STATE OF NEW HAMPSHIRE
SUPREME COURT

ALEXANDER J. WALKER, JR.

v.

AARON DAY

No. 2019-0236

APPEAL FROM THE HILLSBOROUGH COUNTY SUPERIOR COURT NORTHERN DISTRICT PURSUANT TO SUPREME COURT RULE 7

BRIEF OF THE APPELLANT ALEXANDER J. WALKER, JR.

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court err in ruling that res judicata barred Alex Walker Jr.'s claims against Aaron Day even though Aaron Day never proved he was in privity with Michael Gill and/or Mortgage Specialists, Inc., the defendants in *Walker v. Gill et al.*, Docket No. 216-2016-CV-00316?

This issue was raised by the Appellant in various pleadings:

a. Objection to Defendant's Motion to Dismiss the Plaintiff's Claims for Civil Conspiracy and Enhanced Compensatory Damages, dated October 25, 2017 (App. 112-13);
b. Motion for Reconsideration of Court's Order Dated January 10, 2018 Concerning Defendant's Motion to Dismiss, dated January 19, 2018 (App. 130-32);
c. Brief Reply in Support of Motion for Reconsideration of Court's Order Dated January 10, 2018 Concerning Defendant's Motion to Dismiss, dated February 1, 2018 (App. 145-46);
d. Objection to Defendant Aaron Day's Renewed Motion to Dismiss the Plaintiff's Claims for Civil Conspiracy and Enhanced Compensatory Damages, dated May 23, 2018 (App. 185-86); and
e. Objection to Defendant Aaron Day's Renewed Motion to Dismiss the Plaintiff's Claims for Civil Conspiracy and Enhanced Compensatory Damages, dated March 14, 2019 (App. 233-34).

2. Did the trial court err in ruling that joint wrongdoers who share a close relationship arising from the underlying wrongful conduct may not be sued sequentially?

This issue was raised by the Appellant in various pleadings:

a. Motion for Reconsideration of Court's Order Dated January 10, 2018 Concerning Defendant's Motion to Dismiss, dated January 19, 2018 (App. 126-30);

b. Objection to Defendant Aaron Day's Renewed Motion to Dismiss the Plaintiff's Claims for Civil Conspiracy and Enhanced Compensatory Damages, dated May 23, 2018 (App. 185-86); and

c. Objection to Defendant Aaron Day's Renewed Motion to Dismiss the Plaintiff's Claims for Civil Conspiracy and Enhanced Compensatory Damages, dated March 14, 2019 (App. 232-34).

3. Did the trial court err in applying First Circuit claim preclusion principles in lieu of New Hampshire law when it ruled that Alex Walker Jr.'s claims against Aaron Day were barred because, on the alleged facts, Aaron Day shared close relationship with alleged co-conspirators Michael Gill and/or Mortgage Specialists, Inc., the defendants in *Walker v. Gill et al.*, Docket No. 216-2016-CV-00316?

This issue was raised by the Appellant in various pleadings:

a. Motion for Reconsideration of Court's Order Dated January 10, 2018 Concerning Defendant's Motion to Dismiss, dated January 19, 2018 (App. 126-30);

b. Objection to Defendant Aaron Day's Renewed Motion to Dismiss the Plaintiff's Claims for Civil Conspiracy and Enhanced Compensatory Damages, dated May 23, 2018 (App. 185-86); and
c. Objection to Defendant Aaron Day's Renewed Motion to Dismiss the Plaintiff's Claims for Civil Conspiracy and Enhanced Compensatory Damages, dated March 14, 2019 (App. 232-34).

STATUTES INVOLVED

RSA 507:7-e, I(c) Apportionment of Damages.

I. In all actions, the court shall:

(a) Instruct the jury to determine, or if there is no jury shall find, the amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties; and

(b) Enter judgment against each party liable on the basis of the rules of joint and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.

(c) RSA 507:7-e, I(b) notwithstanding, in all cases where parties are found to have knowingly pursued or taken active part in a common plan or design resulting in the harm, grant judgment against all such parties on the basis of the rules of joint and several liability.

II. In all actions, the damages attributable to each party shall be determined by general verdict, unless the parties agree otherwise, or due to the presence of multiple parties or complex issues the court finds the use of special questions necessary to the determination. In any event, the questions submitted to the jury shall be clear, concise, and as few in number as practicable, and shall not prejudice the rights of any party to a fair trial.

III. For purposes of contribution under RSA 507:7-f and RSA 507:7-g, the court shall also determine each defendant's proportionate share of the

obligation to each claimant in accordance with the verdict and subject to any reduction under RSA 507:7-i. Upon motion filed not later than 60 days after final judgment is entered, the court shall determine whether all or part of a defendant's proportionate share of the obligation is uncollectible from that defendant and shall reallocate any uncollectible amount among the other defendants according to their proportionate shares. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

IV. Nothing contained in this section shall be construed to modify or limit the duties, responsibilities, or liabilities of any party for personal injury or property damage arising from pollutant contamination, containment, cleanup, removal or restoration as established under state public health or environmental statutes including, but not limited to, RSA 146-A, RSA 147-A and RSA 147-B.

RSA 507:7-h Effect of Release or Covenant Not to Sue.

A release or covenant not to sue given in good faith to one of 2 or more persons liable in tort for the same injury discharges that person in accordance with its terms and from all liability for contribution, but it does not discharge any other person liable upon the same claim unless its terms expressly so provide. However, it reduces the claim of the releasing person against other persons by the amount of the consideration paid for the release.

STATEMENT OF THE CASE AND FACTS

This case arises from a conspiracy to defame the appellant, Alexander Walker, perpetrated by the appellee, Aaron Day, together with Michael Gill and his company, Mortgage Specialists, Inc. ("MSI"). App. 4-5 (Compl.). The conspiracy consummated in a malicious and highly publicized defamation campaign in which Mr. Walker was accused of attempted murder, corruption, and other deplorable activity. App. 6-17. Many of the defamatory statements still reverberate across public fora, reaching vast audiences and causing lasting damage to Mr. Walker and his family. App. 6, 8, 9 (Compl.); App. 158, 164-66, 172-75 (Order on Damages in Case No. 216-2016-CV-00316) (Delker, J.).

I. The Defamation Action against Mr. Gill and MSI

In 2016, Mr. Walker sued Mr. Gill and MSI (collectively, the "Gill Defendants") for injunctive relief, defamation, and enhanced compensatory damages ("Defamation Action" or "Defamation Claim"). App. 55, 63-64 (Compl., Case No. 216-2016-CV-00316). Mr. Walker won partial summary judgment on some defamatory statements, and after the Gill defendants defaulted, final default judgment was entered against the Gill defendants on May 25, 2017. App. 74 (Order on Pl.'s Mot. Partial Summ. J.) (Delker, J.); App. 83 (Order of Default J.) (Delker, J.).

On April 12, 2018, Mr. Walker was awarded $5,000,000 in damages. App. 175 (Order on Damages) (Delker, J.). In support of this award, the trial court noted, "[Mr. Walker] persuasively demonstrated the impact [of the defamation campaign] on the lives of himself and his family. . . . Walker, a normally private man, has been the subject of constant public

attention for nearly five years." Add. 173. Citing the "egregious nature of the accusations coupled with the unrelenting repetition," the trial court concluded the defamation was motivated by "ill will, hatred, hostility, or evil motive" and merited an unusually high enhanced compensatory damages award. App. 174.

The Gill Defendants filed a notice of appeal on May 1, 2018. App. 191. The judgment was affirmed by this Court on February 7, 2019. App. 230-31 (Order, Case No. 2018-0233).

II. The Conspiracy Action against Mr. Day

Mr. Walker filed the instant action on August 31, 2017 against Mr. Day for conspiracy to commit defamation and enhanced compensatory damages ("Conspiracy Action" or "Conspiracy Claim"). App. 4, 21 (Compl.). The complaint describes the defamation campaign in much the same terms as the complaint in the Defamation Action but also alleges specific facts supporting the Conspiracy Claim. App. 6, 13-18.

Mr. Day moved to dismiss the Conspiracy Action on res judicata and claim splitting grounds. App. 22-24 (Def.'s Mot. Dismiss). Among other theories, Mr. Day argued that all co-conspirators must be joined in a single action, and that he was in privity with the Gill Defendants. App. 31, 34-36.

Mr. Walker countered that "Mr. Day is a different party than the defendants in the Gill action" and "conspirators may be sued in separate actions." App. 112 (Pl.'s Obj. to Def.'s Mot. Dismiss). Mr. Walker further argued that joint tortfeasors, such as Mr. Day and the Gill Defendants, may be sued sequentially in different actions. App. 108.

1. January 10, 2018 Order on Mr. Day's Motion to Dismiss

The trial court stayed the Conspiracy Action pending a final order in the Defamation Action. Add. 1 (Order on Def.'s Mot. Dismiss) (Nicolosi, J.). Addressing the mutuality element of claim preclusion, the trial court ruled that, under precedent from the U.S. Court of Appeals for the First Circuit, Mr. Day had a close enough relationship with the Gill defendants to warrant nonparty preclusion:

> "Under [first circuit] precedents, privity is a sufficient but not a 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 lawsuit, not merely when the two 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 alterations in original). The trial court also found that the Conspiracy Action involved the same cause of action as the Defamation Action. Add. 4-5. But since there was not yet a final judgment in the Defamation Action, outright dismissal was inappropriate. Add. 5-6. Instead, the trial court stayed the Conspiracy Action pending a final order in the Defamation Action. Add. 6.

Mr. Walker moved the trial court to reconsider its order, and, in particular, its reliance on First Circuit precedent:

> [The] January 10th Order . . . adopted the First Circuit's approach to res judicata for joint-tortfeasors (sued consecutively), but the First Circuit's approach in that regard is an extreme outlier that is out of step with prevailing common law.
>
> The general, and prevailing, rule of common law is set forth in the Restatement, which expressly allows consecutive suits against tortfeasors such as this suit against Mr. Day.

App. 126-27 (Pl.'s Mot. Recons.). Mr. Walker further argued that an insufficient factual basis existed to conclude that Mr. Day was in privity with the Gill Defendants. App. 130. "The record does not support any conclusion that Mr. Day participated in the action against Mr. Gill or that Mr. Day consented to representation by Mr. Gill. . . . If anything, the adversity between the interests and anticipated litigation positions of Mr. Day and Mr. Gill inferentially precludes any such finding at the dismissal stage." App. 130-31.

Mr. Walker's motion for reconsideration was followed by various pleadings. App. 133 (Def.'s Obj. to Pl.'s Mot. Recons.); 145 (Pl.'s Reply to Def.'s Obj. to Pl.'s Mot. Recons.); 148 (Def.'s Surreply to Pl.'s Reply to Def.'s Obj. to Pl.'s Mot. Recons.).

2. May 3, 2018 Order on Mr. Walker's Motion for Reconsideration

"[T]he court remains convinced on this State law issue of first impression that the First Circuit's analysis in Airframe is appropriate." Add. 13 (underline in original) (Order on Pl.'s Mot. Recons.) (Nicolosi, J.). The trial court further explained its conclusion that conspiratorial conduct justifies nonparty preclusion:

> [T]he court concluded [in the January 10 order] 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 condonation of the acts or his foreknowledge. In contrast, to prove conspiracy, the conspirators must agree on the tortious objective.

Add. 9-10. Addressing Mr. Walker's argument that the court's finding of privity at the pleading stage is inappropriate, the court stated that it was obligated to accept the plaintiff's allegations as true, and based on the facts alleged, dismissal would be proper upon final judgment in the Defamation Action. Add. 13.

After the April 12, 2018 damages order in the Defamation Action, Mr. Day, unaware that the Gill Defendants had filed a notice of appeal, again moved the court to dismiss the Conspiracy Action. App. 151 (Def.'s First Renewed Mot. Dismiss). Mr. Walker objected and argued, again, that "Mr. Day is not in privity with the Gill defendants solely by virtue of the alleged conspiracy. . . . As such, the record at the pleading stage does not support the conclusion, as a matter of law (or in any respect), that Mr. Day was in privity with the Gill defendants." App. 184-85 (Pl.'s Obj. to Def.'s First Renewed Mot. Dismiss). Mr. Walker further posited, "the likely adversity between the interests of co-conspirators (who would be inclined to, among other things, blame one another for any harm) inferentially precludes any finding of privity at the dismissal stage." App. 186. Mr. Day

replied to Mr. Walker's objection to the renewed motion to dismiss. App. 214 (Def.'s Reply to Pl.'s Obj. to Def.'s First Renewed Mot. Dismiss).

3. June 5, 2018 Order on Mr. Day's First Renewed Motion to Dismiss

The trial court ruled, "[t]his matter will remain stayed pending decision of the appellate court in Mr. Gill's case." Add. 14 (Order on First Renewed Mot. Dismiss) (Nicolosi, J.). Then, after the damages award was affirmed on February 7, 2019, Mr. Day filed another renewed motion to dismiss. App. 224 (Def.'s Second Renewed Mot. Dismiss). Mr. Walker objected, restating arguments he advanced previously. App. 232 (Pl.'s Obj. to Def.'s Second Renewed Mot. Dismiss).

4. March 26, 2019 Order on Mr. Day's Second Renewed Motion to Dismiss

The trial court granted the second renewed motion to dismiss. Add. 16. (Order on Second Renewed Mot. Dismiss) (Nicolosi, J.). "[A]ll of the arguments raised in plaintiff's objection were previously raised in his objection to defendant's original motion to dismiss and in his motion for reconsideration." Add. 16. The trial court addressed those arguments in its January 10, 2018 and May 3, 2018 orders, and "[b]ased on the reasoning set forth in those prior orders, the Court finds the present action is barred by the doctrine of res judicata." Add. 16.

STANDARD OF REVIEW

The applicability of res judicata is a question of law that this Court reviews *de novo*. *Kalil v. Town of Dummer Zoning Bd. of Adjustment*, 159 N.H. 725, 729 (2010).

SUMMARY OF THE ARGUMENT

Under long-established New Hampshire law, a new defendant must prove privity to invoke a claim preclusion defense. Mr. Day made no showing of privity with the Gill Defendants. The court nonetheless dismissed the Conspiracy Action because of an assumed close relationship between Mr. Day and the Gill Defendants. This close relationship test derives from First Circuit precedent that is entirely inconsistent with settled New Hampshire law.

The court erred when it inexplicably applied federal claim preclusion principles in lieu of New Hampshire law. Because the court did not determine whether Mr. Day in fact participated or was virtually represented in the Defamation Action, and did not properly apply New Hampshire law, the judgment below should be reversed and the Conspiracy Action remanded.

ARGUMENT

I. The trial court erred in granting Mr. Day's renewed motion to dismiss because Mr. Day never proved that he was in privity with the Gill Defendants.

"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." *Sleeper v. Hoban Family P'ship*, 157 N.H. 530, 533 (2008). "Collateral estoppel bars a party to a prior action, or a person in privity with such a party from relitigating any issue or fact actually litigated and determined in the prior action. . . . '[C]laim preclusion,' is a broader remedy and bars the relitigation of any issue that was, or might have been, raised in respect to the subject matter of the prior litigation." *Gray v. Kelly*, 161 N.H. 160, 164 (2010) (quoting *McNair v. McNair*, 151 N.H. 343, 352-53 (2004)).

Although res judicata generally does not apply to nonparties to the original judgment, this rule is subject to exceptions. *Sleeper*, 157 N.H. at 533. Privity, as it is called, refers to certain relationships that are held to justify nonparty preclusion. *Id.* at 533-34. For analytical purposes, these relationships fall into either of two categories. One concerns pre-existing, substantive legal relationships between a party and nonparty,[1] *see Brooks v. Trs. of Dartmouth Coll.*, 161 N.H. 685, 690, 693 (2011); *Sleeper*, 157 N.H.

[1] None of these pre-existing relationships is at issue in this case. Qualifying relationships include, for example, that between a property owner and her successor in interest, *id.* (citing Restatement (Second) of Judgments, § 43(1)(b)), and that between an association and its members, *see, e.g.*, *Brooks*, 161 N.H. at 692-93. Such relationships exist independently of the conduct giving rise to litigation.

at 534 (quoting *Taylor v. Sturgell*, 128 S. Ct. 2161, 2172 (2008)), and the other concerns functional relationships in connection to the underlying litigation. *Sleeper*, 157 N.H. at 534.

In this latter context, privity is a "functional relationship in which, at a minimum, the interests of the non-party were in fact represented and protected in the prior litigation." *Id.* at 534 (quotations omitted) (quoting *Cook v. Sullivan*, 149 N.H. 774, 779 (2003)). The relationship is one of "virtual representation, and substantial identity." *Cook*, 149 N.H. at 779 (quoting *Daigle v. City of Portsmouth*, 129 N.H. 561, 572 (1987)). It exists, for example, where a nonparty controls the underlying litigation or authorizes a party to represent her interests. *Daigle*, 129 N.H. at 571-72 (citing Restatement (Second) of Judgments §§ 39, 41(2) (1982)). Though this relationship can arise in various contexts, it is always grounded in fact. *See Cook*, 149 N.H. at 779.

A. The trial court's privity determination was not supported by any facts.

A new defendant claiming res judicata as an affirmative defense must present evidence of a relationship sufficient to justify nonparty preclusion. *See Gray*, 161 N.H. at 164 (res judicata is an affirmative defense); *Waters v. Hedberg*, 126 N.H. 546, 549 (1985) (affirming denial of motion to dismiss because defendant failed to show he was in privity with defendant in earlier suit). If the defendant fails to make the required evidentiary showing, but the trial court nonetheless finds privity, reversal is required. *See Aranson v. Schroeder*, 140 N.H. 359, 369 (1995) (finding no evidentiary basis for the trial court's privity ruling, vacating same, and remanding for factual findings on whether defendant exercised control over

the underlying litigation); *Cook*, 149 N.H. at 779 (affirming finding that plaintiff was not in privity with plaintiff in underlying suit because "[t]here [was] no evidence in the record that the plaintiffs either controlled the underlying wetlands bureau enforcement action or authorized the wetlands bureau to act on their behalf."); *Daigle*, 129 N.H. at 572 (affirming finding that defendant was not in privity with defendant in underlying suit because "there is no apparent basis in the record of the first trial for finding privity between Pace and Portsmouth. There is no indication that Pace participated in the conduct of the first trial beyond a brief appearance as a witness, or that he gave any representational authority either to the city, or to the city's insurer or its counsel."); *Waters*, 126 N.H. at 549 ("[Defendant] did not take control of the suit. He is, therefore, not protected under res judicata . . . .").

The trial court misapprehended this inquiry. Rather than testing Mr. Day's privity defense against evidence, the trial court looked only to the complaint, accepted the alleged facts as true, and dismissed the action on the pleadings. Add. 13. Mr. Day proved, and the trial court found, no facts whatsoever concerning Mr. Day's participation, control, or involvement in the underlying suit. Because Mr. Day did not meet his burden of proof, the trial court's dismissal order should be reversed and the case remanded for further proceedings.

B. The trial court's privity determination was legal error.

The trial court erred in ruling that Mr. Day was in privity with the Gill defendants solely because of the alleged conspiracy between them. This Court has squarely rejected the notion that co-conspirators are necessarily in privity for res judicata purposes. *Aranson*, 140 N.H. at 369.

In *Aranson*, the defendants in the underlying suit and their attorney conspired to fabricate evidence. *Id.* at 361-63. The attorney withdrew as counsel, but later testified falsely on the defendants' behalf. *Id.* The plaintiffs prevailed, were awarded attorneys' fees, and then sued the attorney under a malicious defense theory. *Id.* at 362. The attorney disputed the reasonableness of the underlying fee award, but the trial court estopped him from litigating that issue because, according to the trial court, he was in privity with the defendants in the underlying suit. *Id.* at 368.

On appeal, this Court disagreed that the attorney and his former clients were in privity merely because they conspired to maliciously defend the underlying action. *Id.* at 369. "Such an assertion, standing alone, does not warrant a determination that [the attorney]'s involvement in the underlying action was so significant as to constitute control." *Id.* Rather, to sustain their burden of proving collateral estoppel, the plaintiffs had to show the defendant exercised "*such control over the underlying litigation that he should be bound by a determination against the underlying defendants as though he himself were a party*." *Id.* (emphasis added) (citing Restatement (Second) of Judgments § 39 (1982)). The record had no evidence of such control, so the Court vacated the privity finding. *Id.*

Aranson thus establishes unequivocally that a conspiracy does not per se establish privity. Co-conspirators are instead subject to the same privity standard as all other joint wrongdoers. The standard, moreover, is no more relaxed as applied to co-conspirators: In *Aranson* the new defendant actually participated in the underlying litigation as an attorney and witness, but even his deliberate scheme to influence the litigation was not enough. *Id.* at 361-63, 369. If there was no privity in *Aranson*, there

surely is no privity between co-conspirators where, as here, no facts suggest the unnamed co-conspirator participated, at all, in the underlying suit. The trial court erred in ruling otherwise. Add 4-5, 13, 16.

II. The close relationship standard applied by the trial court violates New Hampshire law.

The trial court mischaracterized this case as involving an issue of first impression, Add. 13, even though *Aranson* and other New Hampshire cases directly address these circumstances. There was no justification, legal or otherwise, to look beyond New Hampshire law. Yet that is exactly what the trial court did when it applied a "close relationship" standard derived from federal preclusion principles. This standard is incompatible with New Hampshire law.

The First Circuit embraces a sweeping concept of nonparty preclusion. Unlike in New Hampshire, "privity is a sufficient but not a 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); *contra Waters*, 126 N.H. at 549 ("Defendant . . . is bound by the doctrine of res judicata *only if he is in privity* with a bound party." (emphasis added)). "Claim preclusion applies [under First Circuit rules] if the new defendant is closely related to a defendant from the original action . . . not merely when the two defendants are in privity." *Airframe Sys., Inc.*, 601 F.3d at 17-18 (quotations omitted) (quoting *Negron-Fuentes v. UPS Supply Chain Solutions, Inc*., 532 F.3d 1, 10 (1st Cir. 2008)).

Under this standard, joint wrongdoers share a close relationship solely because of their participation in the underlying, loss-causing conduct. *See In re El San Juan Hotel Corporation*, 841 F.2d 6, 10-11 (1st

Cir. 1988) ("With regard to these allegedly joint harms, it is evident that Cuprill, as the co-perpetrator, shared a significant relationship with Rodriguez."). The nonparty's involvement in the underlying litigation is irrelevant to this analysis. *See id.*

New Hampshire takes the opposite view. The nonparty's involvement in the underlying litigation *is* the critical inquiry. *Aranson*, 140 N.H. at 369. Participation in the loss-causing conduct does nothing to justify nonparty preclusion, *id.*, nor does shared liability on the underlying loss, *see Waters*, 126 N.H. at 549 (no privity between employer and employee, both liable for the same loss). A joint wrongdoer, necessarily precluded under First Circuit precedent, is not necessarily precluded in New Hampshire. *Cf. Hermes Automation Technology, Inc. v. Hyundai Electronics Industries Co.*, 915 F.2d 739, 750-51 (1st Cir. 1990) (noting that First Circuit standard reaches further than state law requiring "sufficient legal identity" between party and nonparty).

New Hampshire's narrower view of nonparty preclusion tracks deep-rooted common law rules. For well over a century, New Hampshire has adhered to the rule that plaintiffs may pursue joint wrongdoers successively. *See Hyde v. Noble*, 13 N.H. 494, 501 (1843) ("The injured party has a right to pursue all who have done the wrong, until he obtains a satisfaction for it . . . ."). Only full satisfaction of the loss extinguishes the right of action. *Snow v. Chandler*, 10 N.H. 92, 94 (1839) ("[N]othing short of payment of damage . . . or a release under seal, can operate to discharge the other [wrongdoers]." (quotations omitted)). A judgment against one joint wrongdoer does not bar claims against others liable for the same loss. *Zebnik v. Rozmus*, 81 N.H. 45, 47 (1923) ("In some of the states the taking

out of execution upon such a judgment is a bar, but the rule most widely followed is that judgment and execution against one is not a bar to a judgment against another also liable unless the judgment is satisfied. Such is the law here." (citations omitted)); *Fowler v. Owen*, 68 N.H. 270, 271 (1895) ("For such acts they were jointly and severally liable. The plaintiff was at liberty to sue either of them separately. The unsatisfied judgment against Beckman is no bar to the plaintiff's right to recover in this action." (citing *Snow*, 10 N.H. 92)). Under these precedents, Mr. Walker has an independent, surviving right against Mr. Day.[2]

In this regard, New Hampshire represents the modern, prevailing view, and that of the Restatements of Torts and Judgments.[3] *See* Restatement (Second) of Judgments, § 49 (1982) ("A judgment against one person liable for a loss does not terminate a claim that the injured party may have against another person who may be liable therefor."); *id.* cmt. a (under early common law rules, a judgment against one obligor would extinguish claims against others, but "[t]hese rules are now obsolete"); Restatement (Second) of Torts, § 882 (1977) ("If each of two or more persons is subject to liability for the full amount of damages allowed for a single harm

[2] RSA 507:7-h reversed the common law presumption that a release of one wrongdoer released all others. Otherwise, it remains the law today, as in 1839, that the plaintiff's right of action against joint wrongdoers survives until the loss is actually satisfied or the right is validly released. *Cf. Pro Done, Inc. v. Basham & a*, 2019 N.H. LEXIS 88, at *15 (N.H. May 3, 2019) (citing *Snow*, 10 N.H. at 93 in discussing the effect of a release, as distinguished from a covenant not to sue, on the right of action against joint obligors).

[3] These sources have shaped New Hampshire jurisprudence—in particular, the law of res judicata—to a degree that can hardly be overstated. *Aranson*, 140 N.H. at 369 (citing Restatement (Second) of Judgments in discussing nonparty preclusion); *Daigle*, 129 N.H. at 572 (same); *Sleeper*, 157 N.H. at 534 (same); *Cook*, 149 N.H. at 779 (same); *Brooks*, 161 N.H. at 690 (same).

resulting from their tortious conduct, the injured person can properly maintain a single action against one, some or all of them.").

The trial court believed "[its] ruling is not inconsistent with the general rule set out in Restatement of [sic] (Second) of Judgments 49," Add. 11, but the converse is true. Federal courts acknowledge that First Circuit preclusion law is incompatible with the law of states which, like New Hampshire, follow the prevailing rule articulated in Restatement (Second) of Judgments § 49. *See Tingley Sys. v. CSC Consulting*, 919 F. Supp. 48, 54 n.4 (D. Mass 1996) ("While the *Restatement* [(Second) of Judgments § 49] appears to reflect the law in Massachusetts, it does not state the law of the First Circuit, at least insofar as that law pertains to the res judicata effect of a judgment as to claims against one co-perpetrator of allegedly joint harms to a plaintiff." (italics in original)). It is, moreover, no mystery that the close relationship standard reaches further than state law standards, like those of New Hampshire, which require identity of interests in the underlying litigation. *See Cavic v. America's Servicing Co.*, 806 F. Supp. 2d 288, 292 (D. Mass. 2011) ("[U]nder Massachusetts law, claim preclusion may be invoked by a person who was not a party to the prior action only if that person's interest was represented by a party to the prior action. In fact, it may often be insufficient to merely have a 'close and significant relationship' with a party to the prior action." (footnotes omitted)).

The First Circuit recognized as much in *Hermes Automation Technology, Inc.*. There, choice-of-law rules mandated application of Massachusetts preclusion law. *Hermes Automation Technology, Inc.*, 915 F.2d at 750. Like New Hampshire, Massachusetts only recognizes

nonparty preclusion where the nonparty's interests were in fact represented in the underlying litigation. *Id.* (citing *Mongeau v. Boutelle*, 407 N.E.2d 352, 356 (Mass. App. 1980)); *cf. Cook*, 149 N.H. at 779 (requiring "virtual representation, and substantial identity" in the underlying litigation). This standard, the First Circuit observed, "would not necessarily encompass all defendants who shared a 'close and significant relationship' with a defendant to the prior action." *Hermes Automation Technology, Inc.*, 915 F.2d at 751. The court explicitly contrasted *San Juan* with "Massachusetts law, [where] a defendant is not entitled to invoke claim preclusion simply because he acted jointly with the defendant to the prior litigation." *Id.* at 751-52; *cf. Aranson*, 140 N.H. at 369 (defendant not entitled to invoke claim preclusion simply because he acted jointly with the defendant to the prior litigation). Because New Hampshire law parallels Massachusetts law in these material respects, the First Circuit's comments in *Hermes* belie any suggestion that the federal close relationship standard somehow mirrors or integrates with New Hampshire law.

In a variety of contexts, the federal close relationship standard forecloses litigation that survives under New Hampshire law. Take, for example, an official sued in her official capacity and then in her individual capacity, or an employer sued on respondeat superior grounds and the employee sued later. Assuming final judgments are reached, the close relationship standard bars both subsequent suits. *See Negron-Fuentas*, 532 F.3d at 10 (close relationship standard forecloses sequential suits against officer in official and then individual capacity); *Silva v. City of New Bedford*, 660 F.3d 76, 80 (1st Cir. 2011) (close relationship standard forecloses sequential suits against employer (on respondeat superior

grounds) and then employee). But under New Hampshire law, both subsequent suits would proceed (absent a factual showing of privity). *See Daigle*, 129 N.H. at 568-69 (noting that an official who has litigated in one capacity (official or personal) is not precluded from litigating in the other, and rejecting privity by employment).

In *Daigle*, in the underlying action, the City of Portsmouth was held vicariously liable for torts of a police officer. *Daigle*, 129 N.H. at 568-69. Separately, the plaintiff sued the wrongdoing officer in his personal capacity. The plaintiff wanted to estopp the officer from contesting liability. *Id.* at 569-70. No facts, however, suggested privity between the officer and Portsmouth in the underlying action. *Id.* ("There is no indication that Pace participated in the conduct of the first trial beyond a brief appearance as a witness, or that he gave any representational authority either to the city, or to the city's insurer or its counsel. Nor did Portsmouth purport to represent Pace's personal interest."). The officer's employment relationship with Portsmouth also did not establish privity. *Id.* at 572-74. "We reject privity by employment for the basic reason that an employer representing himself does not necessarily defend the interest of the employee . . . . There is, rather, a potential for conflict between their respective interests." *Id.*

Daigle reinforces *Aranson*'s rule that privity does not follow from a conspiracy. Like respondeat superior, conspiracy is a means "through which vicarious liability for the underlying tort may be imposed." *Univ. Sys. of N.H. v. U.S. Gypsum Co.*, 756 F. Supp. 640, 652 (D.N.H. 1991) (construing New Hampshire tort of civil conspiracy). Just as an employer does not necessarily represent the interests of an unnamed employee, a co-

conspirator does not necessarily defend the interests of an unnamed co-conspirator. The same potential for conflict exists in both scenarios. Because this adversity of interests[4] underpinned the decision in *Daigle* to reject privity by employment, *Daigle* provides further context and support for this Court's decision in *Aranson* to reject privity by conspiracy. Without the required factual showing, it cannot be inferred that the interests of an unnamed co-conspirator were somehow represented in an earlier action against other co-conspirators.[5]

In both *Aranson* and *Daigle*, the close relationship standard would have resulted in preclusion, but the law of this State required otherwise. Such is the case here. The trial court was duty-bound to apply *Aranson*, *Daigle*, and other settled precedents, but it overlooked them in favor of an unrecognized and contrary First Circuit standard. The result is untenable.

Affirmance of the dismissal order on the basis of First Circuit preclusion law requires this Court to expressly overrule *Aranson*, *Daigle*, and other precedents recognizing the right of an injured party to pursue wrongdoers sequentially until recovery is had. "[F]undamental changes in our jurisprudence must be brought about sparingly and with deliberation." *Aranson*, 140 N.H. at 365. This Court has no reason to disturb New

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[4] These inevitable positional conflicts would likely preclude an attorney from jointly representing co-conspirators. *Cf. Daigle*, 129 N.H. at 573-74 ("A rule of law that would estop the employee by the results of his employer's litigation would thus create a conflict of interest both for the employer and for the employer's counsel.").

[5] In the present case, had the trial court taken evidence, as it was required to do, Mr. Walker could have demonstrated the extreme animosity that now exists, and has existed for some time, between Mr. Day and Mr. Gill.

Hampshire's long-standing decisional framework on judgments and res judicata.

Considerations of judicial economy, and the risk of inconsistent judgments, do not weigh in favor of affirming the judgment below and overruling established precedent, especially when considering the prejudice such an approach would impose on the victim in this case, Mr. Walker. While both these policy considerations doubtless inform New Hampshire's law on res judicata, neither provides a stand-alone basis for dismissal. *Northern Assur. Co. of America v. Square D Co.*, 201 F.3d 84 (2d Cir. 1999) (dismissal is appropriate if the claims and parties do not differ, but "the scarcity of judicial resources alone does not justify denying a party the opportunity to litigate a claim."). An objection based solely on these considerations, moreover, runs headlong into the legislative choice that co-conspirators ought to be jointly *and severally* liable. *See* RSA 507:7-e, I(c) (providing joint and several liability in cases where parties have "knowingly pursued or taken active part in a common plan or design resulting in the harm"); *Goudreault v. Kleeman*, 158 N.H. 236, 255 (2009) ("[T]he requirements of RSA 507:7-e, I(c) resemble the concerted activity of civil conspiracy."); *DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813, 823 (Cal. 2015) ("[A]llowing separate suits against obligors is inefficient because it subjects the parties, witnesses, and courts to multiple proceedings on the same matter. This objection goes to the very nature of several liability, however, and the Legislature implicitly rejected it in adopting the presumption that contractual obligations are joint and several.").

Nor do equitable considerations weigh in favor of affirmance. Though Mr. Day insists he is bound by the judgment against the Gill Defendants for res judicata purposes, it must be emphasized that this judgment cannot be enforced against him. Mr. Day has not had his day in court. He risks no multiplicity of suits. He has not claimed or shown that his interests were somehow at stake, and adversely affected, by the final judgment in the Defamation Action. Mr. Day should not be absolved by a judgment that he will never have to satisfy.

On the other hand, affirmance would do an injustice to Mr. Walker. When Mr. Walker first sought redress for the "malicious, scorched-earth campaign to destroy [his] reputation," Add. 158, he relied on a body of law that allows him to attempt recovery, separately and sequentially, against all those who harmed him. Only upon full recovery should Mr. Walker's rights be extinguished. *See Zebnik*, 81 N.H. at 47 (unsatisfied judgment is no bar to sequential lawsuits against joint wrongdoers). These rules are premised "on the sound policy that seeks to ensure that parties will recover for their damages," *Gionfriddo v. Gartenhaus Café*, 211 Conn. 67, 71-72 (1989) (citing Restatement (Second) of Judgments § 49), and this case perfectly illustrates their purpose. *Addison Constr. Corp. v. Vecellio*, 240 So. 3d 757, 763 (Fla. App. 2018) ("[Restatement (Second) of Judgments § 49] is rooted in fairness: if a party is unable to collect on a judgment, it should not be precluded from seeking other consistent but separate manners of recovery against equally liable persons.").

All Mr. Walker seeks is to be made whole. While no measure of damage can remedy the lasting injury inflicted on Mr. Walker by Mr. Day and his confederates, Mr. Walker has a surviving, unimpaired right to

recover against Mr. Day. The court plainly erred in depriving Mr. Walker of that right. It must be restored and the judgment below reversed.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Under well-settled New Hampshire law, a new defendant must prove privity to invoke a claim preclusion defense. Mr. Day made no showing of privity with the Gill Defendants. The trial court nonetheless dismissed the Conspiracy Action because of an assumed close relationship between Mr. Day and the Gill Defendants, even though New Hampshire law does not recognize a close relationship standard. This standard derives from a body of federal common law that is entirely inconsistent with New Hampshire law across a variety of contexts. For these reasons, the trial court committed legal error and this Court should reverse the trial court's decision and remand for further proceedings. Mr. Walker respectfully requests fifteen minutes of oral argument before the full Court. Matthew R. Johnson will present oral argument for the appellant, Alex Walker.

Respectfully submitted,

Alexander J. Walker, Jr.

By his Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: June 28, 2019

By: */s/ Matthew R. Johnson*

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CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with Rule 16(3)(i) because copies of the appealed decisions are appended to this brief; Rule 16(11) because this brief contains 6,087 words exclusive of pages containing the table of contents, table of authorities, text of pertinent statutes, and addendum; and Rule 26(7) because, on this 28th day of June, 2019, copies of this brief were forwarded to Peter L. Bosse, Esq. and Jonathan P. Killeen, Esq., counsel of record for Aaron Day, via the Court's electronic filing system's electronic services.

Dated: June 28, 2019

By: */s/ Devin K. Bolger*

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ADDENDUM: ORDERS APPEALED

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Alexander Walker

v.

Aaron Day

Docket No. 216-2017-CV-00640

ORDER

Plaintiff brought this action against defendant alleging one count of conspiracy to commit defamation and a claim for enhanced compensatory damages. Defendant now moves to dismiss, arguing the present action is barred by different theories of claim preclusion. Plaintiff objects. Upon consideration of the parties' pleadings, arguments, and the applicable law, defendant's motion to dismiss is DENIED, but the action is STAYED.

Factual Background

For several years, an individual by the name of Michael Gill has published statements about plaintiff that accused him of being involved with a vast criminal conspiracy including drug trafficking, money laundering, and attempted murder. Gill utilized various media to publish his statements, including Facebook, YouTube, local radio, and an electronic billboard used by his company, Mortgage Specialists, Inc ("MSI"). Throughout this time, defendant assisted Gill behind the scenes. In addition, on March 25, 2016, defendant hosted Gill's radio show, during which he supported Gill's efforts.

On or about April 28, 2016, plaintiff filed a lawsuit against Gill and MSI for defamation in the Rockingham County Superior Court ("the Rockingham action"). The Court granted partial summary judgment in plaintiff's favor on March 30, 2017. On May 25, 2017, the Court (Delker, J.) entered final judgment against defendants on the issue of liability, but reserved defendants' right to request a jury trial on the issue of damages. That jury trial has yet to be scheduled.

On August 31, 2017, plaintiff filed the instant action against defendant.

Analysis

Defendant argues this action is barred by the doctrines of both res judicata and claim splitting. Res judicata seeks to "avoid repetitive litigation in order to promote judicial economy and a policy of certainty and finality in our legal system." Osman v. Gagnon, 152 N.H. 359, 362 (2005). Thus, "[r]es 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." Meier v. Town of Littleton, 154 N.H. 340, 342 (2006). A "cause of action" is "the underlying right that is preserved by bringing a suit or action." In re Estate of Bergquist, 166 N.H. 531, 535 (2014). It encompasses "all theories upon which relief could be claimed on the basis of the factual transaction in question." Id. (brackets omitted). "Thus, if several theories of recovery arise out of the same transaction or occurrence, they amount to one cause of action." Finn v. Ballentine Partners, LLC, 169 N.H. 128, 147 (2016). Three conditions must be met for res judicata to apply: "(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." Meier, 154 N.H. at 342.

The doctrine of claim splitting is related to but distinct from the doctrine of res judicata. See Katz v. Gerardi, 655 F.3d 1212, 1217–18 (10th Cir. 2011); see also Curtis v. Citibank, N.A., 226 F.3d 133, 138 (2d Cir. 2000).[1] While "claim splitting and res judicata both serve the same interests of promoting judicial economy and shielding parties from vexatious concurrent or duplicative litigation . . . [,] claim splitting is more concerned with the [Court's] comprehensive management of its docket, whereas res judicata focuses on protecting the finality of judgments." Katz, 655 F.3d at 1218. "[T]he test for claim splitting is not whether there is finality of judgment, but whether the first suit, assuming it were final, would preclude the second suit." Id. "If the party challenging a second suit on the basis of claim splitting had to wait until the first suit was final, the rule would be meaningless. The second, duplicative suit would forge ahead until the first suit became final, all the while wasting judicial resources." Id. at 1219.

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." Somerville House Mgmt., Ltd. v. Arts & Entm't Television Network, No. 92-CIV-4705 (LJF), 1993 WL 138736, at *2 (S.D.N.Y. Apr. 28, 1993) (collecting cases); see Vohra v. Vora, 86 Va. Cir. 412 (2013) ("Co-conspirators are in privity with each other as related to any action taken in furtherance of the conspiracy"); McIver v. Jones, 434 S.E.2d 504, 506 (Ga. Ct. App. 1993) (same). "Under [first circuit]

[1] While plaintiff argues New Hampshire has not adopted the doctrine of claim splitting, neither has the State expressly rejected it. The Court finds the reasoning of Katz and the underlying policy justifications for the doctrine compelling, and adopts them herein.

precedents, privity is a sufficient but not a 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 two 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.

With respect to the second prong, the facts of this case are largely identical to those of the Rockingham action. Indeed, the first ten pages of plaintiff's complaint in this case is a nearly word-for-word copy of the Rockingham complaint. The two actions are further intertwined due to the nature of the claim against defendant. "The gist of a civil action for conspiracy is not conspiracy as such, without more, but the damage caused by the acts committed pursuant to the formed conspiracy. There must be something done pursuant to the conspiracy which harms the plaintiff." In re Appeal of Armaganian, 147 N.H. 158, 162 (2001). Therefore, "the elements of a civil conspiracy are: (1) two or more persons; (2) an object to be accomplished . . . ; (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. at 163.

Here, plaintiff alleges that defendant conspired with Gill to publish defamatory statements, but only alleges that Gill and MSI published those statements. The crucial element of damages therefore depends entirely on the actions of the defendants in the

Rockingham action. Moreover, there is no indication that defendant's actions were unknown or undiscoverable at the time plaintiff filed the Rockingham action. Therefore, defendant meets the second prong.

With respect to the third and final res judicata factor, there has been no final judgment on the merits in the Rockingham action against Gill and MSI. "Finality will be lacking . . . if the court has decided that the plaintiff should have relief against the defendant of the claim but the amount of the damages, or the form or scope of other relief, remains to be determined." Restatement (Second) of Judgments § 13 cmt. b. The Rockingham Court issued a final judgment on liability, but the issue of damages has yet to be scheduled for a jury trial. Therefore, as the matter remains pending, res judicata is not applicable. However, as noted above, "the test for claim splitting is not whether there is finality of judgment, but whether the first suit, assuming it were final, would preclude the second suit." Katz, 655 F.3d at 1218. For the reasons given above, the Court finds that, assuming the Rockingham action were final, the present action would be precluded.

"Because of the obvious difficulties of anticipating the claim or issue-preclusion effects of a case that is still pending, a court faced with a duplicative suit will commonly stay the second suit, dismiss it without prejudice, enjoin the parties from proceeding with it, or consolidate the two actions." Curtis, 226 F.3d at 138. Because the Rockingham action is at such an advanced stage, consolidation of the two actions is not a feasible solution. Further, dismissal without prejudice would serve no greater purpose than a stay and would subject plaintiff to additional procedural burdens in the event he

became eligible to refile the action. Therefore, a stay would be the most efficient course of action.

It is longstanding law in New Hampshire that "[t]he decision to stay or hold in abeyance a particular action is within the sound discretion of the trial court." Johns-Manville Sales Corp. v. Barton, 118 N.H. 195, 198 (1978). In light of the close relatedness of the parties, the similarity and interdependence of the actions, and the impending final resolution of the first action, the Court finds staying this action until the conclusion of the first is in the best interest of justice. Accordingly, for the foregoing reasons, defendant's motion to dismiss is DENIED, but the action shall be STAYED until the resolution of the Rockingham action.

SO ORDERED.

1/10/2018
Date

Diane M. Nicolosi
Presiding Justice

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Alexander J. Walker, Jr.

v.

Aaron Day

Docket No. 216-2017-CV-00640

ORDER

Plaintiff moves for reconsideration of the court's January 10, 2018 Order, which stayed this action and held that the doctrine of *res judicata* would preclude it if and when prior defamation claims brought against the defendant's alleged co-conspirator, Michael Gill, comes to final judgment. He contends first, the court erred, and second, this matter cannot be decided as a matter of law on the pleadings, an argument he raises for the first time in his motion for reconsideration. The defendant objects.

A motion for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended." Super. Ct. Civ. R. 12(e). However, while "[the rule] entitles a party who has received an adverse ruling on a motion to seek reconsideration, [it] does not purport to authorize either party to submit further evidence bearing on the motion." Smith v. Shepard, 144 N.H. 262, 265 (1999).

Plaintiff asserts the court erred in relying on Airframe Systems v. Raytheon Co., 601 F.3d 9 (1st Cir. 2010). He maintains that the First Circuit is out of step with the prevailing common law and cites a plethora of cases that rely on the Restatement (Second) of Judgments § 49 (1982), which allows for consecutive suits against joint tortfeasors. He argues the Restatement section would be adopted by the N.H.

Supreme Court, and would allow the separate suits against these joint tortfeasors to go forward as separate lawsuits.

As a preliminary matter, the court disagrees that TMTV Corp. v. Mass Productions, Inc., 645 F.3d 464 (1st Cir. 2011) undermines the ruling in Airframe. To the contrary, the First Circuit announced in TMTV Corp. the same claim preclusion test that it used in Airframe, continuing to recognize that "claim preclusion extends beyond parties and their privies [] in unusual circumstances where a plaintiff brings separate suits with identical claims against closely related defendants. 645 F.3d at 473 (citing Negron-Fuentes v. UPS Supply Chain Solutions, 532 F.3d 1, 10 (1st Cir. 2008)). TMTV Corp. does not modify 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.

The court finds the manner in which the First Circuit considered the identity of the parties, whether the new party is closely related to a defendant from the original action, 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. It has been said that "privity is no talisman concept." U.S. v. Manning, 977 F.2d 117, 121 (4th Cir. 1993). "'Privity states no reason for including or excluding one from the estoppel of a judgement. It is merely a word used to say that the relationship between the one who is a party on the record is close enough to include that other within the res judicata.'" Id. (quoting Bruszewski v. United States, 181 F.2d 419, 423 (3rd Cir. 1950) (Goodrich, J., concurring)). It has been recognized that "older definitions [of privity] were very narrow," and that the modern label "simply expresses a conclusion

that preclusion is proper" based on the particular facts and circumstances presented. Russell v. SunAmerica Securities, Inc., 962 F.2d 1169, 1173-74 (5th Cir. 1992) (citing 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: §4449 at 418-19 (1981); Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 95 (5th Cir. 1987) ("privity is nothing more than a 'legal conclusion that the relationship between the one who is the party on the record and the non-party is sufficiently close to afford application of the principle of preclusion.'").

"'Spurred by considerations of judicial economy and a policy of certainty and finality in our legal system, the doctrine[] of res judicata [has] 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) (quotations omitted). "'Res judicata, therefore, prevents plaintiffs from splitting their claims by providing a strong incentive for them to plead all factually related allegations and attendant legal theories for recovery the first time they bring suit." Apparel Art Intern., Inc. v. Amertex Enterprises Ltd., 48 F.3d 576, 583 (1st Cir. 1995) (citation omitted). This determination must be made on a case-by-case basis. Cook v. Sullivan, 149 N.H. at 777.

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 condonation of the acts or his foreknowledge. In contrast, to prove conspiracy, the conspirators must agree on the

tortious objective. In re Appeal of Armaganian, 147 N.H. 158, 163 (2001).

Based on a comparison of the Day and Gill complaints, it is clear the claim against Day is wholly dependent on proof that Gill committed the defamatory acts that damaged Walker for which Gill has already been found liable. In other words, the proof alleged and needed to establish the claims against both parties is largely identical, all of which Walker was aware when he chose to sue only Gill in a different county. Gill, who has already been called upon once to defend his actions, will necessarily be forced to participate in discovery and trial as the central actor and witness in this case. The court will expend resources to process the same case twice. Furthermore, the encouragement of gamesmanship, particularly in discovery, and risk of inconsistent verdicts based on the same nucleus of facts are great, an outcome that does not engender confidence in the judicial system.

Neither the general principle espoused in Restatement § 49 nor the bulk of the cases cited by plaintiff address the circumstance presented to this court. Most of the cases cited involve joint tortfeasors who either acted concurrently or consecutively to cause harm, for such things as trespass, negligence, or breach of contractual obligations. The new defendants for the most part either independently contributed to the plaintiff's injury or were contractually obligated to satisfy any breach of contract by the prior defendants, without mutual design to commit a tort against another. See, e.g., Day v. Kerkorian, 61 Mass. App. Ct. 804, 812–13 (2004) (allowing plaintiff to bring an interference with contractual relationship claim against an insurance agent where initial suit only determined the insurance company's obligations under a life insurance policy); Hilbert v. Roth, 149 A.2d 646 (Pa. 1959) (negligence arising out of an auto accident);

State v. Harding, No. 13AP-362 and No. 13AP-459, 2014-Ohio-1187 (regarding suit against guarantor of a loan after primary borrower defaulted); and Hecht v. New York, 454 N.E.2d 527, (N.Y. App. 1983) (suit involving negligent acts of city and landowner for sidewalk defect). But see Shahi v. Donnelly, 2010 Vt. Super. LEXIS 19 (2010) (allowed successive suits against husband and wife alleged to be coconspirators).[1]

This court's ruling is not inconsistent with the general rule set out in Restatement of (Second) of Judgments § 49, but provide a flexible and logical means of evaluating when parties are truly one and the same for purposes of res judicata. Other courts have likewise determined that conspiracy is a relationship that warrants a finding of privity or a finding of sufficient closeness to bar a successive suit against a conspirator. See Gambocz v. Yelencsics, 468 F.2d 837, 842 (3rd Cir. 1972) (finding the naming of conspirators in a second complaint "was so close to parties to the first that the second complaint was merely a repetition of the first cause of action, and thus barred); Caro v. Fidelity Brokerage Servs., No. 3:14–CV–01028 (CSH), 2015 WL 1975463, at *19 (D. Conn. April 30, 2015) ("[A] number of courts have found that alleged co-conspirators can be considered 'in privity' with one another for res judicata purposes . . ."); Mendez Internet Manangement Services, Inc. v. The Bankers Association of Puerto Rico, Civil No. 07–cv–1667, 2011 WL 336247 (D. Puerto Rico Feb. 3, 2011); Marcello v. Harris, Civil No. 07–cv–55, 2007 WL 3274325, at *6 (D.R.I. Nov. 2, 2007) (finding that new defendants had a close and significant relationship with the prior defendants "by virtue of their status as alleged co-conspirators in the conspiracies . . . identified by the plaintiff"); Burns v. Town of Lamoine, No. Civ. 00–89–B–S, 2000 WL 1612704, at *3 (D.

[1] The court recognizes this contrary opinion. However, the Vermont court does not address whether a tort such as conspiracy, where the defendants are joint perpetrators should be an exception to the general rule.

Me. Sept. 21, 2000) (stating that "[a]s an alleged co-conspirator, defendant shares sufficient identity with the original defendants" for claim preclusion to apply); Winrock Grass Farm, Inc. v. Affiliated Real Estate Approasiers of Arkansas, Inc., 373 S.W.3d 907, 913 (Ark. App. 2010) (noted that it is "widely recognized that coconspirators are privies for res judicata purposes, where [] the alleged conspirator's existence and actions were known to the plaintiff during the prior litigation."); Press Publ., Ltd. v. Matol Botanical Int'l, 37 P.3d 1121, 1128 (Utah 2001) (held "final adjudication of plaintiff's claims bars subsequent litigation concerning the same subject matter against officers or owners of a closely held corporation, partners, co-conspirators, agents, alter egos or other parties with similar legal interests."); Bartlett v. Bartlett, Civil No. 3:17-cv-00037, 1018 WL 1211818 (S.D. Ill. March 8, 2018); McLaughlin v. Bradlee, 599 F. Supp. 839, 848 (D.D.C. 1984); RSM Product Corp. v. Freshfields Bruckhaus Deringer U.S. LLP, 800 F. Supp. 2d 182, 193 (D.D.C. 2011); Somerville House Mgmt., Ltd. v. Arts & Entm't Television Network, No. 92-CIV-4705 (LJF), 1993 WL 138736, at *2 (S.D.N.Y. Apr. 28, 1993); McIver v. Jones, 434 S.E.2d 504, 506 (Ga. Ct. App. 1993); Discon, Inc. v. Nynex Corp., 86 F.Supp.2d 154, 166-67 (W.D.N.Y.2000); and Vohra v. Vora, 2013 WL 8118666 at 1, 86 Va. Cir. 412 (2013) ("Co-conspirators are in privity with each other as related to any action taken in furtherance of the conspiracy"). See also New York Pizzeria, Inc. v. Syal, 53 F. Supp. 3d 962, 969 (S.D Tex. 2014) (rejecting a *per se* rule that coconspirators are always in privity, but distinguishing without disapproval cases, such as Gambocz, where nonmutual claim preclusion was held appropriate based on the facts presented, which are analogous to those of the case at bar.)

Courts allowing non-party defendants to invoke a res judicata defense share a

common thread in their decisions.

> Where a plaintiff has sued parties in serial litigation over the same transaction; where plaintiff chose the original forum and had the opportunity to raise all its claims relating to the disputed transaction in the first action; where there was a "special relationship" between the defendants in each action, if not complete identity of parties; and where although the prior action was concluded, the plaintiff's later suit continued to seek essentially similar relief—the courts have denied the plaintiff a second bite at the apple.

Lubrizol Corp. v. Exxon Corp., 871 F.2d 1279, 1288 (5th Cir. 1989). After reviewing the plaintiff's argument and the law cited, the court remains convinced on this State law issue of first impression that the First Circuit's analysis in Airframe is appropriate.

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. Nonetheless, the argument would bring no success. The court, as it must, in deciding the Day's dismissal request, has accepted the plaintiff's allegations as true as to Gill and Day's relationship and the respective actions of each. Based on the facts presented, dismissal would be proper upon final judgment in the Gill case.

In sum, given the unusual and specific circumstances of this case, the court finds the Airframe analysis remains applicable and, for the reasons set out in its earlier order and above, declines to reconsider its earlier ruling. The plaintiff's motion for reconsideration is DENIED.

SO ORDERED.

Date: 5/3/2018

Diane M. Nicolosi
Presiding Justice

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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June 06, 2018

FILE COPY

Case Name: **Alexander J. Walker, JR v Aaron Day**
Case Number: **216-2017-CV-00640**

You are hereby notified that on June 05, 2018, the following order was entered:

RE: RENEWED MOTION TO DISMISS COMPLAINT AND CLAIMS FOR CIVIL CONSPIRACY AND ENHANCED COMPENSATORY DAMAGES:

"This matter will remain stayed pending decision of the appellate court in Mr. Gill's case." (Nicolosi, J.)

W. Michael Scanlon
Clerk of Court

(923)

C: Daniel E. Will, ESQ; Peter L. Bosse, ESQ; Jonathan P. Killeen, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Alexander J. Walker, Jr.

v.

Aaron Day

Docket No. 216-2017-CV-00640

ORDER

Plaintiff brought this action against defendant alleging one count of conspiracy to commit defamation and a claim for enhanced compensatory damages. In October 2017, defendant moved to dismiss on the grounds that the action was barred by the doctrines of res judicata and claim splitting, as plaintiff had brought a similar action for defamation against defendant's alleged co-conspirator in Rockingham County. Although the Court agreed with defendant that this action would be barred if the Rockingham case were complete, the pendency of that action precluded the Court from applying the doctrine of res judicata here. Therefore, on January 10, 2018, the Court denied defendant's motion but stayed this action pending resolution of the Rockingham action. Plaintiff moved for reconsideration, which the Court denied on May 3, 2018.

The Rockingham action concluded and was appealed to the New Hampshire Supreme Court. On February 7, 2019, the Supreme Court affirmed the judgment of the superior court, resulting in finality of that action. Therefore, defendant has now moved to renew his original motion to dismiss on the basis of res judicata. Plaintiff objects. However, the Court notes that all of the arguments raised in plaintiff's objection were

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previously raised in his objection to defendant's original motion to dismiss and in his motion for reconsideration. The Court addressed these arguments extensively in its prior orders, and incorporates the analysis in those orders herein. (See Court Index #5A & 9A.) Based on the reasoning set forth in those prior orders, the Court finds the present action is barred by the doctrine of res judicata.

Accordingly, defendant's renewed motion to dismiss is GRANTED.

SO ORDERED.

3/26/2019
Date

Diane M. Nicolosi
Presiding Justice