Romeo* lawsuit, the Romeos brought suit against Ronald J. DeRouin and R.J. DeRouin Homes, Inc., alleging malicious prosecution and abuse of process based upon *DeRouin Homes v. Romeo*. **L.F. 204-219.** See Richard Romeo, et al. v. Ronald J. DeRouin, et al., Cause No. 96CC-000044, St. Louis County Circuit Court (hereinafter "*Romeo v. DeRouin*"). **L.F. 204-219.** In paragraphs 4 – 7 of their Petition in *Romeo v. DeRouin*, Appellants alleged multiple acts, performed by R.J. DeRouin Homes, Inc., referred to in that Petition as, "Homes Inc." during the *DeRouin Homes v. Romeo* lawsuit constituting malicious prosecution or abuse of process. Those acts included, "The filing, prosecution, and continuation of such actions." **L.F. 205.** Appellants further alleged that "The aforementioned civil action and the process used by [R.J. DeRouin Homes, Inc. and Ronald J. DeRouin] in initiating, prosecuting and continuing said action, constituted an illegal, improper, and perverted use of process neither warranted nor authorized by the process as determined by law." **L.F. 205-206.** Finally, Appellants alleged that such

actions by DeRouin Homes were authorized, ordered and directed by Ronald J. DeRouin. **L.F. 205.**

As part of their defense to this claim, Ronald J. DeRouin and DeRouin Homes asserted as an affirmative defense their reliance upon counsel. **L.F. 251-266.** Respondent Robert E. Jones, as the attorney of record for R.J. DeRouin Homes, Inc. in *DeRouin Homes v. Romeo*, provided deposition testimony. **L.F. 158-160, 597-631.**

The *Romeo v. DeRouin* suit proceeded over the next two years. On June 22, 1998, the trial court entered an Order setting the matter on the court's dismissal docket for July 15, 1998, and sent copies of that notice to the attorneys. **L.F. 223.** On July 16, 1998, the day after this matter was to have been dismissed for failure to prosecute, the Romeos signed a document asserting that the Romeos had agreed to accept \$23,750.00, to be paid in installments, in exchange for their release and discharge of Ronald J. DeRouin, DeRouin Homes, Don Jones, Jack Elmo, Dell Jones and Associates, Inc., Dell Properties, Inc., D.R. Jones and Associates, Inc., and Gateway Properties, Inc. from “any and all claims, costs, demands, damages, actions, causes of action, expenses, attorney’s fees, or suits” which Appellants may have had against them arising out of the *DeRouin Homes v. Romeo* lawsuit. **L.F. 220-221.** Five days after the Romeos signed the Release, the Court then, on its own motion, entered an order styled, “Judgment and Order of Dismissal,” which dismissed the Romeo Lawsuit, without prejudice, for failure to prosecute. **L.F. 222-223.**

During the time the *Romeo v. DeRouin* lawsuit was pending, Appellants did pursue their claim against their own homebuilder, Dell Jones & Associates for the alleged

construction defects. Petition in Romeo v. Dell Jones & Associates. L.F. 243-247. Appellants obtained a judgment against Dell Jones and filed a Satisfaction of Judgment on July 16, 1998. L.F. 248-250.

E. Procedural Background for This Lawsuit

On August 20, 1999, slightly over one year later after settling the *Romeo v. DeRouin* matter, Appellants then filed this lawsuit against Respondents, based upon the exact same facts as which formed the basis for the *Romeo v. DeRouin* lawsuit. In this matter, Appellants allege that Respondents, as attorneys for the aforementioned released persons, were guilty of abuse of process by filing and prosecuting *DeRouin Homes v. Romeo* matter. L.F. 6-15. In particular, the Romeos allege that the attorneys for Ronald J. DeRouin and R.J. DeRouin Homes, Inc. permitted R.J. DeRouin Homes, Inc. to build and sell houses without disclosure of the standards of quality, standards of workmanship, and levels of purchaser satisfaction; and that Respondents' actions permitted R.J. DeRouin Homes, Inc. to coerce Appellants into degrees of silence and to intimidate Appellants and prevent them from seeking redress for the alleged wrongs committed by Respondents. L.F. 6-15. Respondents filed an Answer denying the allegations and raising the affirmative defenses of res judicata, collateral estoppel, settlement and release, and contributory fault. L.F. 20.

POINTS RELIED ON

I. STANDARDS GUIDING REVIEW AND AFFIRMANCE OF SUMMARY JUDGMENTS.

ITT Commercial Fin. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993);

Martin v. City of Washington, 848 S.W.2d 487 (Mo. banc 1993);

Hallmark v. Haenni, 904 S.W.2d 31 (Mo. App. E.D. 1995);

Felling v. Giles, 47 S.W.3d 390 (Mo. App. E.D. 2001);

II. BY RAISING ISSUES FOR THE FIRST TIME ON APPEAL, APPELLANTS HAVE WAIVED THEIR RIGHT TO ASSERT THESE ARGUMENTS, AND THUS THIS COURT SHOULD NOT CONSIDER THEM.

State ex rel. Nixon v. Am. Tobacco Co., 34 S.W.3d 122 (Mo. banc. 2001);

Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458 (Mo. banc. 1998);

Brizendene v. Conrad, 71 S.W.3d 587 (Mo. banc. 2002);

III. THE TRIAL COURT CORRECTLY GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO APPELLANTS' CLAIM BECAUSE RESPONDENTS DEMONSTRATED FACTS, OF WHICH THERE WAS NO DISPUTE AS TO A GENUINE MATERIAL ISSUE, ESTABLISHING THAT APPELLANTS' CLAIM WAS BARRED BY THE DOCTRINE OF RES JUDICATA, WHERE APPELLANTS' PRIOR LAWSUIT, INVOLVING IDENTICAL ALLEGATIONS AND FACTS, AND PARTIES IN REQUIRED PRIVACY, HAD BEEN PREVIOUSLY ADJUDICATED.

A. Identity of the Cause of Action Exists Between the Instant Matter and *Romeo v. DeRouin* Because Appellants Have Asserted the Same Claim, Arising out of the Same Transaction, and Asserting the Same Acts by A Party in Privacy.

Chesterfield Vill., Inc. v. City of Chesterfield, 64 S.W.3d 315 (Mo. banc. 2002);

The Restatement (Second) of Judgments (1980);

Fleming v. Mercantile Bank & Trust Co., 796 S.W.2d 931 (Mo. App. W.D. 1990);

Missouri Rules of Civil Procedure 55.10, 55.33(a) and (b), 56.01(b);

B. Identity of the Thing Sued For Exists Between the Instant Suit and Appellants' Prior Suit, *Romeo v. DeRouin*, Because Appellants Have Sought the Same Relief in Both Suits.

Creative Walking, Inc. v. American States Ins. Co., 25 S.W.3d 682 (Mo. App. E.D. 2000);

Jordan v. Kansas City, 929 S.W.2d 882 (Mo. App. W. D. 1996);

Chesterfield Vill., Inc. v. City of Chesterfield, 64 S.W.3d 315 (Mo. banc. 2002);

The Restatement (Second) of Judgments;

C. Identity of Persons Exists Between the Instant Matter and the Appellants' Prior Suit, *Romeo v. DeRouin*, Because Respondents Served as the Attorneys for the Plaintiff in the Complained-Of Action, *DeRouin Homes v. Romeo*, and Privity Exists Between Attorneys and Their Clients When the Complained of Transaction Consists of Actions Taken by the Attorneys on Behalf of Their Clients.

Land Clearance for Redevelopment Auth. of City of St. Louis v. U.S. Steel, 911 S.W.2d 685 (Mo. App. E.D. 1995);

Berwald v. Ratliff, 782 S.W.2d 709 (Mo. App. W.D. 1989);

Macke Laundry Serv. Ltd. v. Jetz Serv. Co., 931 S.W.2d 166 (Mo. App. W.D. 1996);

Geringer v. Union Electric Co., 731 S.W.2d 859 (Mo. App. E.D. 1987);

D. A Final Judgment Exists for Appellants' Prior Suit, thus Barring the Instant Matter by Res Judicata.

The Restatement (Second) of Judgments;

Bentch v. Collins, 28 S.W.3d 453 (Mo. App. E.D. 2000);

Kelley v. Kelly Residential Group, Inc., 945 S.W.2d 544 (Mo. App. E.D. 1997);

Corley v. Jacobs, 820 S.W.2d 668 (Mo. App. E.D. 1991).

IV. THE TRIAL COURT CORRECTLY GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO APPELLANTS' CLAIM BECAUSE RESPONDENTS DEMONSTRATED FACTS, OF WHICH THERE WAS NO DISPUTE AS TO A GENUINE MATERIAL ISSUE, ESTABLISHING THAT APPELLANTS HAD SPLIT THE INSTANT CAUSE OF ACTION WITH A PRIOR JUDICIAL PROCEEDING AND THUS THE INSTANT PROCEEDING WAS PROPERLY BARRED.

A. Respondents Did Not Waive The Affirmative Defense Of Splitting A Cause Of Action Because Respondents Specifically Asserted Res Judicata In Their Answer to Appellants' Petition.

Foster v. Foster, 39 S.W.3d 523 (Mo. App. E.D. 2001);

Felling v. Giles, 47 S.W.3d 390 (Mo. App. E.D. 2001);

McCrary v. Truman Med. Ctr., Inc., 941 S.W.2d 695 (Mo. App. W.D. 1997);

Hutnick v. Beil, 2002 WL 452361 (Mo. App. E.D. Mar. 26, 2002);

B. Summary Judgment Was Proper Because Appellants Improperly Split Their Cause Of Action For Abuse Of Process.

Eugene Alper Const. Co. v. Joe Garavelli's of West Port, Inc., 655 S.W.2d 132 (Mo. App. E.D. 1985);

Horwitz v. Horwitz, 16 S.W.3d 599 (Mo. App. E.D. 2000);

Felling v. Giles, 47 S.W.3d 390 (Mo. App. E.D. 2001);

Hagen v. Rapid Am. Corp., 791 S.W.2d 452 (Mo. App. E.D. 1990);

V. THE TRIAL COURT CORRECTLY GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO APPELLANTS' CLAIM FOR ABUSE OF PROCESS BECAUSE RESPONDENTS DEMONSTRATED FACTS, OF WHICH THERE WAS NO DISPUTE AS TO A GENUINE MATERIAL ISSUE, ESTABLISHING THAT APPELLANTS' CLAIM SOUNDED IN MALICIOUS PROSECUTION AND NOT ABUSE OF PROCESS, AND ESTABLISHING THAT NO EVIDENCE SUPPORTED A FINDING THAT RESPONDENTS MADE AN ILLEGAL, IMPROPER, OR PERVERTED USE OF THE PROCESS.

Holley v. Caufield, 49 S.W.3d 747 (Mo. App. E.D. 2001);

Wells v. Orthwein, 670 S.W.2d 529 (Mo. App. E.D. 1984);

Wessler v. Wessler, 610 S.W.2d 650 (Mo. App. E.D. 1980).

Rowland & Co. v. Smith, 698 S.W.2d 48 (Mo. App. 1985);

A. Respondents Did Not Pursue Improper Relief in the Underlying Action They Filed Against Appellants.

B. Respondents Did Not Conduct Improper Use of Discovery in the Underlying Action They Filed Against Appellants.

Mo. R. Civ. P. 56.01;

C. Appellants' Current Action Against Respondents Sounds in Malicious Prosecution.

Wells v. Orthwein, 670 S.W.2d 529 (Mo. App. E.D. 1984);

ARGUMENT

I. STANDARDS GUIDING REVIEW AND AFFIRMANCE OF SUMMARY JUDGMENTS.

The standard of review on appeal regarding summary judgment is essentially *de novo*. See ITT Commercial Fin. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). In evaluating whether the entry of summary judgment should be affirmed, this Court should employ criteria no different from that which was employed by the trial court to determine the propriety of sustaining the motion initially. See Id.

Summary judgment was appropriate pursuant to the provisions of Missouri Rule of Civil Procedure 74.04. There was no genuine issue as to a material fact concerning elements essential to the Appellants' claims against the Respondents, and those material facts establish the Respondents were entitled to judgment as a matter of law.

A defendant moving for summary judgment need not controvert each element of the non-movant's claim in order to establish a right to summary judgment. See Mo.R. Civ.P. 74.04(b), ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 381 (Mo. banc 1993). Rather, a defending party, such as Respondents, may establish their right to summary judgment by showing: (1) facts that negate any one of the claimant's elements; (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements; or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support

the movant's properly-pleaded affirmative defense. See Id.; see also Joseph H. Held and Associates, Inc. v. Wolff, 39 S.W.3d 59, 62 (Mo. App. E.D. 2001).

Any one of these showings establishes a right to judgment as a matter of law. Once a movant makes a prima facie showing, the non-movant's "only recourse is to show, by affidavit, depositions, answers to interrogatories, or admissions on file--that one or more of the material facts shown by the movant to be above any genuine dispute is, in fact, genuinely disputed" or that, under the undisputed facts, the movant is not entitled to judgment as a matter of law. See Id. "Genuine issue of fact," for summary judgment purposes, does not exist only when there is the slightest doubt about facts. Rather, the fact in doubt must be a material one which has legal probative force as to a controlling issue. See Martin v. City of Washington, 848 S.W.2d 487, 492 (Mo. banc 1993); Hallmark v. Haenni, 904 S.W.2d 31, 33 (Mo. App. E.D. 1995).

An appellate court is entitled to affirm on any ground sufficient to sustain the judgment and is not limited to the grounds relied on by the trial court. See Felling v. Giles, 47 S.W.3d 390, 393 (Mo. App. E.D. 2001). The appellate court will affirm the trial court's judgment if it is deemed correct under any reasonable theory supported by all the evidence. "This court on appeal is primarily concerned with the correctness of the result, and not the route taken by the trial court to reach it." See Felling v. Giles, 47 S.W.3d 390, 393 (Mo. App. E.D. 2001).

II. BY RAISING ISSUES FOR THE FIRST TIME ON APPEAL, APPELLANTS HAVE WAIVED THEIR RIGHT TO ASSERT THESE ARGUMENTS, AND THUS THIS COURT SHOULD NOT CONSIDER THEM.

In their substitute brief to this Court, the Appellants for the first time raise arguments the trial court and appellate court never had the chance to consider. In their brief, the Appellants have challenged, as they challenged below, that res judicata is not applicable to their claim by arguing that there was not a final judgment in *Romeo v. DeRouin* and that the Respondents were not the same parties or in privity to either of the defendants in *Romeo v. DeRouin*. In their substitute brief, however, the Appellants have also attacked other aspects of res judicata, arguing that the cause of action differs between the present and prior action, and that the thing sued for is different in each action. **Appellants' Br. at 62-69.** Further, in their brief the Appellants argue for the first time that there are public policy considerations in this case supporting a reversal of the trial court's Order. **Appellants' Br. at 69-72.**

In their Memorandum of Law in Opposition to Defendants' Amended Motion for Summary Judgment, which Respondents have included in their Supplemental Legal File, the Appellants only challenged res judicata on two grounds: that there was not an identity of persons and parties to the action, and that there had been no final adjudication in the previous action, *Romeo v. DeRouin*. See Plaintiffs' Memorandum of Law in Opposition to Defendants' Amended Motion for Summary Judgment at 8-9. **Suppl. L.F. at 727-28.** The Appellants failed to argue to the trial court that res judicata might not apply because two distinct requirements of res judicata were not present; namely, Identity

of Cause of Action and Identity of Item Sued For. Id. Appellants also failed to argue to the trial court that public policy compelled a finding that res judicata did not apply. Id. As such, the Appellants have waived such arguments and cannot raise them for the first time here.

"An issue that was never presented to or decided by the trial court is not preserved for appellate review." See State ex rel. Nixon v. Am. Tobacco Co., 34 S.W.3d 122, 129 (Mo. banc. 2001). This Court, en banc, has repeatedly held that arguments not presented to a trial court will not be considered. See Id.; Seitz v. Lemay Bank and Trust Co., 959 S.W.2d 458, 462 (Mo. banc. 1998) (refusing to consider issues appellants raised on appeal but failed to include in motions for directed verdict or for judgment notwithstanding verdict). "An appellate court will not convict the trial court of error on an issue which was never before it to decide." See Brizendene v. Conrad, 71 S.W.3d 587, 593 (Mo. banc. 2002) (citing VanBooven v. Smull, 938 S.W.2d 324, 330 (Mo. App. W.D. 1997)). This Court should not be asked to rule that the trial court mistakenly found that res judicata applied based upon reasons which were never presented to the trial court.

The Appellants had the choice to raise these arguments, in their response to Respondents' Amended Motion for Summary Judgment, when they first argued that res judicata did not apply. They made the tactical choice to attack res judicata only upon the grounds of a lack of a final adjudication and a denial of privity or sameness between the parties. Appellants cannot now ask this Court to consider new arguments and decide those issues as if this Court were the trial court. Appellants' argument of these issues at

this point subsequently has forced Respondents to raise new arguments in defense. This Court should not consider the Appellants' newly adopted arguments.

III. THE TRIAL COURT CORRECTLY GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO APPELLANTS' CLAIM BECAUSE RESPONDENTS DEMONSTRATED FACTS, OF WHICH THERE WAS NO DISPUTE AS TO A GENUINE MATERIAL ISSUE, ESTABLISHING THAT APPELLANTS' CLAIM WAS BARRED BY THE DOCTRINE OF RES JUDICATA, WHERE APPELLANTS' PRIOR LAWSUIT, INVOLVING IDENTICAL ALLEGATIONS AND FACTS, AND PARTIES IN REQUIRED PRIVITY, HAD BEEN PREVIOUSLY ADJUDICATED.

Res judicata, or claim preclusion, is a judicially-created doctrine which operates as a bar to the reassertion of a cause of action which has previously been adjudicated in a proceeding between the same parties, or those in privity with the parties. See Creative Walking, Inc. v. American States Ins. Co., 25 S.W.3d 682, 686 (Mo. App. E.D. 2000); Jordan v. Kansas City, 929 S.W.2d 882, 885 (Mo. App. W.D. 1996). Res judicata serves several important public policies: relieving the courts, as well as the parties of the cost and vexation of multiple suits, conserving judicial resources, and encouraging reliance on adjudications. The basic principle is that a party should not be able to re-litigate, in a second proceeding, a claim which was, or which should have been, litigated in a previous proceeding. See Jordan, 929 S.W.2d at 885.

For res judicata to apply in a cause of action, there first must be a judgment which terminated an earlier cause of action such that the plaintiff in that earlier cause of action could not reassert the cause of action ("final judgment"). Additionally, there must exist between the earlier and subsequent litigation: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4)

identity of the quality or status of person for or against whom the claim is made. See Id. It has been said that the phrase “cause of action” for res judicata purposes does not refer to the “form” of action in which the claim is asserted, but to the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon. See State ex rel. Shea v. Bossola, 827 S.W.2d 722, 723 (Mo. App. E.D. 1992).

In the present case, there is a "final judgment" terminating the earlier litigation, and all four identity elements of res judicata exist such that the instant matter, Appellants' second cause of action asserted over the same transaction, was properly dismissed by the trial court. In Appellants' brief, they attack each one of these elements and argue that none are present. Such arguments fail both in fact, and in law.

A. Identity of the Cause of Action Exists Between the Instant Matter and *Romeo v. DeRouin* Because Appellants Have Asserted the Same Claim, Arising out of the Same Transaction, and Asserting the Same Acts by A Party in Privity.

There is an identity of Appellants' cause of action asserted in *Romeo v. DeRouin*, brought against R.J. DeRouin Homes, Inc. and Ronald J. DeRouin, and the instant matter brought against R.J. DeRouin Homes' attorneys. In the first action, Appellants asserted a cause of action against DeRouin Homes and Ronald J. DeRouin for abuse of process and malicious prosecution based upon the actions of DeRouin Homes, which were ordered and authorized by Ronald J. DeRouin. Appellants also implicitly asserted such claims against Respondents in their representation of DeRouin Homes, in prosecuting *DeRouin Homes v. Romeo* against Appellants. **L.F. 187-190, and 204-219.** In *Romeo v. DeRouin*, Appellants alleged that, "initiating, prosecuting and continuing said [*DeRouin Homes v.*

Romeo] action, constituted an illegal, improper, and perverted use of process neither warranted nor authorized by the process as determined by law." **L.F. 202-203.**

In the current lawsuit, Appellants again assert a cause of action for abuse of process, although this time it is asserted against Respondents, attorneys for DeRouin Homes, based upon their actions in prosecuting *DeRouin Homes v. Romeo* on behalf of DeRouin Homes.

The allegations in the instant matter arise out of the exact same events, and claim the exact same damages as in the *Romeo v. DeRouin* matter. A comparison of the Petitions filed by Appellants in their suit against DeRouin Homes and Ronald J. DeRouin, with the Petition filed in the instant matter, reveals how the claims, and the underlying transaction giving rise to those claims, are identical. Respondents have made that comparison and tabulated it in the following chart. This chart graphically depicts how the Appellants' claims against Respondents in the instant matter, and the claims previously made against Respondents' clients in *Romeo v. DeRouin*, not only arise out of the same transaction or series of transactions, but are simply identical:

ALLEGATION	<u>Appellants v.</u> <u>DeRouin Homes</u>	<u>Appellants v.</u> <u>Robert Jones, et al</u>
Abuse of Process claim arises out of Defendants' initiating Cause No. 666715, <u>DeRouin v. Romeo</u>	¶ 5 – 6	¶ 8
The civil action [<i>DeRouin Homes v. Romeo</i>] and the process used by [R.J. DeRouin Homes or Respondents] in initiating,	¶ 8	¶10

prosecuting and continuing said action, constituted an illegal, improper, and perverted use of process neither warranted nor authorized by the process as determined by law.		
Underlying suit claimed Romeos made false and misleading statements, and requested they be permanently enjoined from making public statement concerning: (1) R.J. DeRouin Homes professional aptitude; or (2) that DeRouin in any way responsible for Romeo's home's defects; and not to come within 100 feet of real property owned or developed by DeRouin Homes.	¶ 6	¶ 9
Improper Purpose: To cause sales of houses without public knowledge of DeRouin's role in home owned by Romeos	¶ 9 (a)	¶ 20 (a)
Improper Purpose: To silence the Romeos concerning defects	¶ 9 (b)	¶ 20(b)
Improper Purpose: To allow DeRouin Homes to build and sell without disclosing to public standards of quality and workmanship	¶¶ 9 (c) and 9(d)	¶¶ 20 (c) an (d)
Improper Purpose: To allow DeRouin Homes to build and sell without disclosure of levels of purchaser satisfaction	¶¶ 9 (e) and 9(f)	¶¶ 20 (e) and (f)
Improper Purpose: To coerce and intimidate Romeos into silence	¶¶ 9(g)	¶ 20(g)
Improper Purpose: To coerce and intimidate	¶ 9(h)	¶ 20(h)

Richard Romeo into pressuring Darlene Romeo into silence		
Improper Purpose: To intimidate and harass Romeos	¶ 9(I)	¶ 20(i)
Improper Purpose: To cause economic loss to Romeos.	¶ 9(j)	¶ 20(j)
Injuries Alleged: loss of sleep; anxiety; nervousness; worry; irritability; interference with concentration; abilities to work and enjoy the pleasures of life were infringed upon and diminished; required to incur legal fees for defense of <i>DeRouin Homes v. Romeo</i> lawsuit; required to spend substantial amounts of time and efforts in preparing defense to the lawsuit.	¶ 10	¶ 20 (misnumbered)

Appellants allege that there is no identity of cause of action because they claim to have alleged in the instant matter, two different events also comprising a claim for abuse of process, which had not been raised in the *Romeo v. DeRouin* matter. **Appellants' Br. at 68.** Even assuming for the sake of argument that Appellants have asserted two different acts making separate claims for abuse of process not previously raised in the Romeo Lawsuit, their argument misses the point. Appellants' argument focuses on their ability to locate a distinct act, occurring during the transaction for which they bring this claim.

The law of res judicata, however, is clear that the Court's focus must be on the transaction, or series of transactions, giving rise to the claim. See Chesterfield Vill., Inc. v. City of Chesterfield, 64 S.W.3d 315, 318-19 (Mo. banc. 2002). Res judicata is a common law doctrine that precludes litigation of a claim formerly made. See Id. at 318. In evaluating whether res judicata is applicable, the key questions are what is the thing sued for; and has it been previously litigated? See Id. The doctrine of res judicata applies not only to those points actually raised, but also to every point which properly belongs to the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. See Greening v. Klamen, 719 S.W.2d 904, 906 (Mo. App. E.D. 1986).

In evaluating what events or acts are included in the "transaction or series of transactions" for purposes of applying res judicata, reference to the Restatement (Second) of Judgments is most instructive:

§24. Dimensions of "Claim" for Purposes of Merger or Bar – General Rule
Concerning "Splitting"

- (1) when a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes 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.
- (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to

such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments §24 (1980), at 196.

The "considerations" include such items as how much of the witnesses' testimony overlaps and how much overlap is there in other evidence; and whether the facts form a convenient unit for trial purposes. If there is a substantial overlap, the second action should ordinarily be held precluded. Id. at 199. There could be no clearer example of overlap between two claims than the allegations set forth in *Romeo v. DeRouin* lawsuit and the instant matter. They all arise out of the actions taken by Respondents on behalf of R.J. DeRouin Homes, Inc. and Ronald J. DeRouin, in *DeRouin Homes v. Romeo*. The witness testimony doesn't just overlap, it is the same. The time frame doesn't just overlap in places, it is the same. The facts of the two cases don't just overlap in places, they are identical.

Multiple transactions (and therefore multiple claims) cannot be created to defeat res judicata merely because a plaintiff can conceive different legal theories for asserting liability on an action arising out of a given set of events. For example, a plaintiff who brings a claim for personal injury against a defendant arising out of an automobile collision, may not then bring a claim for property damage against that same person. See Id. at 200. Although that person may bring an action against a distinct party for that damage, they may not do so against the same party.

For many years now, the application of res judicata has defined a claim as embracing all of the remedial rights of the plaintiff against the defendant growing out of the relevant transaction (or series of connected transactions):

The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Restatement (Second) of Judgments §24 (1980), at 199.

Another example from the Restatement demonstrating this principle is that A lends goods to B on the understanding that B will return them in good condition. B fails to do so. A then may bring an action for: (1) negligent loss of goods; and (2) breach of contract or conversion, depending on the precise facts proved or varying emphasis put on the facts. The transaction is single and it follows that if A sues upon it and a judgment is rendered which extinguishes the claim under the rules of merger or bar, A is precluded from suing B a second time, even on a view of the facts or a theory not presented, or a form or measure of relief not sought, in the first action. Id. A could not bring a claim for negligent loss of goods; litigate it to conclusion; and then file an entire new claim for breach of contract for B's failure to return the goods.

Such an approach to res judicata, that it applies to the transaction or series of transactions and all remedial rights associated with that transaction, is consistent with the development of the Rules of Civil Procedure governing pleading, amendments to pleading, and discovery. Several provisions of the Missouri Rules of Civil Procedure merge into the principle that in a lawsuit, a plaintiff is permitted the opportunity to present his or her entire claim or controversy and should, therefore, be expected to do so. Id. at 198. For example, our rules permit a plaintiff to plead inconsistent theories of recovery, see Mo.R.Civ.P. 55.10 (party may state as many separate claims as party has, regardless of consistency). The Rules also permit the "discovery" of information which is not just admissible, but reasonably calculated to lead to the discovery of admissible information. See Mo.R.Civ.P. 56.01(b). Our rules further state that amendments of pleadings shall be freely permitted when justice so requires so that new information learned during discovery can be incorporated into the case. See Mo.R.Civ.P. 55.33(a) (pleading may be amended by leave of court, and leave shall be freely given when justice so requires). Finally, the rules clearly identify that the pleadings shall conform to the evidence, thereby implicitly accepting the possibility that a trial, can commence based upon one set of facts, and then change course such that the pleadings are no longer accurate and complete. See Mo.R.Civ.P. 55.33(b). In other words, if facts adduced at trial encompass a variation of the claim not previously plead, then the pleadings must be allowed to conform to the evidence. Id. (if issues not raised by pleadings are tried by consent of parties, such issues shall be treated as if they had been raised, and court shall

freely allow pleadings to be amended when presentation of merits of action will be subserved thereby).

The *Romeo v. DeRouin* Lawsuit and the instant matter are identical. Both lawsuits arise out of the exact same transaction or series of transactions. Appellants did not allege any facts separate, distinct, or exclusively performed by Respondents, which were not previously alleged in *Romeo v. DeRouin*. Both lawsuits are based upon the very same legal actions of Respondents, performed on behalf of DeRouin Homes and Ronald J. DeRouin. See Jordan, 929 S.W.2d at 887 (plaintiff's causes of action were identical where actions both sought relief on basis of same acts, those of municipal employee in investigating violation of ordinance, but first suit was defamation action against employee individually while second suit was constitutional rights and trespass action against city).

Appellants argue that they have stated a new cause of action in this suit distinct from that asserted in *DeRouin Homes v. Romeo*. It is clear, however, that Appellants have merely tried to recast the facts and the names of their claims, to "focus upon some different aspect of the transaction than the first and thereby escape the bar of res judicata." See Fleming v. Mercantile Bank & Trust Co., 796 S.W.2d 931, 934-35 (Mo. App. W.D. 1990). Alleging additional facts which would require additional evidence to that required to prove the claim in the first petition does not prevent an action from being barred by res judicata. Any additional alleged facts should have been included in the first petition with any other claim arising out of the transaction, and if it is not included it is lost. See Id. "A defendant may not be required to come into court time and time again to

defend its position in what is essentially the same controversy presented by the plaintiff from a different angle." Id.

B. Identity of the Thing Sued For Exists Between the Instant Suit and Appellants' Prior Suit, *Romeo v. DeRouin*, Because Appellants Have Sought the Same Relief in Both Suits.

There is no basis for Appellants' argument that res judicata does not apply to their current claim because the thing sued for by Appellants is different than that sued for in the *Romeo v. DeRouin* matter. One element required for res judicata to apply is that there exist an identity of the thing sued for between the current matter and the earlier adjudicated matter. This element is frequently listed first among the four elements required for res judicata to apply. See Creative Walking, Inc. v. American States Ins. Co., 25 S.W.3d 682, 686 (Mo. App. E.D. 2000). Appellants assert that there is a new thing sued for because the subject matter of the Romeo suit was the liability of DeRouin Homes and Ronald J. DeRouin, while in the instant matter, the subject matter of the suit is the liability of the Respondents. **App. Br. 67.**

Appellants appear to confuse and convolute the concept of the identity of thing sued for. The identity of thing sued for is the element of damages. The argument raised in Appellants' brief, however, seems to focus on the identity of the parties to the two matters. Id. Identity of thing sued for, however, is not the identity of parties. The identity of the parties goes to the issue of privity discussed later in this brief, while identity of the thing sued for is no more confusing than it sounds--an identity between the relief the party is seeking in each case. See Jordan v. Kansas City, 929 S.W.2d 882, 886 (Mo. App. W. D. 1996) (finding identity of thing sued for when both actions in question

sought monetary damages arising out of same transaction); see also State ex rel. Sanders v. Martin, 945 S.W.2d 641, 642 (Mo. App. E.D. 1997) (court examined specific relief sought by parties in two actions when analyzing whether identity of thing sued for existed).

The fact that a plaintiff seeks new remedies in a second matter does not create a new cause of action from the first, nor mean that a different thing is sued for in the second matter. See Chesterfield Vill., Inc. v. City of Chesterfield, 64 S.W.3d 315, 319-21 (Mo. banc. 2002) (rejecting argument that landowners' second suit against city seeking damages was barred for res judicata by landowners' first suit against city which sought only declaratory and injunctive relief; even though remedy requested in second suit was different, both suits were based on same operative facts, and damages sought in second suit could have been claimed in first suit). A good analysis of this proposition is set forth in the Restatement (Second) Judgments. Section 25 of that document states:

§25. Exemplifications of General Rule concerning Splitting

The rule of §24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action:

- (1) To present evidence or grounds or theories of the case not presented in the first action, or
- (2) To seek remedies or forms of relief not demanded in the first action.

Restatement (Second) of Judgments, §25, at 209 (1980).

The general rule is that if a plaintiff who has recovered a judgment against a defendant then seeks to obtain increased damages through commencing a second action,

the court should hold him precluded. Id. at 211. For example, if a party has had a piece of business equipment destroyed or damaged by another, that party may commence an action for recovery of the value of the lost property. If that aggrieved party fails to seek, in the first action, damages for lost business due to the inability to use the lost business equipment, he or she may not later commence a second action for the lost profits. Those damages are merged into the first action, and the prior judgment merges the claim and precludes the subsequent action. See Restatement (Second) Judgments, §25 at 212 (1980).

In the instant matter, even assuming for the sake of argument that Appellants are arguing that they have pleaded a different element of damages in this matter than in the *Romeo v. DeRouin* matter, such an argument is irrelevant. A plaintiff may not bring a subsequent action, after having earlier obtained a judgment, solely because the plaintiff now believes the claim is worth more or other damages could be collected. Restatement (Second) of Judgments, §25, comment c., Illust. 4, at 212. The transaction which was the subject of the plaintiff's first action is unchanged in the new action despite the fact that the plaintiff might seek in that second action a form of relief which he or she did not seek in the first. The fact that the Appellants may have found a "harm" with a different moniker or description is not determinative. A transaction, or series of transactions, is still a single transaction despite different harms, substantive theories, measures or kinds of relief asserted. See Restatement, Second, Judgments, § 24, cmt. c (1980).

In the matter at hand, the damages sought by Appellants in *DeRouin Homes v. Romeo* are the same damages as those asserted in this matter; namely, damages caused by

the alleged abuse of process. What Appellants have tried to do is review their Petition and find any item of monetary damage which arose out of the legal proceedings that was not specifically identified as an item of damages. That is in no way sufficient to create a new transaction.

Appellants asserted monetary damages for injuries allegedly suffered due to an abuse of process, while they sought identical damages in their original abuse of process claim. This is demonstrated in the table previously depicted in this memorandum. See Jordan, 929 S.W.2d at 886 (identity of thing sued for was satisfied where both actions sought monetary damages arising out of same set of facts).

C. Identity of Persons Exists Between the Instant Matter and the Appellants' Prior Suit, *Romeo v. DeRouin*, Because Respondents Served as the Attorneys for the Plaintiff in the Complained-Of Action, *DeRouin Homes v. Romeo*, and Privity Exists Between Attorneys and Their Clients When the Complained of Transaction Consists of Actions Taken by the Attorneys on Behalf of Their Clients.

An attorney and client are in privity for purposes of res judicata, when a plaintiff brings two separate causes of action, both of which have a common series of transactions arising out of the attorney's actions taken in his representation of client. The decision by the Eastern District Court of Appeals, holding that Respondents, and Respondents were not in privity with their client, for actions taken as their client's attorney in *DeRouin Homes v. Romeo*, is inherently in conflict with prior decisions of that Appellate court, and the Western District Court of Appeals.

The application of res judicata requires identity of the quality or status of the person against whom the claim is made, with a person against whom judgment was

previously had. See Creative Walking, Inc., 253 S.W.3d at 686. A party is considered in privity with a party to a judgment when the party is so related by identity of interest to the party to the judgment, that the party to the judgment represented the same legal right as the party seeking privity. See Land Clearance for Redevelopment Auth. of City of St. Louis v. U.S. Steel, 911 S.W.2d 685, 688 (Mo. App. E.D. 1995). In this case, it is hard to conceive of a way in which DeRouin Homes and Ronald DeRouin, and the Respondents could be considered **not** in privity to each other. The heart of Appellants claim for abuse of process is litigation in which R.J. DeRouin Homes, Inc. was represented by the Respondents in the litigation DeRouin Homes filed and pursued against the Appellants. Each action which the Respondents took was on behalf of R.J. DeRouin Homes, Inc. and not pursuant to any personal interest. Similarly, every action taken by R.J. DeRouin Homes, Inc. in the *DeRouin Homes v. Romeo* matter, was taken through the eyes, ears, mouth and hands of Respondents.

The analysis of whether Respondents are in privity with the defendants in *Romeo v. DeRouin*, begins with a discussion of privity in the context of principal and agent. Missouri law provides that res judicata prevents a subsequent action against the agent, where there exists a prior judgment in favor of the principal, because of the derivative responsibility present between principal and agent. See Ingels v. Citizens State Bank, 632 S.W.2d 9, 12-13 (Mo. App. 1982) (citing McGinnis v. Chicago, R.I. & P. Ry., 98 S.W. 590, 594 (1906)). There are several examples in Missouri case law demonstrating this principle. See Jordan v. Kansas City, 929 S.W.2d 882, 887 (Mo. App. W.D. 1996) (res judicata barred plaintiff's action against city based on city employee's acts when plaintiff

had formerly pursued action against city employee based on same acts; city was sued in second action solely on basis of acts of its agent, the employee, and judgments in one action acquitting agent or servant bars action against master on basis of those same acts); Berwald v. Ratliff, 782 S.W.2d 709, 711 (Mo. App. W.D. 1989) (borrower's tort action against bank president was barred by res judicata because of dismissal of borrower's tort counterclaim against bank in prior action; although borrower asserted action was brought against president in his individual capacity, president was acting as agent for bank during transactions which formed basis for both lawsuits.

There can be no closer agency relationship between two persons than that relationship which exists between an attorney and a client. Consequently, if privity exists between principal and agent, it must exist in the relationship between an attorney and client. The attorney is the alter ego of the client, particularly when a corporation is the client. The attorney must be a zealous advocate for her client. The communications between an attorney and her client are subject to protections from disclosure afforded few other relationships, and such protections demand the attorney keep such communications confidential. The Missouri Rules of Professional conduct demand an identity of interests, and the loyalty of the attorney to the client. Those rules prohibit the attorney from representing a client if that representation may be materially limited by the lawyer's own interests. See Mo. R. P. C. 4-1.7.

An attorney-client relationship is one of agency in which the attorney serves as the agent and alter ego of the client, rather than performing any act personally. See Macke Laundry Serv. Ltd. v. Jetz Serv. Co., 931 S.W.2d 166, 176 (Mo. App. W.D. 1996). The

client and attorney have such an identity that they generally are not considered legally distinct entities capable of committing conspiracy. See Id. The concept of the attorney as the alter ego of the client is crystallized in the situation where the attorney's client is a corporation, such as the situation was in *DeRouin Homes v. Romeo*. Missouri law specifically prohibits and makes it a misdemeanor criminal offense for a corporation to appear in court other than through an attorney. See RS Mo. § 484.020.1 (2002):

[N]or shall any . . . **corporation**, except a professional **corporation** organized pursuant to the provisions of chapter 356, R.S. Mo. . . engage in the **practice** of the **law** or do **law** business as defined in section 484.010, or both.

Id. (emphasis added).

The status of the parties was the same in both these actions because Respondents only acted on DeRouin Homes' behalf in the lawsuit which was the basis of the Appellants' two lawsuits at issue here. The Respondents, as attorneys acting as agents on their client's behalf, were in the position of defending the same acts in both cases and representing the same status in both cases. See Jordan, 929 S.W.2d at 887 (city's status did not change from first action against its employee, in which city was not defendant, to second action against city itself based on conduct by employee which was within course and scope of his employment with city).

Respondents in this matter actually were R.J. DeRouin Homes, Inc., in every respect, for all of the complained of transactions in *DeRouin Homes v. Romeo*. Corporations may only act through their employees. See Fowler v. Park Corp., 673

S.W.2d 749, 754 (Mo. banc 1984) (it is well-settled that a corporation is artificial entity that can act only through its agents and employees). For the acts which Appellants claim constituted abuse of process, that corporation could not perform those acts through any other employee, because they required, pursuant to Missouri law, an attorney. See RS Mo. § 484.020. Defendants in this case were the corporation's attorneys of record. Logic dictates that Respondents were, therefore, in privity with R.J. DeRouin Homes.

Missouri case law specifically recognizes this situation. In Geringer v. Union Electric Co., 731 S.W.2d 859, 866 (Mo. App. E.D. 1987), the plaintiff brought an action for malicious prosecution against a utility company after the utility company previously had obtained a default judgment against the plaintiff for damage he had caused to a utility pole. The utility company moved for, and was granted, summary judgment in the malicious prosecution action; the court also denied the plaintiff's request to amend the petition to add the utility company's attorneys as defendants. The plaintiff appealed that decision by the trial court, but while the appeal was pending, the plaintiff filed a new petition, again for malicious prosecution, and now adding the utility company's attorneys as a defendant. The attorneys filed a motion to dismiss this petition, asserting that the new cause of action was the same as the previous cause of action between the plaintiff and the utility company and thus was barred by res judicata. In granting the motion to dismiss, the Missouri Court of Appeals for the Eastern District, addressed the privity argument:

Lastly, **it is clear** that Sachs & Miller, P.C., the law firm which represented Union Electric Company in the underlying action, was in privity with

Union Electric in the prior adjudication. Appellant has had a full and fair opportunity to litigate the same issue in the previous lawsuit that he is now asserting against Sachs & Miller, P.C.

Geringer, 731 S.W.2d at 866 (emphasis added).

The Court of Appeals found it "clear" that a law firm was in privity with its client solely for representing the client in a claim against a defendant, when that defendant subsequently attempted to bring separate suits for malicious prosecution. That is the exact situation, which exists in this matter, and the decision by the Court of Appeals in this case is in direct conflict with its prior holding in Geringer. What is even more conflicting is that in Geringer, the Court found that the plaintiff had his "day in court," while in the instant matter, despite being able to litigate the exact same claim, over the exact same transaction, against the Respondents' clients, the Appellants have not had their "day in court."

As to the claims asserted in the instant matter, Respondents had their day in court in the *Romeo v. DeRouin* matter. Privity, for purposes of res judicata, is present when the interests of the two persons are so closely related, that the party sought to be barred may be said to have had their day in court. Geringer, 731 S.W.2d at 866 ("Appellant has had a full and fair opportunity to litigate the same issue in the previous lawsuit that he is now asserting against Sachs & Miller, P.C."); see also Floyd v. Shaw, 830 S.W.2d 564, 565 (Mo. App. E.D. 1992); Whitmer v. John Hancock Mut. Life Ins., 1994 WL 236647, n. 31 (N.D. Ill. 1994) (attorney who represents defendant in first suit but is not named as

defendant himself is in privity with client for application of res judicata when attorney is named as defendant in subsequent suit).

The Appellate Court's decision will have the effect of mandating that attorneys and clients are not in privity with each other. In the state of Missouri, parties will now be able to bring an action against an individual for abuse of process, bring that action to conclusion whether by settlement or trial, and regardless of whether they win or lose, the plaintiff will then be able to turn around and get a second bite at the apple by suing the individual's attorneys. Such a situation is contradictory to prior statements by the same Appellate Court concerning the judicial purpose served by res judicata. See Creative Walking, Inc. v. Am. States, Inc., 25 S.W.3d 682, 686 (Mo. App. E.D. 2000). Litigation against the attorneys or clients will have no finality, as any decisions made as to the actions taken by the individual, through his attorney, can be relitigated a second time, possibly by a second court, against the attorney. Plaintiffs who are unhappy or dissatisfied with a court's decisions as to their claim against the individual will have a second chance to get a better result. Such conduct is clearly that which is sought to be prohibited by the doctrine of res judicata.

Finally, Appellants have cited a number of cases in their brief in support of their argument that the attorney-client relationship present here does not have the required privity. Not one of those cases deals with the attorney-client relationship. In this brief, however, Respondents have cited case law from this state, and other jurisdictions, specifically holding that privity exists between attorney and client.

D. A Final Judgment Exists for Appellants' Prior Suit, thus Barring the Instant Matter by Res Judicata.

There was an adjudication in *Romeo v. DeRouin* such that res judicata should bar the current matter. In its opinion, the Eastern District Court of Appeals determined that the facts and circumstances of this matter, particularly the provisions of the Release, created the potential for filing another action for an adjudication on the merits, and thus that res judicata did not apply to bar Appellants' claim. That decision, however, is contrary to the facts of this case, and runs contrary not only to the tenor of case law and the Restatement (Second) of Judgments describing what is a final judgment, but it also runs contrary to the public policy behind res judicata. Respondents assert that two significant facts accompanying the dismissal without prejudice for failure to prosecute in the *Romeo v. DeRouin* matter make the Order and Judgment in that matter a final termination of the litigation such that it can never be reasserted. That Order and Judgment should, therefore, be res judicata for asserting the same cause of action against a party in privity.

Appellants first brought claims of malicious prosecution and abuse of process, arising out of *DeRouin Homes v. Romeo*, against R. J. DeRouin Homes and Ronald DeRouin. **L.F. 204-219.** That litigation terminated on July 22, 1998 by an Order and Judgment of the trial court, dismissing the matter without prejudice, for failure to prosecute. **L.F. 222-223.** Six days before that Order was entered, Appellants agreed to terminate that litigation by accepting money to bar any claim they may have against numerous entities, arising out of the underlying DeRouin Lawsuit initially filed against

Appellants by DeRouin Homes. Release. **L.F. 220-221**. The entities released included, "Ronald J. DeRouin, R.J. DeRouin Homes, Inc., Don Jones, Jack Elmo, Dell Jones and Associates, Inc., Dell Properties, Inc., D.R. Jones and Associates, Inc., Gateway Properties, Inc. (hereinafter 'Released Parties') and their heirs, executors administrators and assigns" **L.F. 220**. The scope of that Release, as to the released parties, was without reservation or limitations. **L.F. 220-221**.

Consequently, each and every claim Appellants had against R.J. DeRouin Homes, Inc. and Ronald J. DeRouin, as well as anyone else having anything to do with Appellants' home, were extinguished. At the time of the Order and Judgment, July 22, 1998, the legal relationship between Appellants on one hand, and against R.J. DeRouin Homes, Inc. and Ronald J. DeRouin on the other hand, was exactly the same as in any case where a settlement was reached and a voluntary dismissal with prejudice filed. All claims by the plaintiffs against the defendants were extinguished. It was a final judgment and res judicata should apply to the exact same claims brought against Respondents, persons in privity with against R.J. DeRouin Homes, Inc. and Ronald J. DeRouin.

In addition to agreeing to forego any claims against the defendants in *Romeo v. DeRouin*, Appellants also failed to attempt to set aside the Order and Judgment dismissing that matter for failure to prosecute, nor did Appellants attempt to refile *Romeo v. DeRouin* within any applicable statute of limitations. Consequently, the Order and Judgment terminating the Romeo Lawsuit is a final termination of that litigation due to the passage of time and as a matter of law, Appellants cannot ever reassert that claim.

Appellants argue that there was not an "adjudication on the merits," and therefore res judicata cannot apply. **Appellants' Br. at 59.** Such an argument ignores the tenor of the cases addressing the adjudication requirement for res judicata; namely, that res judicata bars future litigation against those in privity, when there has been adjudication by the court and the plaintiff cannot proceed with future claims over the same transaction.

With this being an issue not specifically addressed by this Court in prior decisions, the Restatement, Second, of Judgments is instructive. See Chesterfield Vill. Inc. v. City of Chesterfield, 64 S.W.3d 315, 319 (Mo. banc 2002) (looking to Restatement of Judgments for instruction); Trow v. Worley, 40 S.W.3d 417, 424 (Mo. App. S.D. 2001) (turning to Restatements as persuasive authority when Missouri cases do not directly address issue). That resource states in pertinent part:

When res judicata is in question a judgment will ordinarily be considered final in respect to a claim . . . if it is not tentative, provisional or contingent and represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement that may be consequent upon the particular kind of adjudication.

Restatement (Second) Judgment, §13 at 132 – 133 (1980).

A trial involving the presentation of evidence or a trial of substantive issues is not required for an adjudication to exist. A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim:

a. Rationale. It is frequently said that a valid and final personal judgment for the defendant will bar another action on the same claim only

if the judgment is rendered "on the merits". . . . Increasingly, however, by statute, rule, or court decision, judgments not passing directly on the substance of the claim have come to operate as a bar. Although such judgments are often described as "on the merits" or as "operating as an adjudication on the merits," that terminology is not used here in the statement of the general rule because of its possibly misleading connotations.

Restatement (Second) Judgment, §19, cmt. (a) (1980).

Missouri caselaw also demonstrates that an adjudication "on the merits," meaning a situation where evidence is presented, is not required for the application of res judicata. For example, a dismissal for failure to state a cause of action is sufficient to raise res judicata in a later proceeding, and it is immaterial that the wording of the counts has been changed in an apparent attempt to correct the defects in the original pleadings. See Bentch v. Collins, 28 S.W.3d 453, 457 (Mo. App. E.D. 2000); Bachman v. Bachman, 997 S.W.2d 23 (Mo. App. E.D. 1999).

The Restatement also states, in comment e, that the foregoing rule, in which a valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim, is applicable to a judgment for a defendant based on the failure of the plaintiff to prosecute his claim with diligence. See Restatement, Second, Judgment, §19, cmt. (e) (1980). Respondents acknowledge that Comment e does carve out an exception for those situations when, by statute or rule of court, the judgment

for failure to prosecute does not operate as a bar to another action on the same claim. See Restatement (Second) Judgments, §20, at ¶ 1(c) (1980).

However, the key element in the Restatement, as with the Missouri cases which addresses the lack of preclusive effect for a dismissal without prejudice, is that the party whose claim was dismissed may still bring an action on the same claim. That is clearly not the situation in this matter. Appellants, because of their settlement, could not again bring the action on the same claim. Those rights were extinguished. Consequently, when the Court entered the Judgment and Order in *Romeo v. DeRouin*, it was the final step in the adjudication of the claim.

Appellants assert that res judicata should not apply to their action against Respondents because their prior cause of action was dismissed without prejudice against DeRouin Homes and Ronald J. DeRouin, on the trial court's own motion to dismiss for failure to prosecute. **L.F. 222-223**. In this case, however, the dismissal without prejudice in *Romeo v. DeRouin* precludes Appellants from reasserting that claim. The trial court entered the order of dismissal just five days after Appellants signed a Release settling that cause of action. **L.F. 220-223**. Appellants received a settlement amount in exchange for their agreement to release and discharge numerous entities including DeRouin Homes and Ronald J. DeRouin. For all intents and purposes, Appellants were adjudicated as to DeRouin Homes and Ronald J. DeRouin when Appellants signed the Release and received their settlement money, because of the language of the Release. In the Release, Appellants agreed to

“release and discharge Ronald J. DeRouin . . . from any and all claims, costs, demands, damages, actions, causes of action, expenses, attorney’s fees or suits which [Appellants] have against DeRouin . . . which now have accrued or accrue in the future on account of or in any way growing out of any and all known or unknown, foreseen or unforeseen, injuries or damages to persons and property and any consequences thereof which have resulted or may in the future develop”

L.F. 220.

Based on the language of the Release, Appellants would not have been able to maintain any further claims or causes of actions against DeRouin Homes or Ronald J. DeRouin. Thus, the Dismissal and Release served as a final adjudication of any and all claims Appellants could have made against DeRouin, just as a dismissal without prejudice for failure to state a claim effectively serves as a final judgment because a plaintiff is unable to relitigate that claim. See Bentch, 28 S.W.3d at 456.

Appellants argue, as the Court of Appeals also discussed, that the language of the Release permitting a future action should timely payments not be made, removes the required finality. Respondents believe this argument, however, is not supported either by the record, nor the applicable law. As far as lack of support in the record, there is no assertion, and has never been an assertion, that the payments required in the Release were not made in a timely manner. The last of those payments were to have been made approximately one year before this matter was filed. The statutes of limitations and repose have expired on those claims. Even if they wanted to, Appellants could not reassert those claims.

As a matter of law, the fact that an Order or completion of proceedings leaves open the possibility that it may be restarted does not deprive that Order or Judgment of sufficient finality for purposes of res judicata:

f. Proceedings to set aside or reverse judgment. A judgment otherwise final for purposes of the law of res judicata is not deprived of such finality by the fact that time still permits commencement of proceedings in the trial court to set aside the judgment and grant a new trial or the like . . . This is the case even when a statute or rule of court provides that a judgment cannot be executed upon or otherwise enforced during the period allowed for making such a motion and the further period until the motion if made is decided. The judgment ceases to be final if it is in fact set aside by the trial court, as it would be upon the granting of a motion for a new trial.

Restatement (Second) of Judgments, §13, cmt. (f) (1980).

The issue this Court must address is whether the circumstances under which the proceedings terminated in the DeRouin matter have the required finality for res judicata. The Restatement states that some uncertainty as to the final result, such as during the pendency of a motion for new trial, may be relevant in the timing of deciding the issue of claim preclusion. See Id. The more appropriate course of action, if such uncertainty is considered present, may be to delay ruling on such a motion until that uncertainty is removed. Such uncertainty is not an issue in this matter. There was no refiling of the *Romeo v. DeRouin* lawsuit. That claim is extinguished.

For a judgment to lack the required finality for purposes of res judicata, that judgment must be actually set aside. The test of finality is whether the manner in which the litigation concluded is procedurally definite; not whether the potential exists for future proceedings. In brief, uncertainty does not remove finality. Any decision rendered by a trial court has a certain amount of uncertainty. Trial courts in Missouri retain jurisdiction over proceedings following judgments. Should a losing party avail himself of the rules permitting a post-trial motion, there may be a delay of 120 days from time judgment is entered until time the review process within the trial court concludes. See Mo.R.Civ.P. 78.04, 78.06. In the instant matter, the payments of settlement monies had to be concluded within 107 days; a time less than the post-judgment process provided for by the Missouri Rules of Civil Procedure.

Furthermore, a Release is a contract, and like all contracts, each party must perform a duty under the contract. The null and void language represents only a statement recognizing an action for breach of contract if one party failed to perform pursuant to such contract.

Comment g to the Restatement also provides some guidance to the Court in determining whether the circumstances of the termination of *DeRouin Homes v. Romeo* may be considered a final adjudication. Comment g describes criteria establishing the required finality of proceedings when evaluating issue preclusion. While this comment does not specifically address claim preclusion, the issue in this appeal, one requirement of issue preclusion, as with claim preclusion, is finality of the judgment. Matters to be considered in determining finality for purposes of direct estoppel include the nature of the

decision, namely that it was not avowedly tentative; the adequacy of the hearing; and the opportunity for review. See Restatement (Second) of Judgments, §13, at 141 (1980).

In the instant matter, there is no uncertainty as to the finality of the underlying proceedings. First, the settlement monies have long been paid. Second, the Order of the trial court in the DeRouin matter did not lack finality. On the contrary, it was direct and definitive. It is styled, "Judgment and Order of Dismissal." The court even sent notice to the parties, thirty days in advance, that the court would dismiss this action for failure to prosecute. There was apparently no objection to this notice because the parties had concluded the litigation.

Appellants have asserted throughout their brief a public policy argument. The true public policy of res judicata is that there should be an end to litigation after a plaintiff has had a full and fair opportunity to bring their claim and be heard. See Geringer v. Union Electric Co., 731 S.W.2d 859, 866 (Mo. App. E.D. 1987). Such a public policy supports the summary judgment entered by the trial court in this case. Res judicata promotes the public policy of fairness to the defendant and sound judicial administration. These policies mandate that litigation over a particular controversy must end at some point. See Restatement (Second) of Judgments, §19, at 161 – 162 (1980). Such public policy considerations impose the application of res judicata even though the substantive issues have not been tried, particularly if the plaintiff has failed to avail himself of opportunities to pursue remedies in the first proceeding. See Id.

Appellants' assertion that there was no adjudication in the Romeo v. DeRouin matter is further contradicted by the fact that the form of the dismissal would sustain one

element of a claim for malicious prosecution by the defendants in that matter against the Appellants. To prevail on a claim for malicious prosecution, a plaintiff must show that the underlying suit was terminated in plaintiff's favor. See Kelley v. Kelly Residential Group, Inc., 945 S.W.2d 544, 550 (Mo. App. E.D. 1997). When a case is dismissed without prejudice, the dismissal is a termination in favor of the plaintiff bringing a subsequent claim for malicious prosecution when the party who initiated the case manifests an intent to abandon it. See Id. A party who permits a case to be dismissed by the Court, for failure to prosecute, clearly has manifested an intent to abandon the claim.

Finally, the dismissal without prejudice entered by the court in Romeo Lawsuit on July 21, 1998, and the passage of time, makes the Order and Judgment a permanent bar to Appellants' subsequent attempts to re-prosecute that claim. Following that dismissal, Appellants could only refile the claim so long as the underlying statute of limitations had not expired, or the savings statute had not expired, even assuming it applied. The two year statute of limitations on Appellants claims for malicious prosecution expired not later than two years from the dismissal of *DeRouin Homes v. Romeo*. See R.S. Mo. § 516.140; see also Corley v. Jacobs, 820 S.W.2d 668, 672-673 (Mo. App. E.D. 1991). The lawsuit was dismissed on November 17, 1995. **L.F. 203.** The statute of limitations on the claim for malicious prosecution expired on November 17, 1997. Assuming the dismissal without prejudice by the trial court, entered on July 21, 1998 triggered Missouri's Saving statute, the malicious prosecution action became time barred one year later, or not later than July 21, 1999. See RS Mo. §516.230. Such would explain why,

when Respondents filed the instant matter on August 20, 1999, they did not include a claim for malicious prosecution.

Additionally, the five year statute of limitations on Respondents' claim for abuse of process expired not later than August 23, 1999, five years after the *DeRouin Homes v. Romeo* matter was filed on August 20, 1994. See RS Mo. §516.120; Corley v. Jacobs, 820 S.W.2d 668, 672-673 (Mo. App. E.D. 1991) (claim for abuse of process based upon filing of interpleader action accrued on date action was filed). At the time Respondents filed their responsive pleading in this matter, October 18, 1999, much less by the time Respondents filed their motion for summary judgment, on January 12, 2001, or the time the trial court entered judgment for Respondents on March 12, 2001, there was no possibility Appellants could reassert their claims against Ronald J. DeRouin or R.J. DeRouin Homes, Inc.

To accept Appellants' argument that there was no adjudication in *Romeo v. DeRouin* would permit Appellants to avoid res judicata on a case in which a Judgment was entered for failure to prosecute; after Appellants were paid money to forego their claims; and Appellants failed to take any action when the trial court dismissed their claim for failure to prosecute. That contravenes the public policy behind the doctrine of res judicata.

Finally, Appellants cite to the case of Larken, Inc. v. Wray, et al., 189 F.3d 729 (8th Cir. 1999) for the proposition that when a settlement reserves certain causes of action, that settlement does not act as res judicata to those reserved causes of action. **App. Br. 59 – 61.** To the extent Appellants assert that a settlement acts as res judicata to those

causes of action encompassed within the settlement, Respondents agree. In the instant matter, the settlement executed by Appellants extinguished:

"[A]ny and all claims, costs, demands, damages, actions, causes of action, expenses, attorney's fees or suits which [Appellants] have against DeRouin . . . which now have accrued or accrue in the future on account of or in any way growing out of any and all known or unknown, foreseen or unforeseen, injuries or damages to persons and property and any consequences thereof which have resulted or may in the future develop" **L.F. 220.**

Nothing was reserved and, therefore, pursuant to the language in the Larken matter, res judicata is applicable to all claims against Ronald J. DeRouin and R.J. DeRouin Homes, Inc.

What Respondents disagree with is any assertion by Appellants that a settlement agreement can somehow contractually eliminate the legal principle of privity. It cannot. Privity between parties is a judicially recognized legal principle of res judicata. It is either present or it is not, regardless of how settlement agreement is worded. As demonstrated earlier, privity is present between Respondents, and defendants in the *Romeo v. DeRouin* matter. Consequently, res judicata should bar the claims against Respondents.

III. THE TRIAL COURT CORRECTLY GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO APPELLANTS' CLAIM BECAUSE RESPONDENTS DEMONSTRATED FACTS, OF WHICH THERE WAS NO DISPUTE AS TO A GENUINE MATERIAL ISSUE, ESTABLISHING THAT APPELLANTS HAD SPLIT THE INSTANT CAUSE OF ACTION WITH A PRIOR JUDICIAL PROCEEDING AND THUS THE INSTANT PROCEEDING WAS PROPERLY BARRED.

A. Respondents Did Not Waive The Affirmative Defense Of Splitting A Cause Of Action Because Respondents Specifically Asserted Res Judicata In Their Answer to Appellants' Petition.

Appellants incorrectly assert that Respondents waived the defense of splitting a cause of action. In their Answer to Appellants' Petition, Respondents asserted in an affirmative defense that Appellants' claims against Respondents were "barred on the grounds of *res judicata* and *collateral estoppel*." **L.F. 20.** Appellants have failed to mention this affirmative defense in their brief. Splitting a cause of action is merely one form of *res judicata*. See Foster v. Foster, 39 S.W.3d 523, 528 (Mo. App. E.D. 2001).

Missouri courts have repeatedly stated that the defense of splitting a cause of action is part of the group of defenses collectively identified under the name *res judicata*. "Thus, the rule against splitting a cause of action is a form of claim preclusion or *res judicata*. . . . The doctrine of *res judicata* renders a judgment conclusive in a subsequent action between the same parties, not only as to all issues tried, but as to all issues which might have been litigated." *Id.* Recently splitting a cause of action and *res judicata* have been held by Missouri courts to be designed to prevent the same thing--"a multiplicity of lawsuits"--and to prevent a single cause of action to be split and either "filed or tried piecemeal." See Felling v. Giles, 47 S.W.3d 390, 393-94 (Mo. App. E.D. 2001); McCrary v. Truman Med. Ctr., Inc., 941 S.W.2d 695, 697 (Mo. App. W.D. 1997)

("Missouri's strong bias against the splitting of claims arises from the judicial desirability of litigating all claims in one suit rather than wasting the court's time on separate lawsuits for separate claims between the same parties arising out of the same transaction."); see also Hutnick v. Beil, 2002 WL 452361, *3 (Mo. App. E.D. Mar. 26, 2002) (rules against splitting cause of action are designed to protect defendants against fragmented litigation, which is vexatious and costly). The Felling court also noted that the penalty for splitting a cause of action is essentially res judicata: "[T]he penalty for splitting a cause of action is that an adjudication on the merits in the first action is a bar to the second action." See Felling, 47 S.W.3d at 393-94.

Thus, the defense of splitting a cause of action is one form of the affirmative defense of res judicata. Respondents raised that affirmative defense, and Appellants were aware of that defense through Respondents' Answer. If Appellants needed a more specific description of the details of this affirmative defense, they could have sought relief from the trial court with a motion for more definite statement. See Mo R Civ P 55.27(d) (party may move for more definite statement of any matter contained in pleading that is not averred with sufficient definiteness or particularity to enable party properly to prepare responsive pleadings or to prepare generally for trial).

Finally, the manner in which Appellants approach this argument exemplifies the lack of legal support for their argument. As noted above, Appellants failed to acknowledge in their brief that Respondents did raise the affirmative defense of res judicata in their Answer to Appellants' Petition. **L.F. 20.** Moreover, Respondents fail to mention the plethora of Missouri case law stating the relationship between these two

terms. Finally, the case upon which Appellants rely the most in arguing waiver is factually flawed. See Evans v. St. Louis Comprehensive Neighborhood Health Center, 895 S.W.2d 124, 126 (Mo. App. E.D. 1995). In Evans, this Court held that the defendant had waived the defense of splitting a cause of action because the defendant had failed to file any answer to the plaintiff's petition. See Id. at 126. Consequently, because Respondents did file an answer, and in it specifically raised the affirmative defense of res judicata, the holding in Evans is inapplicable to the instant matter.

B. Summary Judgment Was Proper Because Appellants Improperly Split Their Cause Of Action For Abuse Of Process.

Appellants' cause of action against Respondents has been split from an identical cause of action previously litigated by Appellants. "A cause of action which is single may not be split and filed or tried piecemeal, the penalty for which is that an adjudication on the first suit is a bar to a second suit." Eugene Alper Const. Co. v. Joe Garavelli's of West Port, Inc., 655 S.W.2d 132, 135 (Mo. App. E.D. 1985). Appellants previously filed suit against Respondents' clients in *Romeo v. DeRouin*, over the exact same facts, for the same allegations, and requesting the same damages. Consequently, Appellants' cause of action in the instant matter should be dismissed.

Splitting a cause of action, and res judicata, are closely related principles. See Horwitz v. Horwitz, 16 S.W.3d 599, 604 (Mo. App. E.D. 2000). The doctrine of res judicata takes on the character of the rule against splitting a cause of action, because both res judicata and splitting a cause of action are designed to prevent a multiplicity of lawsuits. See Felling v. Giles, 47 S.W.3d 390, 393-94 (Mo. App. E.D. 2001) ("A cause

of action, which is single, may not be split and either filed or tried piecemeal; and the penalty for splitting a cause of action is that an adjudication on the merits in the first action is a bar to the second suit.”) The test for determining whether a cause of action is single and cannot be split is: (1) whether the separate actions brought arise out of the same act, contract, or transaction; (2) or whether the parties, subject matter, and evidence necessary to sustain the claim are the same in both actions. See Horwitz, 16 S.W.3d at 604. The determination of whether a cause of action has been split depends upon the facts and circumstances in each case. See Eugene Alper Constr., 655 S.W.2d at 135.

There can be no doubt that Appellants’ claim in *Romeo v. DeRouin* and their claims in the instant matter against Respondents, are single and should not be split. Respondents have demonstrated earlier in this brief how the Appellants’ respective Petitions in this matter and in *Romeo v. DeRouin*, demonstrate that they arise out of the same acts and transaction. Appellants have not asserted in the instant lawsuit any different acts taken by Respondents, as attorneys on behalf of R.J. DeRouin Homes, Inc. than the acts alleged in *Romeo v. DeRouin*. The "process" for which Appellants claim abuse are the acts taken in *DeRouin Homes v. Romeo*, brought against Appellants, through DeRouin Homes' attorneys, the Respondents.

Appellants have simply chosen to take two bites at the apple, suing first the clients over the exact same legal transactions for which they are now suing the clients' lawyers. The only difference in the two cases is that in the present one, instead of suing the clients, Appellants now are suing the attorneys who represented the clients in the underlying litigation. Missouri courts do not allow plaintiffs to split their cause of action and try

their single claim against different defendants seriatim. See Hagen v. Rapid Am. Corp., 791 S.W.2d 452, 455 (Mo. App. E.D. 1990).

Appellants also have split their cause of action because the parties, subject matter, and evidence necessary to sustain this claim against Respondents are the same as those to sustain the claim in *Romeo v. DeRouin*. The legal file is the same, the fact witnesses are the same, and the documents are the same.

Although the present case is maintained against the attorneys, those attorneys form the same functional entity as their clients. Each action Respondents took in *DeRouin Homes v. Romeo* was on behalf of their client, R.J. DeRouin Homes, Inc., plaintiff in that matter. The attorney-client relationship is one of agency in which the attorney advocates but does not litigate, and serves as the agent and alter ego of his client. See Macke Laundry Serv. Ltd. v. Jetz Serv. Co., 931 S.W.2d 166, 176 (Mo. App. W.D. 1996); McLaughlin v. McLaughlin, 427 S.W.2d 767, 768 (Mo. App. E.D. 1968). Therefore, any action against an attorney who is the alter ego of his client should be barred, when an identical claim against the client, a member of the same functional entity, has already been adjudicated. DeRouin Homes and its president Ronald J. DeRouin, two of the entities with whom Appellants entered their earlier settlement of all claims arising out of *DeRouin Homes v. Romeo* litigation, are not legally distinct from their attorneys, the Respondents in this matter.

Appellants argue that this case can be distinguished from *Romeo v. DeRouin* because this matter involves the representation by attorneys, the Respondents, and because that issue was not part of the *Romeo v. DeRouin* lawsuit. According to

Appellants, therefore, there is no splitting of a cause of action. That argument is contradictory to the facts and to the concept of "transaction or series of transactions". Respondents have previously discussed the series of transactions which gave rise to this matter, and the *Romeo v. DeRouin* matter.

One crucial issue in determining whether a cause of action has been split is whether the plaintiff “was aware of all the basic facts contained in the second lawsuit” at the time the first lawsuit was filed. See Horwitz, 16 S.W.3d at 604. If a plaintiff is aware of such facts, it is incumbent upon them to plead *all* grounds, theories and counts in the first lawsuit. See Id. (emphasis added). The discovery conducted in *Romeo v. DeRouin* provided Appellants’ knowledge of all the facts triggering the present lawsuit, while they were still prosecuting *Romeo v. DeRouin*. Appellants did not make an effort to amend their Petition in *Romeo v. DeRouin* to include the Respondents. That was a tactical decision for which Appellants must accept the consequences.

Respondents’ representation of plaintiff in *DeRouin Homes v. Romeo* was a key issue in *Romeo v. DeRouin*. In *Romeo v. DeRouin*, defendants raised as an affirmative defense his “reliance upon counsel” in justifying the actions taken in *DeRouin Homes v. Romeo*. See Answer, L.F. 252, 254, 256, 258, 259, 261, 263 and 265. Such a defense is also set forth in Ronald DeRouin’s affidavit. L.F. 185. The assertion of that defense permitted the Appellants complete access to the Respondents’ files for their representation of R.J. DeRouin Homes, Inc. and Ronald DeRouin in *DeRouin Homes v. Romeo*. Ronald J. DeRouin was also questioned extensively in deposition concerning this representation, and regarding conversations with DeRouin Homes’ attorneys, the

Respondents, which Appellants normally would not be entitled to because of the attorney-client privilege. **L.F. 143-147, 149, 151-152, 154-156.**

This discovery in *Romeo v. DeRouin* normally would be protected by attorney-client privilege. By asserting the “reliance on counsel” defense, Ronald J. DeRouin and R.J. DeRouin Homes, Inc. waived the attorney-client privilege, thereby making all of Respondents’ actions key issues in the *Romeo v. DeRouin* suit. Moreover, because of access to this discovery, Appellants were aware of all aspects of the attorney-client relationship during their litigation of the *Romeo v. DeRouin* lawsuit. Consequently, Appellants should have raised their claims against Respondents in the present lawsuit at the time of their first lawsuit against DeRouin Homes and Ronald J. DeRouin.

Missouri courts previously have dismissed claims when the court found plaintiffs have tried to bring claims in subsequent actions which they could or should have brought in a prior action. See Horwitz v. Horwitz, 16 S.W.3d 599, 604 (Mo. App. E.D. 2000) (court dismissed wife’s claim for necessities in civil action, explaining that under the doctrine of splitting a cause of action, the necessities claim should have been joined and tried with her counterclaim for dissolution of marriage). The court found that both claims arose out of the same act or events, namely the marriage and children of the two parties: the counterclaim involved issues of spousal maintenance, custody and child support, while the wife’s separate civil suit was an action to recover necessities expended to support herself and her children. The court additionally found that because the wife was aware of all the basic facts contained in her civil suit when she filed her counterclaim for

dissolution, “it was incumbent upon her to plead all the grounds, theories and counts in her first lawsuit.” Id.

Similarly, in Eugene Alper Const. Co. v. Joe Garavelli’s of West Port, Inc., 655 S.W.2d 132, 134 (Mo. App. E.D. 1983), a contractor successfully brought a quantum meruit suit against an owner, alleging that the owner had refused to pay the contractor for its materials and reasonable services. After entry of judgment, the contractor discovered that the owner had sold its assets, leaving it judgment-proof. Thus the contractor brought a second action against the owner on that basis and asserting those acts, but additionally alleging a count that the owner had fraudulently induced the contractor to provide goods and services to him. See Id. at 134-35. The court held that the owner had improperly split its cause of action as to the count for fraudulent inducement, as the allegations in the second action arose out of the identical transaction that was the subject of the first cause of action. See Id. at 135-36.

The instant matter incorporates a stronger argument for splitting a cause of action than that raised in either Eugene Alper or Horwitz. In each of these reported cases, the claims in those plaintiffs’ subsequent causes of actions were different in name and substance than in the prior causes of action, namely dissolution of marriage and necessities in Horwitz, 16 S.W.3d at 604, and quantum meruit and fraudulent misrepresentation in Eugene Alper, 655 S.W.2d at 135-36. In the present case, the claims in the first and second cases are identical in name and substance. This Court should hold the same under the facts and circumstances of this case, especially because the causes of action are identical in name and substance.

Appellants have previously asserted that it is axiomatic that an action which has been dismissed without prejudice is not an adjudication upon the merits because a dismissal without prejudice permits the party to bring another civil action for the same cause. Respondents have previously discussed in this brief how the termination of *Romeo v. DeRouin* was a final judgment sufficient to meet that requirement of res judicata, and therefore, for splitting a cause of action.

Further, any assertion by Appellants that they had the right to split their cause of action because separate actions may be brought against joint tortfeasors is misguided. The Respondents and plaintiff in *DeRouin Homes v. Romeo* are not joint tortfeasors in this case because they did not take separate actions to injure Appellants. Respondents acted solely on behalf of plaintiff in *DeRouin Homes v. Romeo* as their attorneys and agents, in prosecuting their suit against Appellants. They did not and could not have taken separate actions from their clients. Rather, they were one legal entity, who prosecuted the *DeRouin Homes v. Romeo* lawsuit. Appellants' lawsuit against Respondents should be dismissed as Appellants' attempts to split their cause of action and get a second bite at the apple.

V. THE TRIAL COURT CORRECTLY GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AS TO APPELLANTS' CLAIM FOR ABUSE OF PROCESS BECAUSE RESPONDENTS DEMONSTRATED FACTS, OF WHICH THERE WAS NO DISPUTE AS TO A GENUINE MATERIAL ISSUE, ESTABLISHING THAT APPELLANTS' CLAIM SOUNDED IN MALICIOUS PROSECUTION AND NOT ABUSE OF PROCESS, AND ESTABLISHING THAT NO EVIDENCE SUPPORTED A FINDING THAT RESPONDENTS MADE AN ILLEGAL, IMPROPER, OR PERVERTED USE OF THE PROCESS.

The trial court correctly entered judgment in favor of Respondents because the evidence demonstrated Appellants could not, after a reasonable period of discovery, provide sufficient and credible evidence to prove each of the required elements to succeed on their claim for abuse of process. The undisputed material facts demonstrated that Respondents, in prosecuting *DeRouin Homes v. Romeo*, did nothing more than pursue that matter to its authorized conclusion, and the complained of facts by Appellants, even giving those facts an interpretation favorable to Appellants, at best show only an evil motive.

A defending party, such as Respondents, may establish their right to summary judgment by showing facts that negate any one of the claimant's elements, or that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's required elements. See ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 381 (Mo. banc. 1993).

In order to sufficiently state a claim for abuse of process, a pleading must set forth ultimate facts establishing the following three elements: (1) the defendant made an illegal, improper or perverted use of the process, a use neither warranted or authorized by the process; (2) the defendant had an illegal purpose in exercising such illegal, perverted or improper use of process; and, (3) as a result, plaintiff suffered damages. See Holley v. Caufield, 49 S.W.3d 747, 752 (Mo. App. E.D. 2001). It must be shown that process has been used to accomplish an unlawful end or to compel the defendant to do something, which he could not be compelled to do legally. See Id. Stated somewhat differently, the privilege of process may not be used for an unlawful purpose such as using the litigation to extract money or anything of value from another. See Wells v. Orthwein, 670 S.W.2d 529, 532 (Mo. App. E.D. 1984). Evil motive in pursuing a lawsuit on the part of a plaintiff is not sufficient to sustain a finding that plaintiff abused process. See Wessler v. Wessler, 610 S.W.2d 650, 652 (Mo. App. E.D. 1980).

Even assuming that the suit upon which Appellants claim the abuse of process arose is unfounded, that is not sufficient to sustain a finding that plaintiff abused the process. Missouri courts have previously stated that the essence of abuse of process is not the commencement of an action without a justification but is the misuse of process for an end other than that which it was designed to accomplish: "no liability is incurred where the defendant has done nothing more than pursue the lawsuit to its authorized conclusion regardless of how evil his motive may be." Wells, 670 S.W.2d at 533. Even if courts were to assume plaintiffs had bad motives for bringing lawsuits which were later the

subject of abuse of process suits, "that alone is not sufficient to find [those plaintiffs] guilty of abuse of process." See Id.

Significantly, if the action is confined to its regular and legitimate function in relation to the cause of action at issue, there is no abuse even if the plaintiff had an ulterior motive in bringing the action, or if he knowingly brought the suit upon an unlawful claim. Rowland & Co. v. Smith, 698 S.W.2d 48, 51 (Mo.App. 1985). Rather, the test employed is whether the process has been used to accomplish some unlawful end or to compel the opposite party to do some collateral thing which he could not be compelled to do legally. See Id. at 52. In other words, "no abuse of process occurs in the bringing of a lawsuit if the suit is confined to its regular and legitimate function of pursuing the cause of action pleaded in the petition; it is where the suit is brought for a collateral purpose that there is abuse of process." Id.

There are several examples where the courts of this state have dismissed claims for abuse of process where the acts complained of encompassed, at best, an evil motive. See Duvall v. Lawrence, 2002 WL 1540786 (Mo. App. E.D. 2002) (prosecuting ex parte order of protection is not abuse of process even when petitioner knew persons subject to orders protection were not in petitioner's custody; such allegation can at best be considered ulterior motive in bringing action); Howard v. Youngman 2002 WL 559462 (Mo. App. E.D. 2002) (filing lis pendens action intentionally to "muddy up the title" of piece of property and filing suit to compel sale of property when plaintiff could not legally compel sale found not to be abuse of process).

Additionally, there are several good examples where Missouri courts have found the evidence sufficient to find abuse of process. See Ritterbusch v. Holt, 789 S.W.2d 491, 492-94 (Mo. 1990) (trial court erred in dismissing action for abuse of process where the plaintiff alleged the defendant caused him to be arrested for maliciously damaging an automobile and the defendant offered to withdraw the complaint if plaintiff would pay the alleged claim for damage to the car); Owen v. Owen, 642 S.W.2d 410, 412-414 (Mo. App. S.D. 1982) (plaintiff properly demonstrated a claim for abuse of process by showing plaintiff in underlying litigation had told his wife that he would drop separate lawsuit for return of stock, if she would accept \$50,000 to terminate separate dissolution proceedings between the husband and wife).

Ritterbusch and Owen clearly are distinguishable from the present action. In those cases, Appellants presented evidence that Respondents were using process unlawfully and in order to illegally obtain something of value. In contrast, in the instant matter Respondents, on behalf of their clients, had every right to initiate suit against Appellants, whom they believed to be illegally spreading defamatory information about them.

Respondents, on behalf of their clients, prosecuted *DeRouin Homes v. Romeo* completely within the ambit of the law to prevent Appellants from spreading misleading information about R.J. DeRouin Homes, Inc. Respondents, on behalf of their clients, sought nothing other than the relief specified in their Petitions; there is no evidence Respondents used process to obtain relief or benefit other than that delineated in their petitions or to unlawfully extract something of value from Respondents.

To establish a cause of action for abuse of process, Appellants must present actual evidence rather than making unsubstantiated assertions that Respondents' actions were taken "[t]o cause economic loss," "[f]or the purpose of intimidating and harassing," and "[t]o coerce and intimidate [Appellants] into silence." Petition, **L.F. 6-15**. For example, in their Brief, Respondents assert that "[a]ny statement the Romeos would make concerning Ronald J. DeRouin's professional aptitude would 'concern' the professional aptitude of R.J. DeRouin Homes, Inc - an activity that Defendants had enjoined the Romeos from pursuing." **Appellants' Br. 46**. Nowhere in the Petition for injunctive relief, or the Court's Order, is Ronald J. DeRouin mentioned individually. **L.F. 187-192**.

Appellants assert that a genuine issue of material fact exists as to whether Respondents should be entitled to judgment as a matter of law, and in so doing, Appellants focus on two issues. First, Appellants assert that Respondents sought relief in *DeRouin Homes v. Romeo* not justified by the facts. Second, Appellants assert that Respondents utilized discovery not justified by, or in pursuit of, *DeRouin Homes v. Romeo*. Both of those arguments fail to rebut Respondents' evidence that there was no illegal use of, or illegal purpose in, the process complained of by Appellants.

A. Respondents Did Not Pursue Improper Relief in the Underlying Action They Filed Against Appellants.

Appellants' argue that Respondents, through *DeRouin Homes v. Romeo*, sought improper relief; namely that they sought to prevent Appellants from making truthful statements concerning the construction of, or repairs to, their house. This argument is factually incorrect.

First, it is important to review some of the most pertinent and undisputed material facts. One such fact is that the company which built Appellants' home is not the company which developed and built the houses where Appellants conducted their picketing activities. Appellants purchased their home from a company known as Dell Jones & Associates. **L.F. 61, 95-96.** At the time they selected their home, Appellants had only dealt with two sales agents, and with the sole officer of Dell Jones & Associates, Donald R. Jones. **L.F. 476-477, 479-480.** Even during the year after they purchased their home, Appellants never had any dealings with Ronald J. DeRouin. **L.F. 482-483.** The very first time that Appellants ever met Ronald DeRouin was in August 1991, a year after Appellants had built their home. **L.F. 482-483.** There is absolutely no evidence anywhere that Ronald DeRouin or R.J. DeRouin Homes, Inc. participated in the design or construction of the Appellants' home.

Appellants have repeatedly claimed that Ronald J. DeRouin was responsible for quality control in the Romeos' house and, therefore, they were justified in passing out the information. There is absolutely no evidence of this. The first contact Darlene Romeo had with Ron DeRouin was in August 1991, almost one year after the Romeos moved into their home. **L.F. 44.** The next time she met him was in May 1994, almost three years later. **L.F. 46.**

Appellants had no evidence to support their claim that Ronald J. DeRouin was involved with the construction of their home, and despite this, still chose to focus their protest activities on his company, R.J. DeRouin Homes, Inc., which also had nothing to do with Appellants' home. Appellant Darlene Romeo never investigated who the builder

was in any of the subdivisions she picketed. **L.F. 52.** Additionally, her own testimony from this case is replete with examples that she had no idea what Ronald J. DeRouin's involvement was in the construction of her own home. Appellants claim that Ronald DeRouin decided what was considered acceptable workmanship in their home, yet they had no idea where they obtained such information. **L.F. 166-167.** Yet, the Romeos did not know if DeRouin had any duties in supervising the construction of their home or actively participating in the construction of that home. **L.F. 166-167, 168-169, 171.** Ronald J. DeRouin never indicated to the Romeos' that he built their home and, in fact, only stated he was following up on behalf of Dell Jones to correct existing deficiencies. **L.F. 168-169, 172-173.**

Ronald J. DeRouin was not even the first person who followed up with the Romeos to try and correct the items claimed by the Romeos as defects in their home. The Romeos were aware that DeRouin started communicating with the Romeos after the person they had been talking with from Dell Jones and Associates had a heart attack. **L.F. 170.** The first time the Romeos' became aware of Ron DeRouin's name in any terms of his having any interest in the construction of their home is when he showed up in August 1991 trying to follow up on work for a man named Jack Elmo. **L.F. 172.**

Ronald DeRouin was not an officer of Dell Jones and Associates in 1990, 1991, 1992, or 1993. **L.F. 233-238.** When asked about such quality control in his deposition, Ronald DeRouin stated that he made quality control decisions for Dell Jones & Associates only for a narrow portion of time. **L.F. 153.** That time was long after the Romeos' home was ever constructed. **L.F. 153.**

Appellants' counsel correctly identifies how Appellants' discussions and complaints were limited to Dell Jones and Associates, and not with the companies which Appellants actually picketed. **Appellants' Br. 40.** Despite such knowledge, Appellants distributed this packet of derogatory information at subdivision developments not constructed by Dell Jones & Associates. Appellants continued to distribute this packet of derogatory information after being told that Dell Jones & Associates did not build the subdivisions the Romeos were picketing.

Appellants mistakenly assert that the injunctive relief sought by Respondents kept Appellants from making truthful statements about their home. In their Petition for injunctive relief, Respondents, on behalf of DeRouin Homes, alleged that Appellants made various allegations concerning allegedly improper and substandard workmanship on their home, and that Appellants had made public statements alleging R.J. DeRouin Homes, Inc.'s responsibility for that workmanship. **L.F. 187-190.** Additionally, Respondents requested a Temporary Restraining Order that Appellants refrain from making public statements concerning R.J. DeRouin Homes, Inc.'s professional aptitude and/or any public statements which tended to suggest that R.J. DeRouin Homes, Inc. was in any way responsible for any alleged defects in Appellants residence, and that Appellants be ordered to refrain from coming within one hundred feet of any real property owned or developed by DeRouin Homes. **L.F. 190.** The Court granted this relief. **L.F. 191-192.**

There is absolutely nothing in the Petition prepared by Respondents, nor in the Order entered by the Court, preventing Appellants from discussing their home. They

could go into any public place and state the name of Dell Jones & Associates, along with all of the problems with their home attributable to their homebuilder. Appellants did not want to do that, however, because that would not get them any money for contractors or for additional work to be done on their home. Ironically, it is Appellants who wanted to coerce Ronald DeRouin and R.J. DeRouin Homes, Inc. to do things they could not legally force him to do, rather than the other way around. This coercion was accomplished by trying to damage the business of Ronald DeRouin's corporation, R.J. DeRouin Homes, Inc.

More importantly, Appellants misstate the relief Respondents requested or were granted. **Appellants' Br. 46** ("The Romeos were precluded from making **any truthful statement** about the professional aptitude of Ronald J. DeRouin - a person who was an officer, director and shareholder of Del Jones and Associates, Inc. . . .") (emphasis added). *DeRouin Homes v. Romeo* was brought by R.J. DeRouin Homes, Inc. The Petition and Order of the Court are self evident as to what Appellants were precluded from doing. There is, however, absolutely no language in the Order which prohibits Appellants from making truthful statements concerning Ronald DeRouin.

There is also no evidence to support a claim that the Amended Petition for libel was designed to "shut the [Appellants] up." In support of their claim that Respondents had an illegitimate purpose in filing suit on behalf of R.J. DeRouin Homes, Inc., Appellants claim that Respondents sought to prevent Appellants from making any statements about R.J. DeRouin Homes. The Temporary Restraining Order accurately reflects the requested relief. That Order reads in pertinent part:

Pending hearing and determination of this Petition, Respondents are ordered to refrain from making any public statements concerning Plaintiff's [R.J. DeRouin Homes, Inc.] professional aptitude and/or public statements which tend to suggest that Plaintiff is in any way responsible for any alleged defects in Respondents' residence and to refrain from coming within one hundred feet of any property owned by or developed by Plaintiff.

Temporary Restraining Order, L.F. 191-192 .

Based upon this Order, the Appellants were only prevented from commenting on the professional aptitude of a company, which did not even build their home, and from claiming that a company which did not build their home was responsible for the defects in workmanship.

B. Respondents Did Not Conduct Improper Use of Discovery in the Underlying Action They Filed Against Appellants.

Finally, Appellants have argued to this Court that Respondents utilized *DeRouin Homes v. Romeo* to conduct discovery for information to be used in other litigation, which they claim is an abuse of process. The discovery complained of, however, was completely proper in *DeRouin Homes v. Romeo*, and was certainly within compliance with the Missouri Rules of Civil Procedure. See Request for Production, and Appellants' Responses. L.F. 224-229.

The subject discovery was directed at specific issues in the *DeRouin v. Romeo* lawsuit and was entirely appropriate. The Amended Petition in *DeRouin Homes v.*

Romeo alleged Appellants had made public statements concerning the responsibility of R.J. DeRouin Homes, Inc. for alleged defects in Appellants' home, and that such allegations were untrue. **L.D. 197 – 200.** The discovery which Appellants claim constituted abuse of process requested documents containing statements by Appellants of these alleged defects, and documents referenced by Appellant Darlene Romeo in her depositions. **L.F. 224-229.** This written discovery, the subject of discussion in Appellants brief, was filed, and responded to without objection. **L.F. 224-229.** The depositions of the parties were also taken. **L.F. 83-89, 130-142, 337-471, 472-506, 507-510.**

According to the Argument in Appellants' Brief, the offending discovery is referenced in Alan Farkas's letter of February 23, 1995. **L.F. 297.** The referenced discovery is a set of Request for Production of Documents. **L.F. 297, and 224-229.** This discovery is specifically directed to the issues in *DeRouin Homes v. Romeo*, and is certainly in compliance with Missouri Rule of Civil Procedure 56.01. See Mo.R.Civ P. 56.01(b).

The record also demonstrates why Mr. Farkas would make the comment in his letter of February 23, 1995 that the bulk of the discovery is directed at establishing a defense should the Romeos follow up on their threats to file suit. **L.F. 297.** Not two months earlier, on December 20, 1994, counsel for Appellants, Richard Witzel, wrote a letter to Mr. Farkas specifically telling Mr. Farkas that the Appellants were going to be suing Respondents' client, R.J. DeRouin Homes, Inc., for malicious prosecution and

abuse of process, and that R.J. DeRouin Homes, Inc. should so advise their insurance carrier:

This letter will serve to advise you that my clients fully intend to pursue claims against your client for malicious prosecution and abuse of process arising out of the dismissed injunction action filed against the Romeos. If your client is covered by a policy of liability insurance which includes coverage for such claims, please take whatever notification steps you deem necessary to place the appropriate carrier, or carriers, on notice.

L.F. 272.

Mr. Witzel then went on to demand \$100,000 to settle this claim. **L.F. 272**

Appellants further argue that Respondents were conducting discovery for R.J. DeRouin Homes, Inc., when any suit by the Appellants would be against Dell Jones & Associates. **Appellants' Br. 43** ("Such a suit would have been against Dell Jones and Associates, Inc. - not R.J. DeRouin Homes, Inc."). Appellants' attorney also asserts, "Defendant Farkas clearly abused the process in his use of discovery to gain information to prepare the defense of an action against another corporation which had not yet been filed." **Appellants' Br. 49.** The subject discovery, however, as demonstrated by the record, is directed at key issues in the *DeRouin v. Romeo* matter. Whether such discovery would also be useful in another matter does not make the use of such discovery abuse of process. An attorney cannot be handcuffed in the representation of a client out of concern that information appropriately the subject of discovery, may also be useful in another matter on behalf of a client. When discovery falls within the permissible scope

set forth in the Missouri Rules of Civil Procedure, then the attorney conducting such discovery is doing nothing more than pursuing the lawsuit to its authorized conclusion

C. Appellants' Current Action Against Respondents Sounds in Malicious Prosecution.

Appellants argue that Respondents had no justification for bringing the *DeRouin Homes v. Romeo* action. Appellants appear to confuse their claim for abuse of process with a claim they did not bring, malicious prosecution. This confusion has been recognized by The Missouri Court of Appeals for the Eastern District:

It has been said that some confusion exists as to the nature and essentials of actions for abuse of process; that much of the confusion has resulted from a want of consistency and accuracy in distinguishing between the act of maliciously procuring the issuance of process and the act of abusing process when issued. Where the matter complained of concerns the issuance of process, the action is either strictly or by analogy one for malicious prosecution. The gist of an action for abuse of process is the improper use of process after it has been issued.

Wells, 670 S.W.2d at 532.

Consequently, when Appellants allege and argue that Respondents should never have filed the Petition or Amended Petition in *DeRouin Homes v. Romeo*, they are arguing irrelevant facts. Even if *DeRouin Homes v. Romeo* was an unfounded action, that is no evidence of abuse of process. The Wells court also succinctly held:

If the action is confined to its regular and legitimate function in relation to the cause of action stated in the complaint there is not abuse even if the plaintiff had an ulterior motive in bringing the action, or if he knowingly brought suit upon an unfounded claim. However, if the suit is brought for a collateral purpose, there is abuse of process. Id.

If the *DeRouin Homes v. Romeo* matter was unfounded and without merit, that is immaterial to the instant matter. That may be relevant in a claim for malicious prosecution, but that is not the claim presented to this Court. Whether a claim is unfounded, without merit, and the parties bringing it have an ulterior motive, is irrelevant to a claim for abuse of process.

The evidence shows Respondents, by filing the action on behalf of DeRouin Homes, had no other purpose than to obtain relief delineated in the causes of action for injunctive relief, libel, and slander. As such, Appellants' cause of action should be dismissed.

CONCLUSION

Appellants' claims raised in the instant matter are barred by the doctrine of res judicata, and the related doctrine of splitting a cause of action. Appellants have previously prosecuted a matter, to final judgment, against persons who are in privity with Respondents. That matter involved the exact same cause of action arising out of the exact same series of transactions. Consequently, res judicata should bar this matter. Additionally, Appellants have split their claim, and the adjudication in the prior case should bar the instant matter.

Moreover, after an adequate period of discovery, Appellants have failed to plead, and have also failed to produce evidence, sufficient to allow the trier of fact to find the existence of every one of the elements required to support Appellants' claims for abuse of process.

For the reasons set forth herein, Respondents Robert E. Jones, Alan Farkas, Robert C. Jones, David Korum and David Waltrip pray this Honorable Court reverse the Order of the Missouri Court of Appeals Eastern District entered on February 5, 2002, and further to affirm the Judgment of the trial court, entered on March 12, 2001, granting Respondents' Amended Motion for Summary Judgment.

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CERTIFICATION

I, Thomas J. Hayek, Attorney for Respondents, pursuant to Missouri Supreme Court Rule 84.06(c), certify as follows:

1. The foregoing brief on behalf of Respondents contains 22,171 words.
2. The foregoing brief was prepared using Microsoft Word 97 word processing software and was printed using Times New Roman, 13 point, font.
3. Along with the hard copy of this Brief, Respondents are also filing a 3.5 inch floppy disk, containing a file titled, "Brief of Respondents Jones, et al," and that said disk has been scanned by Norton Anti-Virus Corporate Edition, Ver. 7/18/02 rev. 20, and Scan and found to be virus free.

BEHR, McCARTER and POTTER, P.C.

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CERTIFICATE OF SERVICE

Two hard copies and an electronic copy of the foregoing were served this _____
day of _____, 2002 by hand delivering the same to:

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