

**STATE OF NEW HAMPSHIRE SUPREME
COURT**

No. 2019-0236

ALEXANDER J. WALKER, JR.

v.

AARON DAY

APPEAL OF ALEXANDER J. WALKER, JR.
FROM THE HILLSBOROUGH COUNTY
SUPERIOR COURT NORTHERN DISTRICT
PURSUANT TO SUPREME COURT RULE 7

**BRIEF OF THE DEFENDANT AARON
DAY**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES.....	4
STATEMENT OF THE CASE.....	6
STATEMENT OF THE FACTS.....	8
STANDARD OF REVIEW.....	14
SUMMARY OF ARGUMENT.....	15
ARGUMENT.....	16
I. The Plaintiff Waived Those Issues Identified In His Rule 7 Notice of Appeal That Have Not Been Briefed.....	17
II. The Plaintiff Waived The Argument That The Record At The Motion To Dismiss Stage Does Not Support A Finding Of Privity As A Matter Of Law.....	17
III. The Record At The Motion To Dismiss Stage Is Sufficient To Support The Trial Court’s Order Dismissing The Plaintiff’s Complaint.....	19
a. The trial court did not err in granting Mr. Day’s motion to dismiss based on the allegations in the Plaintiff’s complaint.....	21
b. The unique facts and circumstances of this matter justified an expanded application of privity.....	25
IV. The Trial Court’s Conclusion Of Privity May Be Properly Upheld On Valid Alternative Grounds.....	27

V. The Trial Court’s Ruling Does Not Run Counter To New Hampshire Law.....	29
CONCLUSION AND REQUEST FOR ORAL ARGUMENT.....	34
CERTIFICATE OF SERVICE.....	35

TABLE OF AUTHORITIES

Cases:

<i>Airframe Sys., Inc. v. Raytheon Co.</i> , 601 F.3d 9 (1 st Cir. 2010).....	11, 26, 27, 31
<i>Aranson v. Schroeder</i> , 140 N.H. 359 (1995).....	passim
<i>Brooks v. Trs. Of Dartmouth Coll.</i> , 161 N.H. 685 (2011).....	19, 20, 21, 28
<i>Buckingham v. R.J. Reynolds Tobacco Co.</i> , 142 N.H. 822 (1998)...	22
<i>Cook v. Sullivan</i> , 149 N.H. 774 (2003).....	19, 22, 25, 29
<i>DKN Holdings LLC v. Faerber</i> , 61 Cal. 4 th 813 (Cal. 2015).....	30, 31
<i>Daigle v. City of Portsmouth</i> , 129 N.H. 561 (1987).....	22
<i>Fiumara v. Fireman's Fund. Ins. Cos.</i> , 746 F.2d 87 (1st Cir. 1984).....	19, 21
<i>Gambocz v. Yelencsic</i> , 468 F.2d 837 (3rd Cir. 1972).....	21
<i>Hewes v. Roby</i> , 135 N.H. 476 (1992).....	31
<i>Hyde v. Noble</i> , 13 N.H. 494 (1843).....	31
<i>Hallisey v. Deca Corp.</i> , 140 N.H. 443 (1995).....	20
<i>In re El San Juan Hotel Corp.</i> , 841 F.2d 6 (1st Cir. 1988).....	26
<i>Jay Edwards, Inc. v. Baker</i> , 130 N.H. 41 (1987).....	26
<i>Meier v. Town of Littleton</i> , 154 N.H. 340 (2006).....	14
<i>Mortg. Specialists, Inc. v. Davey</i> , 153 N.H. 764 (2006).....	18
<i>Nilsson v. Bierman</i> , 150 N.H. 393 (2003).....	32
<i>Pinnacle Great Plains Operating Co., LLC v. Swenson</i> , No. 1:17-cv-00120-DCN, 2017 WL 4855846 (D. Idaho 2017).....	26

<i>Powell v. Gorham</i> , No. 2:13-CV-0055-LSC, 2013 WL 3151632 (N.D. Ala. 2013).....	29
<i>Scheele v. Vill. Dist. of Eidelweiss</i> , 122 N.H. 1015 (1982).....	30
<i>Sherryland, Inc. v. Snuffer</i> , 150 N.H. 262 (2003).....	27
<i>Sleeper v. Hoban Family P'ship</i> , 157 N.H. 530 (2008).....	20, 21
<i>Smith v. Shepard</i> , 144 N.H. 262 (1999).....	18
<i>Snow v. Chandler</i> , 10 N.H. 92 (1839).....	31
<i>State v. Lambert</i> , 147 N.H. 295 (2001).....	19
<i>Taylor v. Sturgell</i> , 553 U.S. 880 (2008).....	20, 25, 27, 28
<i>Town of Londonderry v. Mesiti Dev., Inc.</i> , 168 N.H. 377 (2015).....	16, 17
<i>Univ. Sys. of N.H. v. U.S. Gypsum Co.</i> , 756 F. Supp. 640 (D.N.H. 1991).....	26, 30, 32
<i>Vohra v. Vora</i> , 86 Va. Cir. 412, (Va. Cir. Ct. 2013).....	21
<i>Waters v. Hedberg</i> , 126 N.H. 546 (1985).....	21
<i>Zebnik v. Rozmus</i> , 81 N.H. 45 (1923).....	31
<u>Treatises:</u>	
16 Am. Jur. 2d. <i>Conspiracy</i> § 57 (2019).....	28

STATEMENT OF THE CASE

This matter presents a unique and specific set of factual circumstances giving rise to an issue of first impression in New Hampshire relating to res judicata and the concept of “privity.” Specifically, the Plaintiff, Alexander Walker, initiated a lawsuit against Michael Gill (“Gill”) and the Mortgage Specialists, Inc. (“MSI”) (collectively the “Gill Defendants”) for defamation *per se*. The Plaintiff obtained judgment as to liability against the Gill Defendants more than one and one-half years after initiating his lawsuit. At that time, however, the Plaintiff had not obtained a final judgment on the merits pertaining to damages. While the lawsuit against the Gill Defendants still remained pending, the Plaintiff filed a second lawsuit exclusively against Mr. Day in a separate county for alleged civil conspiracy with the Gill Defendants to commit the previously adjudicated defamation *per se*. The conspiracy claim against Mr. Day, the allegations of which the Plaintiff was fully aware of at the time he chose to sue only the Gill Defendants, did not allege any independent defamatory conduct against Mr. Day; rather, it was wholly dependent on proof that the Gill Defendants committed the previously adjudicated defamatory acts.

Mr. Day moved to dismiss the Plaintiff’s complaint against him. Mr. Day asserted that the Plaintiff improperly split his cause of action against Mr. Day from the lawsuit against the Gill Defendants and that the Plaintiff’s claim was barred by the doctrine of res judicata. The trial court found that the first two elements of res judicata were satisfied; namely, that as alleged co-conspirators Mr. Day and the Gill Defendants were in privity or closely related so as to satisfy the privity element and that the lawsuit

against Mr. Day and the lawsuit against the Gill Defendants were the “same cause of action.” However, the Court denied Mr. Day’s motion to dismiss because there had been no final judgment against the Gill Defendants in the earlier-filed lawsuit. Nevertheless, the court stayed the Plaintiff’s action against Mr. Day pursuant to the doctrine of claim splitting pending the resolution of the Plaintiff’s claim against the Gill Defendants.

The doctrine of claim splitting considers whether the first suit, assuming it were final, would preclude the second suit; otherwise, parallel litigation could proceed simultaneously until the first suit became final. As a result, the trial court stayed the action against Mr. Day in light of the advanced nature of the action against the Gill Defendants and determined that when the lawsuit against the Gill Defendants became final, the Plaintiff’s alleged civil conspiracy claim against Mr. Day would be precluded.

The Plaintiff subsequently obtained a judgment on damages against the Gill Defendants and the Gill Defendants appealed. The Gill Defendant’s appeal was affirmed in favor of the Plaintiff. Thereafter, Mr. Day renewed his motion to dismiss because all of the necessary elements of res judicata were met. The trial court granted Mr. Day’s motion to dismiss and this appeal followed.

STATEMENT OF THE FACTS

I. The Plaintiff's Defamation Action Against The Gill Defendants

On April 28, 2016, the Plaintiff initiated a lawsuit against the *pro se* Gill Defendants for defamation *per se* (the “Defamation Action”) arising out of a “campaign to defame Mr. Walker by falsely accusing him of crimes, including attempted murder, drug dealing, and extortion” (App.¹ 47, 54–55.) At that time, the Plaintiff knew he intended to sue Mr. Day at a later date based on Mr. Day’s alleged conspiratorial conduct to commit defamation with the Gill Defendants but chose not to name him in the Defamation Action. (AB² 30; Add.³ 5, 10.) On March 30, 2017, the Plaintiff won partial summary judgment as to some of his claims against the Gill Defendants. (App. 66–74). Two months later on May 25, 2017, the trial court entered a final judgment against the Gill Defendants in the Plaintiff’s favor regarding the remaining defamatory statements. (App. 76–83.) The issue of damages remained pending and was not resolved until April 12, 2018, when, following a bench trial, the court awarded the Plaintiff a judgment for \$5,000,000. (App. 86–86; 157–75.) The Gill Defendants appealed and the matter was affirmed by the Supreme Court on February 7, 2019. (App. 230–32.)

II. The Plaintiff's Conspiracy Action Against Mr. Day

On August 31, 2017, approximately three months after obtaining a liability judgment in the Defamation Action against the Gill Defendants,

¹ “App.” refers to the appellant’s appendix.

² “AB” refers to the appellant’s brief.

³ “Add.” refers to the appellant’s addendum.

the Plaintiff commenced the instant action against Mr. Day for conspiracy to commit the previously adjudicated defamatory acts for which the Gill Defendants had been found liable (“Conspiracy Action”). (App. 4–21.) The Plaintiff did not accuse Mr. Day of publishing or committing any independent acts of defamation. (App. 4–21.) Rather, the underlying tort forming the basis of the alleged conspiracy was perpetrated entirely by the Gill Defendants. (Add. 010.)

In particular, the Plaintiff alleged that “[t]hroughout most of 2016 into January 2017, [Mr. Day] conspired with [the Gill Defendants] to defame Mr. Walker” and “others.” (Add. 5.)⁴ In particular, the Plaintiff alleged that Mr. Day “conspired,” “banded together,” “worked,” “joined forces,” and “collaborated” with the Gill Defendants. (Add. 5, 13–15.) The Plaintiff further alleged that Mr. Day “adopted Gill’s theories” in addition to “expressly ty[ing] himself to” the Gill Defendants such that they had an “alliance,” “unity,” and an “express and/or implicit agreement to malign Mr. Walker’s reputation.” (Add. 15, 17, 19.)

III. Mr. Day’s Motion To Dismiss

On October 16, 2017, while the issue of damages in the Defamation Action remained unresolved, Mr. Day moved to dismiss the Conspiracy Action on the basis that the Plaintiff improperly split his claim and on the legal doctrine of res judicata. (App. 22–45.) In particular, Mr. Day argued that: (1) for purposes of res judicata, he and the Gill Defendants were in

⁴ The “others” to which the Plaintiff referenced in his complaint were Messrs. Dick Anagnost, Andy Crews, and William Greiner who also obtained judgment against the Gill Defendants for defamation in a separate lawsuit filed on April 18, 2016, nearly contemporaneously with the Plaintiff’s complaint. (App. 28, n. 2.) Indeed, Mr. Day was a defendant in that separate action where he was accused of defamation and civil conspiracy, but was subsequently dismissed from the case. (App. 88–101.)

privity or closely related as alleged co-conspirators at the motion to dismiss stage; (2) the Defamation Action and the Conspiracy Action were the “same cause of action”; and (3) the Defamation Action reached a final judgment on the merits regarding liability or would inevitably reach a final judgment during the pendency of the Conspiracy Action. (App. 34–40; 121–23.) Furthermore, Mr. Day argued that pursuant to the doctrine of claim splitting, the Plaintiff should have presented his civil conspiracy claim to commit defamation in the Defamation Action, especially when the Plaintiff knew of Mr. Day’s alleged conduct. (App. 40–42.) The Plaintiff objected, asserting that res judicata did not apply because the Defamation Action and the Conspiracy Action involved different party defendants, distinct causes of action, and that no final judgment had been reached in the Defamation Action. (App. 112–114.)

IV. The Trial Court’s Order On Mr. Day’s Motion To Dismiss

On January 10, 2018, the trial court issued an order on Mr. Day’s motion to dismiss and determined that for purposes of res judicata, assessed through the doctrine of claim splitting, Mr. Day and the Gill Defendants were in privity or closely related and the Defamation Action and Conspiracy Action were the same cause of action. (Add. 2–5.) In particular, the trial court stated:

With respect to the first prong of the claim preclusion analysis, ‘a number of courts have found that alleged co-conspirators can be considered ‘in privity’ with one another for res judicata purposes, despite the fact that those parties might have some adverse interests.

....

Under [first circuit] precedents, privity is a sufficient but not necessary condition for a new defendant to invoke a claim

preclusion defense. *Airframe Sys., Inc. v. Raytheon Co.*, 601 F.3d 9, 17 (1st Cir. 2010). The first circuit, ‘along with other circuits, [has] long held that claim preclusion applies if the new defendant is closely related to a defendant from the original action—who was not named in the previous law suit, not merely when the defendants are in privity.’ *Id.* at 17–18.

The sole basis for the instant claim is defendant’s alleged participation in a conspiracy to defame plaintiff. As an alleged co-conspirator with Gill and MSI, defendant meets the first prong of the analysis.

(Add. 3–4) (quotations, citations, and brackets in original). The trial court further agreed that the Conspiracy Action would be barred by the doctrine of res judicata if the Defamation Action was complete but the pendency of the Defamation Action precluded the application of res judicata at that time. (Add. 5–6.) The trial court therefore denied Mr. Day’s motion to dismiss but stayed the Conspiracy Action pursuant to the doctrine of claim splitting until a final judgment in the Defamation Action, at which time the Conspiracy Action would be barred by res judicata. (Add. 1, 5–6.)

V. The Plaintiff’s Motion to Reconsider

On January 19, 2018, the Plaintiff moved to reconsider the trial court’s ruling. (App. 126–132.) The Plaintiff argued that the trial court erred in relying on the First Circuit’s analysis in *Airframe Systems v. Raytheon Co.*, 601 F.3d 9 (1st Cir. 2010) which, he argued, was inconsistent with the prevailing common law that allows for consecutive suits against joint tortfeasors. (App. 126–130.) On reconsideration, for the first time, the Plaintiff argued that the factual record at the motion to dismiss stage was insufficient to support a finding of privity. (App. 130–

132.) Mr. Day objected to the Plaintiff's motion to reconsider and argued that the Plaintiff improperly raised a new argument on reconsideration for the first time. (App. 7–8.)

VI. The Trial Court's Order On The Plaintiff's Motion To Reconsider

On May 3, 2018, the trial court denied the Plaintiff's motion to reconsider and confirmed its decision that res judicata would bar the Plaintiff's claim against Mr. Day upon a final judgment in the Defamation Action. (Add. 007) In doing so, the trial court stated that:

Here, the court concluded that co-conspirators that join together to engage in tortious conduct to harm another are closely related. They are essentially holding hands to achieve their mutual objective. A closer relationship cannot be imagined. It is unlike other relations of derivative liability, such as agent-principal, landlord-tenant, employer-employee, where liability can be imposed on a non-actor by virtue of a relationship with the actor, regardless of the party's condonations of the acts or his foreknowledge. In contrast, to prove conspiracy, the conspirators must agree on the tortious objective.

(Add. 9–10.) Additionally, the trial court emphasized the conclusion in *Airframe* that a “successive lawsuit against a co-conspirator presents an unusual circumstance such that an expanded view of privity would bar a second suit against a co-conspirator.” (Add. 8.) The trial court further stated that in the context of the unusual and specific circumstances of the instant action, the manner in which the First Circuit considers the identity of parties for purposes of res judicata “strikes the proper balance between allowing a plaintiff the opportunity for full recovery and strategic choices and the need for finality of judgment, fairness, and judicial economy.”

(Add. 8.) Finally, the trial court denied the Plaintiff's newly raised argument that the pleading stage does not support a determination of privity as a matter of law because it was not proper to raise on reconsideration for the first time. (Add. 13.) Even if it were to entertain the new argument, the trial court stated that the court was required to accept the Plaintiff's allegations as true pertaining to Mr. Day's alleged relationship with the Gill Defendants and the respective actions of each. (Add. 13.)

VII. Subsequent Pleadings And Dismissal Of The Plaintiff's Complaint

On May 16, 2018, Mr. Day prematurely filed a renewed motion to dismiss the Conspiracy Action under the impression that the Defamation Action had reached a final conclusion. (Add. 151–55.) The trial court continued to stay the Conspiracy Action. (Add. 14.) On May 17, 2018, the Gill Defendants appealed the trial court's ruling on damages in the Defamation Action. (App. 223.) On February 7, 2019, the Supreme Court affirmed the trial court's order on damages. (App. 230.) On March 8, 2018, Mr. Day renewed his motion to dismiss. (App. 224–27.) The trial court subsequently granted Mr. Day's motion. (Add. 15–16.) The Plaintiff used Mr. Day's renewed motions to dismiss as opportunities to object and assert various arguments that had not been raised in the Plaintiff's original objection to Mr. Day's first motion to dismiss. (Add. 184–87; 232–35.) This appeal followed.

STANDARD OF REVIEW

“The applicability of res judicata is a question of law [that the Supreme Court] review[s] *de novo*.” *Meier v. Town of Littleton*, 154 N.H. 340, 342 (2006) (citation omitted).

SUMMARY OF ARGUMENT

The trial court properly made a determination of privity, for purposes of res judicata, at the motion to dismiss stage under the unique and specific circumstances of this case. The Plaintiff's allegations at the motion to dismiss stage must be taken as true. It follows that the determination of privity is supported by the assumed true allegations that Mr. Day and the Gill Defendants were co-conspirators that conspired, banded together, joined forces, and collaborated with the each other whereby Mr. Day adopted the Gill Defendant's theories such that they had an alliance, unity, and an agreement to harm the Plaintiff.

The trial court's finding of privity based on a "close relationship" standard does not run counter to New Hampshire jurisprudence or the principles of the Restatement (Second) of Judgments § 49; rather, it strikes the appropriate balance between permitting a party the chance at full recovery against known prospective defendants with considerations of judicial economy and finality.

Alternatively, a showing of privity may be supported by the substantive legal relationship between parties. Mr. Day and the Gill Defendants are in privity as alleged co-conspirators under the substantive legal relationship standard recognized by, and consistent with, New Hampshire jurisprudence.

As a result, the Court should affirm the trial court's ruling that the Plaintiff is barred from further litigation against Mr. Day in light of his strategic choice to pursue only the Gill Defendants in the Defamation Action.

ARGUMENT

I. The Plaintiff Has Waived Those Issues Identified In His Rule 7 Notice of Appeal That Have Not Been Briefed

“An argument that is not raised in a party’s notice of appeal is not preserved for appellate review.” *Town of Londonderry v. Mesiti Dev., Inc.*, 168 N.H. 377, 379 (2015). Likewise, the New Hampshire Supreme Court deems waived “issues that are raised in the notice of appeal but are not briefed.” *Id.* at 380.

The Plaintiff identified fourteen issues in his Rule 7 Notice of Mandatory Appeal but briefed only two. (*Compare* Rule 7 Notice of Appeal *with* AB.) Issues referenced in the Plaintiff’s Notice of Appeal but not briefed include: (1) the adoption of the doctrine of claim splitting; (2) the application of the doctrine of claim splitting; and (3) whether the Plaintiff’s claim against Mr. Day constituted the same “cause of action” and/or “factual transaction” as that brought against Mr. Gill and MSI for purposes of res judicata. The Plaintiff does not raise, analyze, or otherwise reference these issues in his brief and has therefore waived them. *See Town of Londonderry*, 168 N.H. at 380 (“questions listed in the respondent’s notice of appeal but not mentioned at all in their brief are similarly deemed waived.”).

Other issues referenced in the Plaintiff’s Rule 7 Notice of Appeal are too generic to specifically identify the basis for the Plaintiff’s challenge to the trial court’s ruling. For instance, the Plaintiff’s first four questions and question 12 listed in his Rule 7 Notice of Appeal ask some variation of whether the trial court erred in dismissing the Plaintiff’s complaint for

failure to state a claim or in denying the Plaintiff's motion for reconsideration. No further specificity is provided so as to express the issues "in [the] terms and circumstance of the case" and to provide enough detail to notify Mr. Day about which specific issues are being raised. *See* Rule 7 Notice of Appeal Form ¶ 13 (inferring that some level of necessary detail is required in the specific questions to be raised on appeal). Of the generic questions noted in the Plaintiff's Rule 7 Notice of Appeal, Mr. Day "can only hazard a guess as to which issues, if any, this Court will deem capable of review." *See Town of Londonderry*, 168 N.H. at 381. Under such circumstances, only those issues specifically briefed by the plaintiff should be deemed capable of review.

There are only two issues identified in the Plaintiff's Rule 7 Notice of Appeal that were briefed. The issues presently before the Court are: (1) whether the trial court erred by concluding at the motion to dismiss stage that Mr. Day and the Gill Defendants as alleged co-conspirators were in privity with each other; and (2) whether the trial court relied on the incorrect standard in determining that Mr. Day and the Gill Defendants were in privity for purposes of res judicata in contravention to New Hampshire law.

II. The Plaintiff Waived The Argument That The Record At The Motion To Dismiss Stage Does Not Support A Finding Of Privity As A Matter Of Law

Of the two issues identified in the Plaintiff's Rule 7 Notice of Appeal and briefed for appeal, one was raised for the first time in the Plaintiff's motion to reconsider. Specifically, on reconsideration the Plaintiff argued that the record at the pleadings stage did not support, as a

matter of law, the trial court's finding of privity. (App. 131–32; 139–40; Add. 13.) This argument was, or reasonably should have been, readily apparent to the Plaintiff when he initially filed his objection to Mr. Day's motion to dismiss. To be sure, Mr. Day argued in his motion to dismiss that he was in privity and/or substantially related to the Gill Defendants based on the Plaintiff's allegations of conspiracy such that the Plaintiff should be precluded from pursuing Mr. Day in a parallel lawsuit. (App. 34–42.)

The trial court recognized as much. In its order on the Plaintiff's motion to reconsider, the trial court stated that the "Plaintiff next argues that the record at the pleading stage does not support a finding of privity as a matter of law. This is a new argument that is not a proper one to raise on reconsideration, and is denied on this basis." (Add. 13.) The trial court was not required to consider the Plaintiff's new argument. *See Smith v. Shepard*, 144 N.H. 262, 265 (1999) ("Because the plaintiffs first raised the issue in their motion for reconsideration, the trial court had the discretion to [] not consider the issue.") Just as importantly, the trial court did not abuse its discretion in denying the Plaintiff's new argument.

[W]here an issue is raised for the first time in a motion for reconsideration and failure to raise the issue earlier did not deprive the trial court of a full opportunity to correct its error, the issue has been preserved for our review. If, however, the trial court exercises its discretion to refuse to entertain the issue on reconsideration due to the party's failure to raise it at an earlier time, we will uphold that decision absent an unsustainable exercise of discretion.

Mortg. Specialists, Inc. v. Davey, 153 N.H. 764, 786 (2006). In light of the trial court's careful analysis set forth in both its order on Mr. Day's motion

to dismiss and its lengthy order on the Plaintiff's motion to reconsider, the trial court's denial of the Plaintiff's new argument was not an unsustainable exercise of discretion. *See State v. Lambert*, 147 N.H. 295, 296 (2001) (stating whether "record establishes an objective basis sufficient to sustain the discretionary judgment made") (quotation omitted).

III. The Record At The Motion To Dismiss Stage Is Sufficient To Support The Trial Court's Order Dismissing The Plaintiff's Complaint

"Spurred by considerations of judicial economy and a policy of certainty and finality in our legal system, the doctrines of res judicata and collateral estoppel have been established to avoid repetitive litigation so that at some point litigation over a particular controversy must come to an end." *Cook v. Sullivan*, 149 N.H. 774, 777 (2003) (citation omitted). "Res judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action." *Brooks v. Trs. of Dartmouth Coll.*, 161 N.H. 685, 690 (2011) (citation omitted). "For the doctrine [of res judicata] to apply, three elements must be met: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered in the first action." *Id.*

"The application of res judicata . . . both in the federal courts and in New Hampshire, is no longer grounded upon mechanical requirements of mutuality." *Fiumara v. Fireman's Fund. Ins. Cos.*, 746 F.2d 87, 91 (1st Cir. 1984) (citations omitted) (applying New Hampshire law). "Although generally res judicata does not apply to nonparties to the original judgment,

this rule is subject to exceptions” based on the concept of “privity.” *Brooks*, 161 N.H. at 690.

It is generally recognized that “privity” is a difficult concept to define. *See Hallisey v. Deca Corp.*, 140 N.H. 443, 445 (1995). “Privity” is sometimes defined as “the substantive legal relationships” between parties “justifying preclusion.” *Taylor v. Sturgell*, 553 U.S. 880, 894, n. 8. (2008) “[P]rivacy” has also come to be used more broadly, as a way to express the conclusion that nonparty preclusion is appropriate on any ground.” *Id.* At least two recognized “privity” exceptions have been applied under New Hampshire law. *Brooks*, 161 N.H. at 693; *see also Sleeper v. Hoban Family P’ship*, 157 N.H. 530, 533–34 (2008). Specifically, “[o]ne exception concerns ‘a variety of pre-existing substantive legal relationships between the person to be bound and a party to the judgment.’” *Brooks*, 161 N.H. at 693 (quoting *Taylor*, 553 U.S. at 894). A second exception pertains to the “functional relationships,” whereby the interests of the nonparty were in fact represented and protected in an earlier litigation. *Sleeper*, 157 N.H. at 534.

Assuming the Plaintiff has preserved this argument regarding determining privity as a matter of law, the record at the motion to dismiss stage supports the trial court’s determination that the first element of res judicata was satisfied. The Plaintiff argues that privity, in the “functional relationship” context, is grounded in fact and that Mr. Day has the burden of proving a sufficient relationship with the Gill Defendants. (AB 18–19.) Here, in light of the unique and specific circumstances of this case, the trial court determined privity as a matter of law in the context of a motion to dismiss based on the “close relationship” between Mr. Day and the Gill Defendants as alleged co-conspirators; a standard recognized by the First

Circuit. The trial court did not, nor was it required to, base its determination on Mr. Day and the Gill Defendants' functional relationship.

A. The trial court did not err in granting Mr. Day's motion to dismiss based on the allegations in the Plaintiff's complaint

Notwithstanding the standard applied by the trial court to determine privity, its determination of "privity" as a matter of law is supported by New Hampshire precedent. Indeed, a determination of privity can be made based on the nature of relationships between the parties rather than by control or representational authority. *Cf. Brooks*, 140 N.H. at 445 (acknowledging general rule that judgment against non jural entity satisfies privity requirement with its members based solely on relationship between parties despite conflicting interests); *Sleeper*, 157 N.H. 530, 534 (privity based on relationship between successors in interest); *see also Fiumara*, 746 F.2d at 92 (applying New Hampshire law and stating that defendants were "clearly qualifi[ed] as person in privity" with previous defendants based on "allegations of the federal complaint" that each acted as "agents" of previous defendants). The trial court's determination is further supported by case law from numerous other jurisdictions. (Add. 011–012); *see e.g. Gambocz v. Yelencsic*, 468 F.2d 837, 842 (3rd Cir. 1972) (finding close relationship as a matter of law based on allegations of conspiracy); *Vohra v. Vora*, 86 Va. Cir. 412, (Va. Cir. Ct. 2013) (concluding alleged co-conspirators are in privity based on standard of identical interests).

The majority of cases cited to and relied upon by the Plaintiff assess the concept of privity from only the functional relationship standard, without consideration of the nature of the relationship between the parties. *See Waters v. Hedberg*, 126 N.H. 546, 549 (1985) (applying functional

relationship and assessing whether employee “takes control of the suit”); *Daigle v. City of Portsmouth*, 129 N.H. 561, 572 (1987) (applying functional concept noting that employment relationship does not confer employer power to represent employees due to conflict of potential interests); *Cook*, 149 N.H. at 779 (applying functional relationship).

At the motion to dismiss stage, the trial court must assume “the truth of the facts alleged in the plaintiff’s pleadings and construe all reasonable inferences in the light most favorable to him.” *Buckingham v. R.J. Reynolds Tobacco Co.*, 142 N.H. 822, 825 (1998) (quotation omitted). This necessarily required the trial court to assume as true that Mr. Day and the Gill Defendants were co-conspirators and that they conspired together to commit defamation *per se*. The Plaintiff alleged, and the court assumed as true, that through a combination of hosting Gill’s radio show, speaking with police, and testifying to the legislature, Mr. Day established an alliance and worked with the Gill Defendants, adopting their theories as his own, in order to harm the Plaintiff. (App. 5, 13–17.) In other words, assuming the Plaintiff could prove his allegations true, his claim would unavoidably be barred by res judicata given the relationship between the parties. Consequently, the trial court’s determination of privity was supported by the motion to dismiss record based on the various allegations concerning Mr. Day’s alleged relationship with the Gill Defendants.

The Plaintiff relies upon *Aranson v. Schroeder*, 140 N.H. 359 (1995) for the proposition that alleged “conspiracy does not *per se* establish privity” for res judicata purposes where “no facts suggest the unnamed co-conspirator participated, at all, in the underlying suit.” (AB 21–22.) The

Plaintiff misconstrues the holding and significance of *Aranson*, which is both procedurally and substantively inapposite to the issue on appeal.

In *Aranson*, the Town of Conway sued the sellers and purchasers of a condominium unit for failing to conduct a sale with a certificate of occupancy for the real estate. 140 N.H. at 361. The sellers were represented against the Town by counsel who facilitated the real estate deal while the buyers retained independent counsel and filed a counterclaim against the sellers, which was severed from the Town's case and decided in the purchasers' favor following a jury waived bench trial. *Id.* 361–62. The purchasers recouped, among other things, their attorneys' reasonable fees. *Id.* at 362. After prevailing against the sellers in their counterclaim action, the purchasers initiated a new action against the attorney and his firm that facilitated the original real estate deal. *Id.* The purchasers alleged that the attorney committed "malicious defense" in defending the sellers for fabricating evidence and then testifying about that evidence in the purchasers' counterclaim action against the sellers. *Id.* at 361–62. The trial court transferred numerous question for the Supreme Court's consideration, one of which was whether the trial court "erred in ruling that [the attorney defendants] are collaterally estopped from litigating the issue of reasonableness of [the purchasers'] attorneys' fees in the [counterclaim action]." *Aranson*, 140 N.H. at 361. The trial court had previously "agreed with the [purchasers'] assertion that [the attorney defendant] was in privity with the [sellers] because [the attorney defendant] allegedly created the 'false' defense and then acted as a co-conspirator in presenting that defense." *Id.* at 369 (emphasis added).

In vacating the trial court's ruling, the Supreme Court, relying on a functional relationship analysis, held that an assertion that the defendant fabricated evidence and then acted as a co-conspirator to present the malicious defense, "standing alone, does not warrant a determination that [the attorney defendant's] involvement in the underlying action was so significant as to constitute control" where the purchasers failed to show any evidence in support of their position. *Id.*

Both the procedural posture and the unique set of facts and circumstances differentiate *Aranson* from the current action. This matter does not involve the application of offensive nonmutual issue preclusion based on a functional relationship analysis arising out of a claim for malicious defense. *See Aranson*, 140 N.H. at 368–69. Rather, it is Mr. Day that seeks to preclude the Plaintiff's action at the motion to dismiss stage based on the Plaintiff's own claim for civil conspiracy. The Plaintiff's allegations must be taken as true in this regard whereas the purchasers in *Aranson*, who also had the burden to demonstrate privity, simply "asserted" the defendant attorneys acted as co-conspirators to which the trial court "apparently agreed," so as to preclude the defendant attorneys from challenging the reasonableness of the damages award.

Furthermore, unlike the attorney defendants in *Aranson* who allegedly created the false evidence and then conspired to present the defense with the underlying defendants, here Mr. Day's liability is entirely dependent on the actions of the Gill Defendants. In other words, in order to find Mr. Day liable for conspiracy to commit defamation, the Plaintiff must necessarily show that Mr. Day agreed to Gill's defamatory conduct which he has alleged, and which has been taken as true, whereas the fabrication of

evidence in the underlying tort for malicious defense in *Aranson* was committed exclusively by the defendant attorneys and not by the underlying defendants.

In sum, the trial court did not err in reaching its decision that Mr. Day and the Gill Defendants satisfied privity with one another at the motion to dismiss stage. The court did not base its analysis on a functional relationship standard, nor was it required to. Rather, under the unique set of circumstances presented by this case, the trial court found that alleged co-conspirators were closely related.

B. The unique facts and circumstances of this matter justified an expanded application of privity

The application of res judicata must be determined on a case-by-case basis. *See Cook*, 149 N.H. at 777. The trial court was presented with a scenario where the Plaintiff was actively pursuing a claim against the Gill Defendants for the underlying tort forming the basis of the alleged conspiratorial conduct when it considered the relationship between Mr. Day and the Gill Defendants in the Conspiracy Action. It was based on this unique scenario—successive and parallel litigation between alleged co-conspirators—that the court determined an expanded view of privity based on a close relationship justified barring the Conspiracy Action. *See Taylor*, 553 U.S. at 894, n. 8. (privity has more broadly been contemplated as a way to express that nonparty preclusion is appropriate on any ground).

As noted by the trial court, co-conspirators essentially hold hands towards achieving an agreed upon mutual objective and that a closer relationship cannot be imagined. (Add. 9.) To be sure, a claim for civil conspiracy is “a combination of two or more persons by concerted action to

accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means.” *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 47 (1987) (quotation omitted). The necessary elements are: “(1) two or more persons (including corporations); (2) an object to be accomplished (i.e. an unlawful object to be achieved by lawful or unlawful means or a lawful object to be achieved by unlawful means); (3) an agreement on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof.” *Id.* (citation and emphasis omitted). Importantly, a claim for civil conspiracy cannot be maintained in and of itself; rather, it is dependent on the commission of an underlying tort—in this case the Gill Defendants’ conduct. *See Univ. Sys. of N.H. v. U.S. Gypsum Co.*, 756 F. Supp. 640, 652 (D.N.H. 1991).

The “close relationship” standard recognized in *Airframe Sys. Inc.*, 601 F.3d 9 (2010) and utilized by the trial court, takes into consideration whether a plaintiff had every opportunity to fully litigate his various claims against the full range of defendants in an earlier suit and made the strategic choice not to do so with the need for finality and judicial economy. *Id.* at 14; *see In re El San Juan Hotel Corp.*, 841 F.2d 6, 10 (1st Cir. 1988) ([a]nother formulation of this idea is that preclusion is appropriate only if the new party can show good reasons why he should have been joined in the first action and the old party cannot show any good reasons to justify a second chance.”). Such is the case here, where the Plaintiff knew of Mr. Day’s alleged conspiratorial relationship prior to filing suit against the *pro se* Gill Defendants—whose defamatory conduct forms the only basis for liability against Mr. Day. *See In re El San Juan Hotel Corp.*, 841 F.2d at 10–11 (prevailing plaintiff barred from pursuing second action against

closely related co-perpetrator accused of jointly causing harm with underlying defendant when co-perpetrator could, and should, have been named in first lawsuit). Furthermore, the court in *Airframe* stated that protection against gamesmanship, added litigation costs of claim splitting, and preventing the waste of judicial resources “are especially implicated” in such a scenario. *Airframe Sys. Inc.*, 601 F.3d at 14.

Likewise, here, because the proof of the underlying tort required by the Plaintiff to prove his claim for conspiracy against Mr. Day was identical to the proof required to prove defamation against the Gill Defendants, the Gill Defendants would necessarily be forced to participate in the Conspiracy Action’s discovery process while simultaneously defending the Defamation Action in another court. Under such circumstances, the Court properly determined that Mr. Day and the Gill Defendants shared a close enough relationship so as to preclude the Plaintiff from parallel litigation against Mr. Day. *See Taylor*, 553 U.S. at 894, n. 8.

IV. The Trial Court’s Conclusion Of Privity May Be Properly Upheld On Valid Alternative Grounds

The trial court’s ruling also considered, and could properly be upheld, on the basis that alleged co-conspirators satisfy a more traditional concept of privity. *See Sherryland, Inc. v. Snuffer*, 150 N.H. 262, 267 (2003) (stating “[w]hen a trial court reaches the correct result, but on mistaken grounds, this court will sustain the decision if there are valid alternative grounds in support of it”) (citation omitted). Even if this Court agrees with the Plaintiff that the application of federal precedent was not applicable to the unique set of facts presented by this litigation, and that privity is best defined as either pre-existing, substantive legal relationships

between a party and nonparty or functional relationships in connection to the underlying litigation, the trial court's decision should still be affirmed.

The Plaintiff concedes that there are recognized exceptions to the concept of res judicata and its application to the benefit of nonparties. (*See* AB 18.) In doing so, the Plaintiff cites to *Brooks*, 161 N.H. at 690, 693, which elaborated upon the “pre-existing, substantive relationships” exception. In that case, the New Hampshire Supreme Court cited favorably to and relied upon *Taylor*, 553 U.S. 880. In *Taylor*, the United States Supreme Court explained that “nonparty preclusion may be justified based on a variety of pre-existing ‘substantive legal relationship[s]’ between the person to be bound and a party to the judgment.” *Id.* at 894. The Court further explained that “[q]ualifying relationships” are not limited or circumscribed to a defined list, leaving open the application of the rule to other forms of relationships not discussed in *Taylor*. *See id.*

Alleged co-conspirators satisfy the substantive legal relationship exception discussed in *Taylor* and cited favorably to by New Hampshire in *Brooks*. For instance, in *Powell v. Gorham*, the court held that an “alleged co-conspirator relationship satisfies the ‘pre-existing substantive legal relationship’ discussed in [*Taylor v. Sturgell*, 553 U.S. 880 (2008)].” *See Powell v. Gorham* No. 2:13-CV-0055-LSC, 2013 WL 3151632 at *11 (N.D. Ala. 2013). Indeed, such a determination is supported by the very nature of alleged conspiracy and participants to it. A civil conspiracy is “a theory of mutual agency,” and “upon joining a conspiracy, a defendant becomes a party to every act previously or subsequently committed by any of the other conspirators in pursuit of the conspiracy.” 16 Am. Jur. 2d. *Conspiracy* § 57 (2019). Other similar relationships between parties satisfy

the “pre-existing substantive legal relationship” exception akin to conspiracy. *See e.g., Pinnacle Great Plains Operating Co., LLC v. Swenson*, No. 1:17-cv-00120-DCN, 2017 WL 4855846 at *10 (D. Idaho 2017) (stating “principal-agent relationship is the type of ‘pre-existing substantive legal relationship []’ *Taylor* recognized as establishing privity”) (quoting *Taylor*, 553 U.S. at 894) (brackets in original).

As a result, Mr. Day and the Gill Defendants, as alleged co-conspirators, satisfy the pre-existing substantive legal relationship exception recognized by *Taylor* and cited to favorably by this Court. This Court should affirm the trial court’s conclusion that Mr. Day and the Gill Defendants were in privity for purposes of precluding the Plaintiff’s parallel litigation against Mr. Day.

V. The Trial Court’s Ruling Does Not Run Counter To New Hampshire Law

Affirmance of the trial court’s order on the basis of First Circuit preclusion law does not require that this Court to expressly overrule *Aranson*, or disrupt those opinions permitting an injured party to pursue alleged wrongdoers in sequential actions. Indeed, the application of res judicata must be determined on a case-by-case basis. *See Cook*, 149 N.H. at 777. The trial court’s conclusion that co-conspirators that join together to engage in tortious conduct to harm another are closely related is based on the unique set of facts presented by this case. As the trial court correctly stated, “the general principle espoused in the Restatement § 49, nor the bulk of the cases cited by the plaintiff address the circumstances presented to this court.” (Add. 10.) The court noted that these other situations primarily deal with “joint tortfeasors who either acted concurrently or consecutively

to cause harm” and “independently contributed” or were “contractually obligated to satisfy any breach of contract by the prior defendants,” but did not involve a “mutual design to commit a tort against another.” (Add. 10.) Unlike other forms of derivative liability, conspirators involve a level of intent and must agree on the objective to be achieved, especially when the tortious conduct forming the conspiracy is committed by only one conspirator. Because this matter must be decided on its unique set of facts and circumstances, affirming the trial court’s order would not disturb New Hampshire precedent.

The Plaintiff can claim no unfairness or injustice. While the Plaintiff avers that Mr. Day “has not had his day in court,” (AB 30), the Plaintiff certainly has, *Scheele v. Vill. Dist. of Eidelweiss*, 122 N.H. 1015, 1019 (1982) (stating res judicata determinations have “always turned on whether there had been a full and fair opportunity to the party estopped to litigate the issue barring him . . .”). Here, the Plaintiff had a calculated, full, and fair opportunity to litigate his claim. He all along planned to attempt recovery, separately and sequentially, against Mr. Day.⁵ (See AB 30.) That is to say, the Plaintiff from the start planned to pursue Mr. Day for his alleged conspiratorial conduct from the beginning of his lawsuit

⁵ The Plaintiff cites to *DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813, 823 (Cal. 2015) for the proposition that separate suits against co-obligors to a contract may be sued in sequential law suits. What that case makes clear is that as long as the co-obligors are not considered the same party or privies, then a second action is permissible, will not be subject to bar, and works in harmony with the doctrine of res judicata. *Id.* Indeed, the court inferentially placed weight on the fact that joint and several liability alone does not create a closely aligned interest between co-obligors to satisfy the privity requirement because each obligors’ liability is separate and independent *and not vicarious or derivative*. *Id.* 826 (emphasis added). Here, Mr. Day’s liability is entirely derivative of the Gill Defendant’s conduct for defamation. See *Univ. Sys. of N.H.*, 756 F. Supp. at 652 (conspiracy is a means through which to impose vicarious liability for the underlying tort).

against the *pro se* Gill Defendants but only after obtaining a judgment against the Gill Defendants for defamation *per se*. Such conduct is generally prohibited when the alleged wrongdoers are in privity with one another or would otherwise satisfy the application of claim preclusion. *See DKN Holdings LLC. v. Faerber*, 61 Cal. 4th 813 (Cal. 2015) (res judicata “operates in harmony with joint and several liability principles because it only bars repeated claims for the same relief *between the same parties*.”) (emphasis in original).⁶ As the trial court recognized, “the claim against [Mr.] Day is wholly dependent on proof that Gill committed the defamatory acts that damaged Walker for which Gill has already been found liable” and which the plaintiff “was aware of when he chose to sue only Gill in a different county.” (Add. 010.) It is this type of “piecemeal litigation [that] is not in the interest of judicial economy,” *Hewes v. Roby*, 135 N.H. 476, 477 (1992), and is the precise conduct the *Airframe Sys. Inc.* court rebuked, *see Airframe Sys. Inc.*, 601 F.3d at 18 (stating plaintiff made “choices to bring piecemeal and sequential litigation, apparently hoping this strategy would maximize its chances of recovery through settlement or trial.”).

To hold otherwise will cause the trial court to unavoidably “expend resources to process the case twice.” (Add. 10.) Without a doubt, the Gill Defendants will be necessary parties to the Conspiracy Action, as it is their conduct alone that gives rise to the tort that forms the basis of the alleged

⁶ The majority of cases cited to and relied upon by the Plaintiff, (AB 23–25), involve situations where the alleged joint wrongdoers were not the same or in privity with one another or did not involve the same cause of action such that claim preclusion was an issue. *See Hyde v. Noble*, 13 N.H. 494, 501 (1843) (two suits against joint tortfeasors “not for the same cause of action.”), *Snow v. Chandler*, 10 N.H. 92, 92 (1839) (assault and battery by two separate defendants), and *Zebnik v. Rozmus*, 81 N.H. 45 (1923) (two actions for trespass tried together against two separate defendants).

conspiracy. *See Univ. Sys. of N.H.*, 756 F. Supp. at 652 (stating “[t]here is no such thing in New Hampshire, however, as a civil action based on conspiracy alone.”) They will again be called upon to produce evidence and participate in the litigation for the second time arising out of the same transaction.

Furthermore, there is great risk of inconsistent judgments as to liability and inevitably with regard to damages. For instance, Mr. Day may be able to defend against the underlying defamation claims where the *pro se* Gill Defendants could not, resulting in a different conclusion on liability for all defendants. Indeed, theoretically the Plaintiff could prevail on his civil conspiracy claim against Mr. Day and a jury could award a verdict greater than or less than that awarded against the Gill Defendants. Such scenarios, as the trial court correctly noted, do “not engender confidence in the judicial system.” (Add. 10.)

The Plaintiff’s reliance on New Hampshire’s apportionment of damages statutory framework is equally unavailing. RSA 507:7-e-h is part of a comprehensive approach to comparative fault, apportionment of damages, and contribution. *See Nilsson v. Bierman*, 150 N.H. 393, 395 (2003). The statutes cannot be stretched to support the Plaintiff’s strategic attempt to bring subsequent lawsuits based on vicarious liability because a plaintiff ordinarily has complete control over who, when, and where to sue. Likewise, the fault apportionment statutory framework has been interpreted to permit defendants to identify those parties not named in a lawsuit that may have caused or contributed to cause a harm through sufficient evidence during pretrial discovery so as to have those parties listed on the jury verdict slip at the time of trial. Tellingly, rather than permit plaintiffs to file

a subsequent lawsuit arising out of the same incident against so-called *DeBenedetto* defendants, courts permit plaintiffs 30 days from the date of such a disclosure to amend the initial pleading to add a *DeBenedetto* party as a direct defendant. *See* Super. C. R. 5 Case Structuring and ADR Order ¶ 5.

At some point, a particular controversy must come to an end. Under the unique and specific facts of this case, the trial court provided a practical and rational means for determining “privity” between two parties. The Plaintiff had a full and fair opportunity to prosecute his claim and obtained a judgment against the Gill Defendants. However, parallel and piecemeal litigation is discouraged for causing waste of judicial resources and the risk of inconsistent judgments. These policy considerations are especially true when a plaintiff strategically chooses to split his cause of action from the outset. As a result, the trial court’s order should be affirmed.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Based on the unusual and specific circumstances of this case, alleged co-conspirators satisfy the “privity” requirement based on a “close relationship” standard for purposes of res judicata. Alternatively, alleged co-conspirators satisfy the “substantive legal relationship” standard cited to favorably by this Court. The trial court, accepting the Plaintiff’s allegations as true, properly reached this conclusion and barred the plaintiff from further litigation against Mr. Day. For these reasons, this Court should affirm the trial court’s order. Mr. Day respectfully requests fifteen (15 minutes) of oral argument before the full Court. Jonathan P. Killeen, Esq. will present oral argument on behalf of Mr. Day.

Respectfully submitted by,

The Defendant/Appellant, Aaron Day
By His Attorneys,

Date: July 31, 2019

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CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with Rule 16(4)(a) because it conforms with all necessary requirements set forth therein; 16(11) because the brief contains no more than 7,784 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters; and 26(7) because, on this 31st day of July, 2019, copies of this brief were forwarded to Matthew R. Johnson, Esq. and Devin K. Bolger, Esq., counsel of record for Alexander J. Walker, via the Court's electronic filing system's electronic services.

