IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

GALEN SUPPES,	)	
	)	
Appellant,	)	
v.	)	**WD83509**
	)	
	)	**OPINION FILED:**
THE CURATORS OF THE	)	**November 17, 2020**
UNIVERSITY OF MISSOURI, et al.,	)	
	)	
Respondents.	)	

Appeal from the Circuit Court of Boone County, Missouri
The Honorable Jeff Harris, Judge

Before Division One: Thomas N. Chapman, Presiding Judge, and Mark D. Pfeiffer and W. Douglas Thomson, Judges

Mr. Galen Suppes ("Suppes") appeals from the judgment of the Circuit Court of Boone County, Missouri ("trial court"), granting the motion of The Curators of the University of Missouri ("University") and other University-related defendants to dismiss Suppes's first amended petition and dismissing the petition with prejudice.[1] We affirm.

[1] On appeal, the University filed a Motion to Dismiss because of Suppes's failure to comply with Rule 84.04(c) and (e). The motion was taken with the case. "Whether to dismiss an appeal for briefing deficiencies is discretionary." *McDowell v. St. Luke's Hosp. of Kansas City*, 572 S.W.3d 127, 130 n.1 (Mo. App. W.D. 2019) (internal quotation marks omitted). "It is always our preference to resolve an appeal on the merits of the case rather than to dismiss an appeal for deficiencies in the brief." *Id.* (internal quotation marks omitted). "While [Suppes's] brief may be deficient, the deficiencies do not impede our ability to decide the legal issues presented." *Id.* The University's motion is denied.

Factual and Procedural Background[2]

The lawsuit underlying this appeal is the latest in more than a decade of administrative proceedings and state and federal court litigation between Suppes and the University.[3]

2009 Boone County Lawsuit

Suppes began his employment at the University on August 1, 2001, as a professor of chemical engineering. In April 2009, in the Boone County Circuit Court, the University filed a petition for declaratory judgment, breach of contract, injunctive relief, and monetary damages against Suppes for failing to assign rights to inventions and intellectual property developed while he was an employee (Case No. 09BA-CV02314) ("2009 Boone County Lawsuit"). Suppes asserted counterclaims against the University but dismissed them with prejudice during trial. A trial was conducted from August 25 through September 6, 2017. The jury found in favor of the University on its claims of breach of contract and breach of the duty of loyalty and awarded $300,000 in damages on each claim. The court entered judgment in favor of the University and against Suppes for $600,000 plus interest. The court also ordered Suppes: (1) to provide to the University a sworn written accounting of all inventions made by him between August 1, 2001, and the end of his employment with the University and to provide a detailed description of each such invention; (2) to provide to the University an accounting of all revenue and other consideration he received from such inventions; (3) to pay over to the University all revenue and other consideration he received from such inventions; and (4) to execute an assignment to the University for any inventions related to certain technology. Suppes appealed, and the judgment was affirmed by this court in *Curators of University of Missouri v. Suppes*, 583 S.W.3d 49 (Mo. App. W.D. 2019).

[2] In reviewing a grant of a motion to dismiss, we view the facts and all reasonable inferences in a light most favorable to the non-movant. *Williams v. Bayer Corp.*, 541 S.W.3d 594, 606 (Mo. App. W.D. 2017).

[3] The trial court took judicial notice of the prior litigation between the parties.

Employment Dismissal for Cause Proceeding

By letter dated September 2, 2016, Suppes was notified by the University of a charge seeking his dismissal from employment with the University for cause. Cause for dismissal included intimidation/harassment/bullying and exploitation/coercion of students, neglect of teaching duties, creation of a hostile work environment, and violations of the University's intellectual property rules and regulations. After conducting a number of hearing sessions regarding the charge, on May 15, 2017, the MU Campus Faculty Tenure Committee made a unanimous written recommendation to the University's interim chancellor that the evidence warranted Suppes's dismissal for cause ("Dismissal for Cause Proceeding"). In a letter dated May 25, 2017, the interim chancellor reported the findings and recommendations of the Committee, stated that he concurred with the Committee, and terminated Suppes's tenured faculty appointment and employment at the University effective May 25, 2017. The interim chancellor stated: "You are required to have prior written permission from me in my role as Provost prior to coming onto campus."

On September 29, 2016, Suppes filed a declaratory judgment action requesting that the court declare that the University's written procedures for dismissal for cause violated due process and requesting injunctive relief to prevent the University from proceeding with the dismissal for cause. The trial court granted judgment on the pleadings in favor of the University. Suppes appealed. This court found that the University's procedures for dismissal of tenured faculty for cause satisfied due process, and affirmed the trial court's judgment. *Suppes v. Curators of the Univ. of Mo.*, 529 S.W.3d 825 (Mo. App. W.D. 2017).

A few months later, in September 2017, Suppes filed a petition for judicial review of the Dismissal for Cause Proceeding in the Circuit Court of Cole County (Case No. 17AC-CC00505). That case was dismissed without prejudice due to inactivity in March 2018.

2018 Federal Lawsuit

On November 9, 2018, Suppes filed a complaint in federal court against certain University-related defendants (Case No. 2:18-CV-04230-MDH) ("2018 Federal Lawsuit"). Suppes's Second Amended Complaint alleged thirty-seven claims against twelve different defendants:

> Count I – First Amendment Violation by Stokes in her individual capacity
> Count II – Fifth and Fourteenth Amendment Violations by Stokes in her individual capacity
> Count III – Abuse of Process against Stokes in her individual capacity
> Count IV – Patent Misuse against Owens, Hoskins, Loboa, Cooper, Jones, Pinhero, Polsinelli, and Choi in their individual and professional capacities
> Count V – Abuse of Process against Owens and Hoskins in their individual capacities
> Count VI – Abuse of Process against Jones, Owens, and Hoskins in their individual capacities and against Jones in his official capacity
> Count VII – Abuse of Process against Jones, Owens, and Hoskins in their individual capacities and against Jones in his official capacity
> Count VIII – Abuse of Process against Jones, Owens, and Hoskins in their individual capacities and against Jones in his official capacity
> Count IX – Fraudulent Misrepresentation against Jones, Owens, and Hoskins in their individual capacities and against Jones in his official capacity
> Count X – Fifth and Fourteenth Amendment Violations against Jones, Owens, and Hoskins in their individual capacities and against Jones in his official capacity
> Count XI – Fraudulent Misrepresentation against Jones, Owens, and Hoskins in their individual capacities and against Jones in his official capacity
> Count XII – Abuse of Process against Jones, Owens, and Hoskins in their individual capacities and against Jones in his official capacity
> Count XIII – First Amendment Violation against Cooper, Loboa, and Freyermuth in their individual capacities
> Count XIV – Fifth and Fourteenth Amendment Violations against Cooper, Loboa, and Freyermuth in their individual capacities
> Count XV – Sixth Amendment Violation against Cooper, Loboa, and Freyermuth in their individual capacities
> Count XVI – Additional Violation of Rights of Due Process against Cooper, Loboa, and Freyermuth in their individual capacities

Count XVII – Civil Conspiracy against Loboa, Pinhero, Stokes, and Cooper in their individual capacities
Count XVIII – Abuse of Process against Cooper, Loboa, and Freyermuth in their individual capacities
Count XIX – Abuse of Process against Loboa, Pinhero, Cooper, Owens, and Hoskins in their individual capacities
Count XX – Restraint of Trade against Owens, Loboa, Cooper, Jones, Pinhero, Polsinelli, Feyermuth, Stokes, and Choi in their individual and professional capacities
Count XXI – Libel against the Tribune and Keller
Count XXII – Defamation against the Tribune and Keller
Count XXIII – Defamation against Jones, Stokes, Loboa, Cooper, Pinhero, and Freyermuth in their individual capacities
Count XXIV – Tortious Interference against Pinhero in his individual capacity
Count XXV – Prima Facie Tort against Pinhero in his individual capacity
Count XXVI – Intentional Infliction of Emotional Distress against Cooper
Count XXVII – Fourteenth Amendment Violation against Owens, Hoskins, Stokes, Loboa, Cooper, Jones, and Pinhero in their individual capacities
Count XXVIII – Fraudulent Misrepresentation against Owens, Hoskins, Loboa, Cooper, and Pinhero in their individual capacities
Count XXIX – Injunctive Relief against the Tribune
Count XXX – Declaratory Judgment against Polsinelli
Count XXXI – Fourteenth Amendment Violation against Choi in his individual and professional capacity
Count XXXII – Negligent Misrepresentation Tort against Owens, Hoskins, Loboa, Cooper, Jones, Pinhero, Polsinelli, Freyermuth, Stokes, and Choi in their individual and professional capacities
Count XXXIII – Civil Illegal Conspiracy against Owens and Hoskins in their individual capacities
Count XXXIV – Injunctive Relief on violation of the First Amendment against Stokes in her official capacity
Count XXXV – Injunctive Relief on Misuse of Patent Law against Owens in his official capacity
Count XXXVI – Injunctive Relief on Misuse of Patent Law against Owens in his official capacity
Count XXXVII – Injunctive Relief on Arbitrary and Capricious Administrative Process against Choi in his official capacity

The defendants moved to dismiss, and on August 1, 2019, the district court dismissed that lawsuit for failure to state a claim. Suppes did not appeal the district court's judgment.

2019 Boone County Lawsuit

Suppes filed his petition against the University in the lawsuit underlying this appeal on July 8, 2019, claiming "violations related (1) to handling of intellectual property, (2) termination of Plaintiff's position as Professor on May 25, 2017, and (3) related acts all occurring from July of 2014 to present" (Case No. 19BA-CV02685). Suppes filed his First Amended Petition on July 16, 2019, adding a number of individual University-related defendants "in their Official Capacities on contract law violations" and adding a cause of action related to abuse of process. Suppes alleged:

- Count I: Breach of Contract against the University, alleging violation of the University's Collected Rules and Regulations ("CRR") with regard to the treatment and ownership of inventions and patents in connection with the 2009 Boone County Lawsuit and the administrative Dismissal for Cause Proceeding.
- Count II: Breach of Covenant of Good Faith and Fair Dealing against the University, alleging that the University did not act in good faith "concerning all matters associated with the terms of Plaintiff's contract as a tenured professor, his rights as a member of the Faculty, and [its] duties and obligations under . . . the Collected Rules and Regulations" in connection with inventions and patents, the 2009 Boone County Lawsuit, and the administrative Dismissal for Cause Proceeding.
- Count III: Abuse of Process against two of the University's attorneys (defendants Hoskins and Owens) in their official capacities for pursuit of the 2009 Boone County Lawsuit through verdict and for enforcement of the judgment.
- Count IV: Civil Conspiracy against the Dean of the College of Engineering (defendant Loboa), a professor/interim chairman in the Department of Chemical Engineering

(defendant Pinhero), and two of the University's attorneys (defendants Hoskins and Owens) in their official capacities in connection with the administrative Dismissal for Cause Proceeding.

- Count V: Intentional Infliction of Emotional Distress against the Dean of the College of Engineering (defendant Loboa) and the President of the University of Missouri system (defendant Choi) in their official capacities for the "eviction" of Suppes from a wine-tasting event on the University campus and for being escorted off campus by campus police.
- Count VI: Civil Conspiracy against the Dean of the College of Engineering (defendant Loboa) and the President of the University of Missouri system (defendant Choi) in their official capacities for conspiring to evict him from the wine-tasting event as described in Count V.

On November 4, 2019, after the judgment in the 2018 Federal Lawsuit became final, the University filed a motion to dismiss Suppes's First Amended Petition on the ground that it failed to state a claim upon which relief can be granted in that Counts I-IV were barred by the doctrine of *res judicata* and Counts V-VI were barred by the doctrine of official immunity. Before the trial court ruled on the University's motion to dismiss, Suppes filed multiple requests for leave to file amended petitions.

The trial court held a hearing on the University's motion to dismiss on December 14, 2019, and took the matter under advisement. The trial court entered its final judgment on January 14, 2020, granting the University's motion to dismiss and dismissing Suppes's First Amended Petition with prejudice. The trial court also denied Suppes's various motions for leave to amend his First Amended Petition or to join parties or for injunctive relief.

Suppes timely appealed.

Standard of Review

We review the grant of a motion to dismiss *de novo*. *Williams v. Bayer Corp.*, 541 S.W.3d 594, 599 (Mo. App. W.D. 2017) (citing *Armstrong-Trotwood, LLC v. State Tax Comm'n*, 516 S.W.3d 830, 835 (Mo. banc 2017)).

Analysis

Point I

In Suppes's first point, he asserts that the trial court erred in dismissing his petition and denying him leave to amend his petition to request injunctive relief from the University's "barring of Suppes from public activities" on the University campus.

Rule 67.06[4] provides that when a motion to dismiss a claim is sustained, the trial court "shall freely grant leave to amend and shall specify the time within which the amendment shall be made or amended pleading filed." "Nonetheless, a party does not have an absolute right to file an amended petition." *Gross v. A New Mo., Inc.*, 591 S.W.3d 489, 494 (Mo. App. W.D. 2019) (internal quotation marks omitted). "The denial of leave to amend is within the discretion of the trial court and presumed correct." *Id*. (internal quotation marks omitted). "The burden is on the proponent to demonstrate that the trial court clearly and palpably abused its discretion." *Id*. (internal quotation marks omitted).

The trial court denied Suppes leave to amend to add a request for injunctive relief, explaining:

> In his later proposed petitions, Suppes began requesting injunctive relief in addition to relief prayed for in the First Amended Petition. Suppes' proposed petitions did not meet the requirements for injunctive relief. In particular, he failed to allege facts to support irreparable harm or lack of an adequate remedy at law. In fact, Suppes continued to request monetary relief, which is incompatible with a claim for injunctive relief. *See Minana v. Monroe*, 467 S.W.3d 901, 907 (Mo. App. E.D. 2015 (irreparable harm is established where "monetary remedies cannot provide

[4] All rule references are to I MISSOURI COURT RULES – STATE 2020.

> adequate compensation"); *Smith v. City of St. Louis*, 409 S.W.3d 404, 413-14 (Mo. App. E.D. 2013) (failure to demonstrate lack of adequate remedy at law precludes equitable relief such as an injunction). Suppes also cannot show that he is likely to be successful on the merits. *See Impey v. Clithero*, 553 S.W.3d 344, 354 (Mo. App. W.D. 2018) (preliminary injunction requires that the movant show a likelihood of success on the merits).

"The purpose of an injunction is to prevent actual or threatened acts that constitute real injury." *State ex rel. Gardner v. Stelzer*, 568 S.W.3d 48, 51 (Mo. App. E.D. 2019) (internal quotation marks omitted). "An indispensable requirement for obtaining injunctive relief is the wrongful and injurious invasion of some legal right." *Id*. (internal quotation marks omitted). "To be entitled to an injunction, a party must demonstrate: 1) no adequate remedy at law; and 2) irreparable harm will result if the injunction is not awarded." *Id*. (internal quotation marks omitted). "'[O]ne seeking injunctive relief on grounds of irreparable damage and lack of adequate remedy at law must plead irreparable injury and inadequate legal remedy as traversable facts, not mere conclusions.'" *Id*. (quoting *Aust v. Platte Cty*., 477 S.W.3d 738, 744-45 (Mo. App. W.D. 2015)). "An injunction is a remedy, not a cause of action; thus, an injunction must be based on a recognized *and pleaded* legal theory." *Id*. (internal quotation marks omitted). "In the context of a motion to dismiss a petition for failure to state a cause of action, the court considers whether 'the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.'" *Id*. (quoting *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329 (Mo. banc 2009)). "To survive the motion to dismiss, the petition must plead facts that invoke substantive principles of law entitling [the petitioner to relief]." *Id*. (internal quotation marks omitted).

In Suppes's subsequent proposed petitions, Suppes included a separate count for injunctive relief against the University, in addition to claims for monetary relief related to the same factual allegations. He alleged that his request for relief was based on CRR 110.010.E.3, which provided that: "A person shall be deemed to be on University property 'without an appropriate purpose'

whenever their presence is not reasonably related to the University's educational function, or an approved University related extracurricular activity." Suppes alleged that the University's restrictions "barring" him from campus were overbroad and baseless; however, he did not allege any facts to support his conclusory allegations. Simply put, Suppes did not adequately plead the wrongful and injurious invasion of some legal right, that he had no adequate remedy at law, and that he would suffer irreparable harm.[5] Accordingly, the trial court did not abuse its discretion in denying Suppes leave to amend to add a claim for injunctive relief.

Point I is denied.

Points II, III, IV, and V

In Suppes's second, third, fourth, and fifth points, he asserts that the trial court erred in dismissing Counts I (breach of contract) and II (breach of covenant of good faith and fair dealing) of his First Amended Petition based on the doctrine of *res judicata*.[6] In points two and three, he contends that there was not identity of parties because the University was not named as a defendant in the 2018 Federal Lawsuit (Point II) or in the Dismissal for Cause Proceeding (Point III). In points four and five, he contends that there was not identity of the thing sued for because the claims in the First Amended Petition related to events that occurred after the earlier lawsuits.

[5] In other counts related to his "eviction" and "barring" from campus, Suppes requested monetary damages. *See* proposed Second Amended Petition, Counts V, VI, VII, VIII, IX, X, XIII; LF 1514-25, 1529-31. "Irreparable harm is established if monetary remedies cannot provide adequate compensation for improper conduct." *Walker v. Hanke*, 992 S.W.2d 925, 933 (Mo. App. W.D. 1999). "The term 'adequate remedy at law' generally means that damages will not adequately compensate the plaintiff for the injury or threatened injury . . . ." *Id*. "For this reason, injunctive relief is usually not available if the party has an adequate remedy at law by way of damages . . . ." *Id.*

[6] "Although *res judicata* is an affirmative defense, Rule 55.08, a motion to dismiss for failure to state a claim is appropriate." *Chesterfield Vill., Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 n.1 (Mo. banc 2002). "[D]efenses of *res judicata* and issue preclusion are in essence defenses alleging the plaintiff has failed to state a claim upon which relief may be granted." *Id*. (internal quotation marks omitted). "This is so even though matter outside the pleadings is considered by the court taking judicial notice of the earlier judgment." *Id*. (citing Rule 55.27(a)).

"Res judicata, or claim preclusion, prohibits a party from bringing any previously-litigated claim and any claim that, with the exercise of reasonable diligence, should have been brought in that prior suit." *Kesler v. Curators of the Univ. of Mo.*, 516 S.W.3d 884, 890 (Mo. App. W.D. 2017) (citing *Kesterson v. State Farm Fire & Cas. Co*., 242 S.W.3d 712, 715 (Mo. banc 2008)). "For res judicata to apply, four identities must be present: '1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the action; and 4) identity of the quality of the person for or against whom the claim is made.'" *Id*. (quoting *King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. banc 1991)).

Suppes's second point charges that the trial court erred in dismissing Counts I and II of his First Amended Petition because the third identity of *res judicata* was not present in that the University was not named as a defendant in the 2018 Federal Lawsuit.

"A party is identical, for purposes of res judicata, when it is the same party that litigated the prior suit or when the new party was in privity with the party that litigated the prior suit." *Williston v. Vasterling*, 536 S.W.3d 321, 343 (Mo. App. W.D. 2017) (internal quotation marks omitted). For *res judicata* to apply to the parties and their privies, "the party in the instant action need not have actually been a party in the prior action." *Xiaoyan Gu v. Da Hua Hu*, 447 S.W.3d 680, 690 (Mo. App. E.D. 2014). "Privity, as a basis for satisfying the identical party requirement of res judicata, is premised on the proposition that the interests of the party and non-party are so closely intertwined that the non-party can fairly be considered to have had his or her day in court." *Williston*, 536 S.W.3d at 343 (internal quotation marks omitted). In determining whether the new party was in privity with the parties named in the prior litigation, "we look not only to the caption

of the prior litigation, but also to the substance of the petition in the prior litigation." *Lauber-Clayton, LLC v. Novus Props. Co.*, 407 S.W.3d 612, 619 (Mo. App. E.D. 2013).

Suppes's Second Amended Complaint, alleged that "[a]ll counts have common and inseparable actions related to the handling of patented intellectual property ("IP") at the University," and named among the defendants Loboa, Dean of the University's College of Engineering; Hoskins, an attorney in the University's Office of General Counsel; Stokes, University Provost/Interim Chancellor; Freyermuth, University professor/Chair of the Dismissal-for-Cause jury; Pinhero, University professor/interim chairman of the Department of Chemical Engineering; Owens, General Counsel in the University's Office of General Counsel; and Choi, President of the University of Missouri System.

Suppes's argument ignores the fact running through all the pleadings that the defendants in the 2018 Federal Lawsuit were acting solely as employees and agents of the University within the scope of their employment and that the doctrine of *respondeat superior*[7] applies as between them and the University. The transactions forming the basis for this action were not performed by the 2018 Federal Lawsuit defendants as individuals. "[W]here the action is one involving the doctrine of respondeat superior, a judgment in separate actions acquitting the servant bars the action against the master and *vice versa*." *Berwald v. Ratliff*, 782 S.W.2d 709, 711 (Mo. App. W.D. 1989) (internal quotation marks omitted).

In Suppes's third point, he contends that the trial court erred in dismissing Counts I and II of his First Amended Petition because the third identity of *res judicata* was not present in that the

[7] "[T]he doctrine of *respondeat superior* . . . is derived from the principle that the master, or the employer, controls the actions of the servants, or employees, and that the servants' actions are thereby imputed to the master[.]" *Bare v. Carroll Elec. Coop.*, 558 S.W.3d 35, 47 (Mo. App. S.D. 2018) (internal quotation marks omitted). "[R]espondeat superior is . . . a theory under which an employer is held responsible for the misconduct of [an] employee where that employee is acting within the course or scope of his employment." *State ex rel. Blue Springs Sch. Dist. v. Grate*, 576 S.W.3d 262, 271 (Mo. App. W.D. 2019) (internal quotation marks omitted).

University was not named as a defendant in the Dismissal for Cause Proceeding. Suppes's argument is unavailing. Suppes appealed the trial court's grant of judgment on the pleadings in favor of the University on Suppes's declaratory judgment and injunctive relief action challenging the University's procedures for dismissal for cause, and this court affirmed the trial court's judgment. *Suppes v. Curators of the Univ. of Mo*., 529 S.W.3d 825 (Mo. App. W.D. 2017).

In Suppes's fourth and fifth points, he argues that the trial court erred in dismissing Counts I and II of his First Amended Petition because the first and second identities of *res judicata* were not present. He contends that there was not identity of the thing sued for and identity of the cause of action in that the claims in the First Amended Petition related to events that occurred after the earlier lawsuits.

In *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. banc 2002), the Missouri Supreme Court defined these identities as "the 'facts' that form or could form the basis of the previous adjudication." "The facts that form the basis of the previous adjudication are the same and, therefore, the identities of the thing sued for and the cause of action are the same, if 'the claim arises out of the same act, contract or transaction' as the previous adjudication." *Kesler*, 516 S.W.3d at 891 (quoting *Chesterfield Vill.*, 64 S.W.3d at 318-19) (internal quotation marks omitted). "The court must focus on the factual bases for the claims and not the legal theories." *Id*. (citing *Chesterfield Vill*., 64 S.W.3d at 319). "Separate legal theories are not to be considered as separate claims, even if the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief." *Id*. (internal quotation marks omitted). "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.'" *Id*. (quoting

Chesterfield Vill., 64 S.W.3d at 319). "For a subsequent claim on the same transaction to be considered separate, 'there must be new ultimate facts, as opposed to evidentiary details, that form a new claim for relief.'" *Id*. (quoting *Kesterson*, 242 S.W.3d at 716). "To constitute 'new' ultimate facts, those facts that form the basis of a new claim for relief must be unknown to plaintiff or yet-to-occur at the time of the first action." *Id.* (citing *Chesterfield Vill*., 64 S.W.3d at 320).

The "unknown facts" cited by Suppes relate to his claims of "illegal restraint of trade and abuse of process." Suppes's allegations in paragraph 23 of his First Amended Petition relate to the University's actions with regard to claims to inventions and patents through May 2017. To determine whether the same claims are asserted, we look "to the factual bases for the claims, not the legal theories." *Chesterfield Vill*., 64 S.W.3d at 319. "Claim preclusion prevents reassertion of the same claim even though additional or different evidence or legal theories might be advanced to support it." *Id.* at 320 (internal quotation marks omitted). Any claim that Suppes attempts to assert in his 2019 lawsuit is based on the same operative facts as his claim in the 2009 Boone County Lawsuit, in which he disputed patent ownership. *See Curators of the Univ. of Mo. v. Suppes*, 583 S.W.3d 49 (Mo. App. W.D. 2019).

Furthermore, Suppes incorporated by reference his Second Amended Complaint in the 2018 Federal Lawsuit into his First Amended Petition. The Second Amended Complaint asserted claims against University-related individuals. The federal district court found that Suppes's claims were barred by *res judicata* and/or the *Rooker-Feldman* doctrine[8] in that they arose out of issues that either had been previously litigated or could have been raised in Suppes's numerous prior lawsuits against the University and/or University-related individuals.

Points II, III, IV, and V are denied.

[8] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

Point VI

In Suppes's sixth point, he asserts that the trial court erred in dismissing Counts V and VI of his First Amended Petition based on the doctrine of *res judicata* because the actions of two University employees "occurred later than the timeframe of actions the federal court allowed for consideration."

In the letter terminating Suppes's employment, the interim chancellor stated: "You are required to have prior written permission from me in my role as Provost prior to coming onto campus." In Counts V (intentional infliction of emotional distress) and VI (civil conspiracy) of his First Amended Petition, Suppes alleged that two University employees, College of Engineering Dean Loboa and University President Choi, in their official capacities, restricted his access to campus; specifically, that they "evicted" him from a University Wine-Tasting Club event.

We agree with the trial court that these claims in Suppes's First Amended Petition overlap with claims made in the 2018 Federal Lawsuit and are barred by *res judicata.* In Count I of Suppes's 2018 Federal Lawsuit, he raised a similar claim regarding the requirement that he obtain prior written permission from the Provost of the University before coming onto campus after the termination of his employment. Specifically, he alleged that he was warned by campus police that he was not allowed to attend a meeting on campus without written permission. Counts II and III were also related to Suppes's prohibition from campus. The federal district court determined that Suppes "cannot establish that he has an absolute constitutional right to be on campus, or that a requirement that he request permission to be on campus, violates his First Amendment rights."

"The facts that form the basis of the previous adjudication are the same and, therefore, the identities of the thing sued for and the cause of action are the same, if the claim arises out of the same act, contract or transaction as the previous adjudication." *Kesler*, 516 S.W.3d at 891 (internal

quotation marks omitted). "Separate legal theories are not to be considered as separate claims, even if the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief." *Id*. (internal quotation marks omitted). The factual bases for the claims here and in the 2018 Federal Lawsuit were the same, as the claims in both cases arose out of the same acts or transactions: the University's decision to restrict Suppes's access to campus without prior written permission. *See id*. at 892.

Suppes contends that because the actions of defendants Loboa and Choi "evicting" him from a University Wine-Tasting Club event occurred later than the actions alleged in the 2018 Federal Lawsuit, *res judicata* did not apply to Counts V and VI. In the 2018 Federal Lawsuit, Suppes raised a similar claim regarding the requirement that he obtain prior written permission before coming onto campus after the termination of his employment. Contrary to Suppes's contention, the allegations in this case were merely evidentiary details relating to the University's enforcement of its decision to restrict Suppes from campus that did not constitute new ultimate facts. *See id*. at 894. The claims in this case are not new for *res judicata* purposes.

Point VI is denied.

Point VII

In Suppes's seventh point, he asserts that the trial court erred in dismissing Counts III and IV of his First Amended Petition against defendants Loboa, Choi, Owens, Hoskins, and Pinhero based on *res judicata* because "the federal court dismissal was on different counts in different capacities."

Count III of Suppes's First Amended Petition alleged abuse of process against University attorneys Owens and Hoskins in their official capacities for pursuing "Declaratory Judgment 3,"

which was part of the judgment rendered in the 2009 Boone County Lawsuit. The trial court determined that the proper time to raise this complaint was during that case or on its direct appeal. The court further concluded that the claims in Count III were barred by *res judicata* because they "substantially overlap[ ] with the claims adjudicated in the 2018 Federal Lawsuit, which the District Court found were *already* precluded by *res judicata* principles at that time."

The abuse-of-process claims in the 2018 Federal Lawsuit (Counts V, VI, VII, VIII) were against attorneys Owens and Hoskins in their individual capacities with regard to the Dismissal for Cause Proceeding, the 2009 Boone County Lawsuit, and University's enforcement of the judgment in the 2009 Boone County Lawsuit. The federal district court determined that the claims against Owens and Hoskins arose out of the 2009 Boone County Lawsuit and were barred by *res judicata* and collateral estoppel:

> Plaintiff simply cannot relitigate the invention dispute he has with the University through claims against the University's attorneys in this lawsuit. Plaintiff also previously sued Owens and Hoskins directly in a 2015 Boone County case and Owens and Hoskins were dismissed by Court order finding judgment in their favor on claims arising out of these same issues.

Similarly, in Count IV of Suppes's First Amended Petition, he alleged that defendants Loboa, Pinhero, Owens, and Hoskins, in their official capacities, engaged in a civil conspiracy during the Dismissal for Cause Proceeding. Likewise, in the 2018 Federal Lawsuit, Suppes alleged that defendants Loboa and Pinhero, in their individual capacities (Count XVII), and attorneys Owens and Hoskins, in their individual capacities (Count XXXIII), engaged in a civil conspiracy during the Dismissal for Cause Proceeding. The federal district court noted that, as to defendants Loboa and Pinhero, Suppes had previously sued the University, alleging his dismissal for cause violated his due process rights; lost at trial; and the judgment was affirmed on appeal in *Suppes v. Curators of the University of Missouri*, 529 S.W.3d 825 (Mo. App. W.D. 2017). As to attorneys

Owens and Hoskins, the federal district court noted that Suppes did not allege intentional misconduct against the attorneys; rather, his allegations against them were in their roles as attorneys for the University, which claims had been resolved in the 2009 Boone County Lawsuit. The trial court determined that the claims within Count IV were barred by *res judicata* because they were "nearly identical" to complaints made and resolved in the 2018 Federal Lawsuit. We agree.

While Suppes sued defendants Loboa, Pinhero, Owens, and Hoskins in their "individual" capacities in the 2018 Federal Lawsuit but in their "official" capacities in the First Amended Petition, to determine whether the fourth element of *res judicata*, "identity of the quality or status of the person for or against whom the claim is made," is met, "we look not only to the caption of the prior litigation, but also to the substance of the petition in the prior litigation." *Lauber-Clayton, LLC v. Novus Props. Co.*, 407 S.W.3d 612, 619 (Mo. App. E.D. 2013) (citing *State ex rel. Tinnon v. Mueller*, 846 S.W.2d 752, 759 (Mo. App. E.D. 1993); *Singer v. Siedband*, 138 S.W.3d 750, 754 (Mo. App. E.D. 2004); *Watson v. Watson*, 562 S.W.2d 329, 331 n. 2 (Mo. 1978)). "The phrase 'quality of the person' apparently refers to the status in which he sues or is sued." *Fleming v. Mercantile Bank & Trust Co.*, 796 S.W.2d 931, 935 (Mo. App. W.D. 1990) (internal quotation marks omitted). "While it is apparent the designation of the [defendant](s) is different in each case, the scope of res judicata transcends such nominal difference where the subject matters of both disputes are essentially the same." *Mullen v. Roberts & Roberts Real Estate, Inc.*, 550 S.W.2d 588, 589 (Mo. App. 1977) (citing *Smith v. Preis*, 396 S.W.2d 636, 640 (Mo. 1965)). "Where a party in an individual or representative capacity is asserting or protecting the same rights or interests he later seeks to assert or protect in a different representative capacity, he is in effect the

same party, or at least in one capacity he is in privity with his other capacity." *Preis*, 396 S.W.2d at 641.

The quality of defendants Loboa, Pinhero, Owens, and Hoskins, that is, the status in which they were sued, is the same in both actions. The substance of Suppes's abuse of process and civil conspiracy claims against the defendants stems from their participation during administrative proceedings and lawsuits as University employees (Loboa and Pinhero) and attorneys for the University (Owens and Hoskins). Comparing the First Amended Petition with the petition in the 2018 Federal Lawsuit, it is clear that the parties are identical for the purposes of *res judicata*.

Point VII is denied.

Point VIII

In Suppes's eighth point, he asserts that the trial court erred in dismissing Counts III, V, and VI of his First Amended Petition against University attorneys and employees based on immunity.

Count III of Suppes's First Amended Petition alleged abuse of process by University attorneys Owens and Hoskins "[i]n an illegal, improper and perverted use of the Boone County Circuit Court" by "pursu[ing] Declaratory Judgment 3," which is part of the judgment in the 2009 Boone County Lawsuit. Suppes's further alleged that Hoskins "was directly and indirectly involved in [the 2009 Boone County Lawsuit and trial] as a University Counsel working with the lead attorney" and "was present in the courtroom and met in counsel with [the lead attorney]." Suppes alleged that "Owens was directly and indirectly involved as the University's General Counsel and supervisor to Hoskins. Owens was present for the verdict of [the trial of the 2009 Boone County Lawsuit]." Suppes alleged that as a consequence of Owens's and Hoskins's actions,

his damages included paying attorney fees and being "subjected to an improper judgment, interest, and costs."

As to Count III, the trial court concluded, in part:

> Even if *res judicata* did not apply, these claims—which are asserted against the University's attorneys—would be barred by absolute immunity and by lack of standing to sue an opposing party's counsel. *Murphy v. Morris*, 849 F.2d 1101, 1104 (8th Cir. 1988); *Roth v. La Societe Anonyme Turbomeca France*, 120 S.W.3d 764, 776 (Mo. App. W.D. 2003).

"Generally, an attorney is not liable to a third party who is not his or her client because the attorney is not in privity of contract—or in an attorney-client relationship—with the third party. *Roth*, 120 S.W.3d at 776 (citing *Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co.*, 931 S.W.2d 166, 176-77 (Mo. App. W.D. 1996)). This general rule arises out of "the attorney's fiduciary duty to the client, and the public policy that attorneys be able to discharge that duty by freely using those procedures that are necessary to competently represent their clients unfettered by fear of personal liability." *Macke*, 931 S.W.2d at 177. The general rule is subject to an "exceptional circumstances" exception, limited to intentional torts, such as fraud or collusion. *Sheffield v. Matlock*, 587 S.W.3d 723, 729 (Mo. App. S.D. 2019) (citing *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 627 (Mo. banc 1995); *Macke*, 931 S.W.2d at 177, 178).[9]

"The essence of a claim for abuse of process is the use of process for some collateral purpose." *Impey v. Clithero*, 553 S.W.3d 344, 349 (Mo. App. W.D. 2018) (internal quotation marks omitted). "A plaintiff who brings an abuse of process claim must establish (1) an illegal, improper, perverted use of process, (2) done for an improper purpose, (3) resulting in damage." *Id*. (internal quotation marks omitted). "The test is whether the process was used to accomplish

[9] In *Stafford v. Muster*, 582 S.W.2d 670 (Mo. banc 1979), following the historical precedent of malicious prosecution and false imprisonment cases, the Missouri Supreme Court ruled that a cause of action could be brought against an attorney for abuse of process. *Id*. at 679.

some unlawful end or to compel the opposing party to do some collateral thing that he could not be compelled to do legally[,] such as to extract money from another." *Id*. (internal quotation marks omitted). "However, if the action is confined to its regular and legitimate function in relation to the cause of action stated in the complaint[,] there is no abuse even if the plaintiff had an ulterior motive in bringing the action[ ] or . . . knowingly brought suit upon an unfounded claim." *Id*. at 349-50 (internal quotation marks omitted).

The third count of Suppes's petition alleges that "[i]n an illegal, improper and perverted use of the Boone County Circuit Court," Owens and Hoskins "pursued Declaratory Judgment 3." Suppes alleges that the actions of Owens and Hoskins were "illegal because they used the Court to enforce and illegal restraint of trade." He further alleges that the actions of Owens and Hoskins were "improper and perverted" because they "improperly expanded their dominion over Suppes," "concealed negligent acts," and required him to pay an infringement penalty.

Suppes's argument is without merit as the action between these parties was "confined to its regular and legitimate function[.]" *Id*. at 349. The University's attorneys brought suit against Suppes for breach of contract, tortious interference, and breach of the duty of loyalty in a dispute over the ownership of inventions and patents. The University prevailed on a majority of its claims against Suppes sought on its behalf by Owens and Hoskins when the court entered its judgment on the jury's verdict for the University on the breach of contract and breach of loyalty claims.

Suppes's conclusory allegations regarding the attorneys' actions to prosecute the University's case against him do not establish the elements of an abuse of process. Liberally granting Suppes all reasonable inferences from these allegations, they support only that Owens and Hoskins provided legal services in the course of representing the University in legal proceedings. Suppes's allegations fall short of supporting any claim that Owens and Hoskins

engaged in any fraud, collusion, or intentional torts such that their conduct would fall within the "exceptional circumstances" rule.

Counts V (Intentional Infliction of Emotional Distress) and VI (Civil Conspiracy) are against defendants Loboa and Choi in their official capacities. Suppes alleges that Loboa and Choi "participated" in his "eviction" from a wine-tasting event on campus. The trial court concluded that, in addition to these claims being barred by *res judicata*, they were also barred under the doctrine of sovereign immunity.

Intentional infliction of emotional distress and civil conspiracy are both tort claims. *Thomas v. Special Olympics Mo., Inc.*, 31 S.W.3d 442, 446 (Mo. App. W.D. 2000) (referring to intentional infliction of emotional distress as a tort); *Greene v. Schneider*, 372 S.W.3d 887, 890 (Mo. App. E.D. 2012) (stating an action for civil conspiracy "sounds in tort"); *Williams v. Bayer Corp.*, 541 S.W.3d 594, 612 (Mo. App. W.D. 2017) (referring to the "tort of civil conspiracy"). "The Curators of the University of Missouri is a public entity with the status of a governmental body and, as such, is immune from suit for liability in tort in the absence of an express statutory provision." *Hendricks v. Curators of Univ. of Mo.*, 308 S.W.3d 740, 743 (Mo. App. W.D. 2010) (internal quotation marks omitted). "'Sovereign immunity is a judicial doctrine that precludes bringing suit against the government without its consent.'" *State ex rel. Cravens v. Nixon*, 234 S.W.3d 442, 449 (Mo. App. W.D. 2007) (quoting *State ex rel. Div. of Motor Carrier & R.R. Safety v. Russell*, 91 S.W.3d 612, 615 (Mo. banc 2002)). "'Sovereign immunity, if not waived, bars suits against employees in their official capacity, as such suits are essentially direct claims against the state.'" *Id.* (quoting *Betts-Lucas v. Hartmann*, 87 S.W.3d 310, 327 (Mo. App. W.D. 2002)).

"The liability of a public entity for torts is the exception to the general rule of immunity for tort and it is incumbent upon a plaintiff who seeks to state a claim for relief to specifically

allege facts establishing that an exception applies." *Wyman v. Mo. Dep't of Mental Health*, 376 S.W.3d 16, 19 n.1 (Mo. App. W.D. 2012) (internal quotation marks omitted). *See also Shifflette v. Mo. Dep't of Nat. Res.*, 308 S.W.3d 331, 334 (Mo. App. W.D. 2010) ("Sovereign immunity is not an affirmative defense but is part of the plaintiff's *prima facie* case."). Suppes has failed to plead any facts giving rise to an exception to sovereign immunity.

Point VIII is denied.

Point IX

In Suppes's ninth point, he asserts that the trial court erred in denying him leave to file various amended petitions. His proposed amendments included adding defendants, including the University, a law firm and two of its attorneys that represented the University in the 2009 Boone County Lawsuit, and the Columbia Tribune and two of its reporters; changing the capacity in which named defendants were sued; adding claims related to his alleged "banning" from campus; adding constitutional claims for "excessive punishment" and equal protection; adding tort claims; and requesting injunctive relief.

The trial court denied Suppes's motions for leave to file his various amended petitions on the grounds that several of the motions did not comply with the mandatory requirements of Rule 55 and that all of the proposed petitions would be subject to dismissal; therefore, it would be futile to allow such filings. The trial court found that:

> None of his proposed amendments would change the fact that the underlying basis for his claims are issues that have already been adjudicated. His addition of additional defendants or switching between individual and official capacities does nothing to change this analysis. Similarly, none of his proposed amendments would change the applicability of sovereign or other immunity doctrines to bar his claims.

The trial court further found that "[t]o the extent that Suppes' proposed amendments seek to vary the descriptive language in an effort to describe his contentions as claims that were not previously

adjudicated, those contentions would fail because they arise out of the same essential facts and legal claims as have already been raised." As to Suppes's requests for injunctive relief in later proposed petitions, the trial court found that the requirements for injunctive relief were not met in that "he failed to allege facts to support irreparable harm or lack of an adequate remedy at law," and he continued to request monetary relief, "which is incompatible with a claim for injunctive relief." The trial court also found that any "new claims," such as constitutional or tort claims, would be "meritless" and "fail under immunity doctrines because they are tort claims or because they fail to allege the essential elements of the claim." Finally, the trial court found that Suppes improperly used the amended pleadings procedure "to change his allegations in order to avoid Defendants' arguments" and that he "had multiple opportunities, in multiple venues, to plead and litigate legally sufficient claims." The trial court's meticulous explanation for his refusal to grant Suppes leave to amend his pleadings is not an abuse of the discretion afforded the trial court.

Rule 55.33(a) provides, in pertinent part, that "leave shall be freely given *when justice so requires*." (Emphasis added.) "[A]lthough the rules favor liberality in allowing leave to amend pleadings, a party does not have an absolute right to an amended petition." *State ex rel. Church & Dwight Co. v. Collins*, 543 S.W.3d 22, 27 (Mo. banc 2018). The trial court's decision whether to grant or deny leave to amend "will not be disturbed absent an obvious and palpable abuse of discretion." *Moore v. Armed Forces Bank, N.A.*, 534 S.W.3d 323, 328 (Mo. App. W.D. 2017) (internal quotation marks omitted). "Judicial discretion is abused when the court's ruling is clearly against the logic of the circumstances presented to the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Sheffield*, 587 S.W.3d at 731. "In reviewing the court's decision, we are concerned with whether justice is furthered or subverted by the trial court's decision." *Moore*, 534 S.W.3d at 328 (internal

quotation marks omitted). "[A] trial court does not err when it denies a motion to amend a pleading to assert a claim that possesses no merit." *Id.* (internal quotation marks omitted). A court rightly refuses a request to grant leave to amend if the requested amendment would not cure the legal defects in the originally-asserted claims. *Spencer v. State*, 334 S.W.3d 559, 573 (Mo. App. W.D. 2010). In these circumstances, where an amendment would be futile, the trial court does not abuse its discretion in denying leave to amend. *Id.* at 573-74. "The denial of amendment is presumed correct and the burden is on the proponent to show an abuse of discretion." *Gohlston v. Lightfoot*, 825 S.W.2d 864, 869 (Mo. App. W.D. 1992).

In Suppes's approximately one-page argument, he fails to meet his burden to show how the trial court abused its discretion in denying his motions to file amended pleadings. His claims in the proposed amended petitions were based on the Dismissal for Cause Proceeding and the termination of his employment by the University and on the 2009 Boone County Lawsuit and its judgment, included issues raised in the 2018 Federal Lawsuit, and would not cure the legal defects in the originally-asserted claims, including *res judicata* and immunity. The proposed amended pleadings were futile, and the trial court did not abuse its discretion in denying them.

Point IX is denied.

Point X

In Suppes's tenth and final point, he asserts that the trial court erred in denying him the right to a jury trial under the Seventh Amendment to the United States Constitution. Suppes contends that "the trial court improperly applied rules and case law, in that justice demands *inter alia* a right to relief of current and ongoing violation of Appellant's rights."

The trial court addressed Suppes's assertion in its judgment:

> Suppes' main response to Defendant's *res judicata* arguments is to assert that dismissing his claims on this basis would violate his constitutional right to a jury

> trial. However, the right to a jury trial in civil cases applies only to legal claims for which there was a right to jury trial at common law at the time the constitution was ratified. *State ex rel. Kiehl v. O'Malley*, 95 S.W.3d 82, 84-89 (Mo. banc 2003). Further, the right to jury trial is generally inapplicable in administrative proceedings, such as the Dismissal for Cause proceeding. *Curtis v. Loether*, 415 U.S. 189, 194 (1974); *see also Suppes v. Curators of the University of Missouri*, 529 S.W.3d 825 (Mo. App. W.D. 2017) (finding that University's dismissal for cause procedure to be constitutionally sufficient).

The Seventh Amendment to the United States Constitution guarantees a litigant the right to a jury trial. However, certain procedural devices, such as *res judicata*, have been held to withstand constitutional challenge despite infringing on the right to a jury trial. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) ("Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.") (footnote omitted) (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 328-29 (1971)). Furthermore, "[t]he Seventh Amendment guarantee to a jury trial does not apply in state courts." *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462, 472 n.10 (Mo. banc 2004) (citing *Hammons v. Ehney*, 924 S.W.2d 843, 848 n.3 (Mo. banc 1996)). *See also, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999).

Suppes's assertion also fails because the 2009 Boone County Lawsuit *was* tried to a jury, and Suppes could have had a jury trial on his counterclaims against the University if he had not dismissed them with prejudice at trial. "*Res judicata* is based on the principle that a party should not be allowed to litigate a claim and then, after an adverse judgment, seek to relitigate the identical claim in a second proceeding." *Bendis v. Alexander & Alexander, Inc.*, 916 S.W.2d 213, 217 (Mo. App. W.D. 1995) (internal quotation marks omitted). "*Res judicata* thus protects the adversaries of parties who have had a full and fair opportunity to litigate their claims from the expense and vexation attending multiple lawsuits." *Id.* (internal quotation marks omitted). "*Res judicata* also

conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id*. (internal quotation marks omitted).

Suppes's claim that the trial court's judgment denied him his constitutional right to a jury trial is wholly without merit.

Point X is denied.

Conclusion

The trial court's judgment is affirmed.[10]

/s/ *Mark D. Pfeiffer*
Mark D. Pfeiffer, Judge

Thomas N. Chapman, Presiding Judge, and W. Douglas Thomson, Judge, concur.

[10] Given that our ruling today is the third in a series of cases stemming from very similar, and often identical, factual underpinnings submitted repeatedly by Suppes in both state and federal courts, we caution Suppes about his litigious behavior now approaching the standard of frivolity that warrants sanctions should he seek to continue harassing the University and its employees over the same legal issues that have been finally resolved at this point on more than one occasion by the Circuit Courts of Boone and Cole Counties, the United States Federal District Court, and this Court.