THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019–0264

Riverbend Condo Association

v.

Groundhog Landscaping & Property Maintenance, Inc.

Appeal from the Hillsborough County Superior Court, Northern District

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APPELLEE'S / DEFENDANT'S BRIEF

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QUESTION PRESENTED FOR REVIEW

Whether the Superior Court properly granted defendant Groundhog Landscaping and Property Maintenance's motion to dismiss, based on *res judicata*, where plaintiff failed to properly seek reconsideration and/or appeal the dismissal of its prior case arising out of the same operative facts (such disposition resulting from both counsel's failure to file pretrial statements and attend the trial management conference) and instead opted to re-file its complaint, a conscious strategy prohibited by longstanding principles of estoppel and this court's precedent?

STATEMENT OF THE CASE

Plaintiff Riverbend Condo Association ["Riverbend"] sued defendant Groundhog Landscaping & Property Maintenance, Inc. ["Groundhog"] in the Circuit Court, alleging breach of contract related to an alleged failure to provide agreed upon "mulching" as part of its landscaping and plowing services. See No. 456-2017-SC-0740 (Manchester Cir. Court, Dist. Div.). In reply, Groundhog transferred the case to the Hillsborough County Superior Court for jury trial (No. 216-2018-CV-598, Hillsb. Co. Super. Ct., Northern Dist.), where the court issued a scheduling order on October 26, 2017 [over defendant's objection]. Following discovery and sundry motions, on August 8th, the trial court (Abramson, J.) issued an order, noting: "Neither party appeared at the final trial management conference this date. Trial is canceled and case is dismissed." See Appendix ["A"] at p. 1. Rather than filing a properly formulated motion to reconsider, Riverbend filed a late "Motion to Reopen" on August 17, 2018. See A-2 to A-3. Groundhog objected on August 22d and the court issued an order on September 5th, stating: "Motion denied. Pleading constitutes a motion to reconsider, not 're-open' and is untimely filed." A-

4 to A-6 & A-7 (emphasis added). Riverbend did not docket any additional pleadings or file an appeal of that disposition.

On September 17, 2018, Riverbend filed a second breach of contract case, adding additional legal theorem, but relying on the same contract, circumstances and alleged breach. No. 216-2018-CV-737, Hillsb. Co. Super. Ct., Northern Dist.). Groundhog filed a motion to dismiss: *res judicata* -- asserting that neither party filed pretrial statements or attended the trial management conference (as scheduled) in the earlier litigation and that "[n]either party moved to reconsider, nor pursued a timely appeal, though plaintiff did file an untimely, self-styled, unsuccessful motion to re-open the prior litigation in [the Superior Court.]" See A-8 to A-9. Groundhog further noted that in lieu of a proper appeal, Riverbend made a tactical decision to file a second suit, adding additional theorem "some of which are redundant to one another and/or improperly framed, [but] all rely on the same *operative* facts asserted in and forming the bases for the prior litigation which the court dismissed." See A-9. The defense noted that principles of *res judicata* and interpretive cases from this court compelled dismissal of this second suit. See A-9 to A16. Riverbend objected, disputing the categorization and practical effect of the prior adjudication. See A-17 to A-20.

The Superior Court (Anderson, J.) conducted a hearing on Groundhog's motion to dismiss on January 29, 2019. See Transcript of Hearing [hereinafter "Tr.," with page references]. During that hearing, the defense chronicled the case history and applicable standards (Tr.2-4); urging compliance with both the letter and spirit of precedent, particularly the directly applicable holding in Foster v. Bedell, *infra*, and adding that the court issued a standard scheduling order[1] with its usual caveats. Tr.5-7.

1 The Superior Court issued its scheduling order over the defense's objections -- the defense

Judge Anderson actively engaged in colloquies with both counsel, observing that Federal Rule of Civil Procedure 41 speaks to the presumption [of being "with prejudice"] when a federal disposition is silent, inquiring whether the plaintiff had filed any titled reconsideration request or appeal in *Riverbend I* (which the defense answered in the negative) and noting that he had reviewed the plaintiff's cited cases[2] – which patently seemed distinguishable because the unique facts evinced good faith efforts to comply with the court rules. Tr.7-10. When asked for an interpretation of the take-away from *Riverbend I*, the defense noted that Foster v. Bedell compelled dismissal of *Riverbend II*, where the parties did not comply with pretrial filings and trial management attendance and where the plaintiff failed to properly reconsider the disposition and/or take an appeal. Tr.11-13. Conceding the first and second elements of *res judicata* analysis, plaintiff's counsel framed the disposition as a "mere dismissal" more akin to a voluntary non-suit, with no preclusive effect. Tr.14. When asked about the disposition entered at the eleventh-hour of the case, plaintiff's counsel discussed the "motion to re-open" and stated: "Attorney Prieto inadvertently filed it on the 11th day. It was styled as a motion to re-open. That was a tactical choice on his point [sic]; I can't speak to that." Tr.15 (emphasis added). Finally, Riverbend's counsel advanced Donovan v. Canobie Lake Park, *infra*, in support of relief [and continued prosecution], contrasting that decision with Barton, *infra*. Tr. 15-17.

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requesting a structuring conference and the plaintiff submitting its proposed scheduling stipulation with a motion to cancel the preliminary hearing. Those dates, proposed by Riverbend, were thereby adopted and applied by the trial court (Abramson, J.).

2 The lower court noted plaintiff's reliance on Gray v. Kelly, 161 N.H. 160, 13 A.3d 848 (2010) and Berg v. Kelley, 134 N.H. 255, 590 A.2d 621 (1991) (Tr.10), as well as Town of Plaistow v. Riddle, 141 N.H. 307, 681 A.2d 650 (1996) and Roberts v. GMC, 140 N.H. 723, 673 A.2d 779 (1996) (Tr.11). However, as noted herein, those cases are neither controlling nor persuasive to the limited question before the lower or this court.

Counsel closed by echoing the disposition as a "mere dismissal" that did not explicitly term the result a "default." Tr.17. Later that same date, pursuant to the request of the presiding judge, the undersigned filed supplementation – specifically, copies (as exhibits) of the court's electronic orders and notices (of scheduling) issued on October 26, 2017 (in the prior litigation). See A-21 to A-26.

On March 18, 2019, Judge Anderson issued an order granting Groundhog's motion to dismiss, applying *res judicata*. See A-28 to A-32. His honor traced the procedural history of the successive cases and identified the elements embodied in *res judicata* analysis. See A-28 to A-29. The court noted that "[b]oth parties agree that the first two elements are satisfied in this case and the sole issue is whether the court's dismissal constituted a 'final judgment on merits' for purposes of *res judicata*. See A-29. The trial court noted that an answer in the affirmative effectively bars re-litigation in a second action. See A-29 to A-30. Noting the earlier disposition's silence on whether such dismissal issued with or without prejudice, Judge Anderson considered prior decisions of this court – *e.g.*, Donovan v. Canobie Lake Park, 127 N.H. 762, 763 (1986), and Foster v. Bedell, 136 N.H. 728, 730 (1993) – as well as other courts and court rules (both federal and sister states) for guidance. See A-30 to A-31. The court wrote:

> Based on the foregoing, the Court concludes that the court's prior dismissal was a judgment on the merits for purposes of *res judicata*. This decision is informed, in part, by the general rule following in other jurisdictions where a dismissal order is presumed to be 'with prejudice' when silent as to its intended effect. This decision also comports with the holding in *Foster* – than an involuntary dismissal for failure to follow a court order is considered a judgment on the merits. 136 N.H. at 730 (finding that a plaintiff's 'failure to comply with the court's order … and the resulting dismissal was a judgment on the merits precluding them from availing

> themselves of the saving statute'). Similarly here, in plaintiff's initial action, the trial management conference was scheduled nearly ten months in advance, and both parties received clear notice through the Case Structuring Order that failure to attend it could result in dismissal of the case. (*See* Def's Supp. Ex. A). Plaintiff's subsequent absence at the trial management conference was in violation of this court order, which warranted the court's decision to dismiss plaintiff's action. Moreover, Plaintiff neither filed a timely motion to reconsider pursuant to Superior Court Rule 12(e) nor sought leave to file a motion to reconsider after the passage of 10 days. Instead, Plaintiff filed a motion to re-open the case, which the court denied as untimely. In light of *Foster*, the court's dismissal for Plaintiff's failure to comply with the scheduling order (and Plaintiff's failure to cure that issue in a timely manner) constitutes a judgment "with prejudice."

See A-31 to A-32. Noting the general preference to reach a case on its merits, the lower court nevertheless added: "However, the issue before the Court is not the validity of the court's dismissal order, but rather its intended effect on plaintiff's subsequent, substantively identical case. Having found that the court's dismissal order constituted a judgment 'with prejudice,' the Court concludes that the dismissal is a final judgment on the merits and bars further action under the doctrine of *res judicata*." See A-32.

Riverbend filed a lengthy motion to reconsider the dismissal (A-33 to A-39), Groundhog objected (A-40 to A-44) and the Superior Court (Anderson, J.) ultimately denied reconsideration, noting that it cited federal law *only* for guidance (not direct application) and that the "very similar" Foster v. Bedell decision "guided" the court's holding. Further the trial court distinguished the cases relied upon by Riverbend and concluded: "Although New Hampshire law is somewhat unclear on what presumption should be afforded to a dismissal that is silent as to whether it is with or without prejudice, on the facts of this case and with the guidance of *Foster*,

the court confirms its earlier finding that a dismissal of the first case was with prejudice and thus precludes the pending action." See A-45 to A-49 (emphasis added). This appeal followed.

SUMMARY OF THE ARGUMENT

The Superior Court properly granted defendant Groundhog Landscaping and Property Maintenance's motion to dismiss, based on *res judicata*, where dismissal in the prior case (arising out of the same operative facts) stemmed from the failure to file pretrial statements and attend the mandatory trial management conference and the plaintiff failed to properly and timely seek reconsideration and/or appeal that earlier dismissal, but instead re-filed its complaint, a strategy prohibited by precedent and longstanding principles of estoppel.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED GROUNDHOG'S MOTION TO DISMISS: *RES JUDICATA,* AS COMPELLED BY THE FACTS OF THIS CASE AND THE APPLICATION OF *FOSTER V. BEDELL*

A. *Standard of Review*

Relative to the standard of review applicable to dismissal, this Court has written:

> Our standard of review of the trial court's grant of a motion to dismiss for failure to state a claim is whether the factual allegations in the plaintiff's complaint are reasonably susceptible of a construction that would permit recovery. Plaisted v. LaBrie, 165 N.H. 194, 195, 70 A.3d 447 (2013). We assume that the plaintiff's allegations of fact are true and construe all reasonable inferences from such facts in the light most favorable to him. Id. We will not, however, assume the truth or accuracy of any allegations which are not well-pleaded, including conclusions of fact and principles of law.

> Snierson v. Scruton, 145 N.H. 73, 76, 761 A.2d 1046 (2000). We then engage in a threshold inquiry that tests the facts in the complaint against the applicable law and, if the allegations do not constitute a basis for legal relief, we will uphold the granting of the motion to dismiss. Plaisted, 165 N.H. at 195.

Stone v. Bruce, -- N.H. --, -- A.3d --, 2018 N.H. LEXIS 231 at *1-2 (Nov. 27, 2018). However, when a litigant moves to dismiss based exclusively upon *res judicata* – an affirmative defense – the movant bears the burden of proving its application. Gray v. Kelly, 161 N.H. 160, 164, 13 A.3d 848, 851 (2010)[3]. Because the trial court determined that *res judicata* applied as a matter of law, [this court's review] is *de novo*. Id. (citations omitted).

B. *Res Judicata Analysis*

This court has noted:

> *Res judicata* applies if three elements are met: (1) the parties are the same or in privity with one another; (2) the same cause of action was before the court in two actions; and (3) the first action ended with a final judgment on the merits. Id. Whether a claim is barred by *res judicata* is determined on a case-by-case basis. Cook v. Sullivan 149 N.H. 774, 777 (2003).

Cavanaugh v. Beaulieu, Not Reported in A.3d, 2017 WL 4770390 at *1 (N.H. Sept. 20, 2017) (citation omitted). The United States District Court for the District of New Hampshire has added:

> In applying *res judicata*, New Hampshire law defines "cause of action" to include "all rights to remedies with respect to all or any part of the transactions, or series of connected transactions, out of which the [first] action arose." Grossman v. Murray, 141 N.H. 265, 269 (1996). "*Res judicata* will bar a second action even though the plaintiff is prepared in the

3 Gray is neither controlling nor persuasive in this instance, as that case dealt only with the question of whether the second element ("the same cause of action") of *res judicata* analysis applied. 161 N.H. at 164, 13 A.3d at 851-52 ("Gray does not contest the first and the third elements.")

> second action to present evidence or grounds of theories of the case not presented in the first action." Sleeper v. Hoban Family P'ship, 157 N.H. 530, 534 (2009) [*sic*].

Goodman v. Wells Fargo Bank, N.A., 2018 WL 4440549, 2018 DNH 189 at *5 (D.N.H. Sept. 17, 2018). See also Terry v. Chicago Title Insurance Company, Not Reported in A.3d, 2017 WL 4770463 at *2 (N.H. Sept. 29, 2017) (affirming dismissal of second suit on *res judicata* grounds, despite claim that plaintiff did not possess sufficient information in first case and sought additional remedies in subsequent filing). In the case at bar, the plaintiff conceded below, Tr.14, [and in its brief, at p. 10], the first two elements of *res judicata* analysis, leaving only the third – *i.e.*, whether the prior adjudication operated as a final decision on the merits.

C. *Final Decision on the Merits*

The fundamental question before this court is whether the parties' failure to file pretrial statements and attend the case structuring conference (both set forth in the court's scheduling orders of October 26, 2017) now constitutes a final decision on the merits warranting preclusive effect, particularly where plaintiff untimely moved to re-open[4] [rather than reconsider] the earlier disposition, failed to pursue a proper appeal of that first dismissal and made a "tactical election" to resort to a second complaint instead. Tr.9. In *Riverbend II*, the trial court properly found that such a

4 In its self-styled "motion to re-open," the appellant did not request any clarification on the category of dismissal, nor move to have such disposition designated as being "without prejudice;" rather it sought only a re-opening of the case and a resetting of the trial management conference – such requested relief put to the *same* trial judge who dismissed the case. See A-2 to A-3. In light of such omissions and appellant's failure to appeal the first dismissal and/or the motion to re-open – raising the specter of a lack of "preservation" – such a course of conduct stands in contrast to the "diligent suitor" observations in cases relied on by Riverbend. See Brief at p. 17-18. Compare with Berg v. Kelley, 134 N.H. 255, 258-59, 590 A.2d 621, 623 (1991) (allowing second suit where dismissal stemmed from counsel's use of wrong writ form, clerk's refusal to docket it and the trial court's denial of a corresponding and timely motion to amend – such a series of events supporting the conclusion of diligent pursuit of the suit).

sequence of events does not warrant exempting this matter from the longstanding precedent and principles embodied in *res judicata* analysis, finding its answer compelled by the "facts of this case" and this court's holding in Foster v. Bedell.

In Foster, 136 N.H. 728, 729, 621 A.2d 936, 937, *cert. denied*, 510 U.S. 844, 114 S.Ct. 133, (1993), the plaintiff appealed an order dismissing the plaintiffs' case due to the application of *res judicata*. Chief Justice Brock, writing for this court, noted the plaintiff's position: "He contends that dismissal of his first suit for failure to file a pretrial statement was not a judgment on merits, and therefore, pursuant to RSA 508:10, he may bring a new action." Id. The Foster Court disagreed and affirmed dismissal of that successive suit. Id. Similar to the instant, the trial judge in the first Foster filing "non-suited" the plaintiff for failure to file a pretrial statement, denied a motion to reconsider [twice, and after a hearing, but without a record[5]] and observed that the plaintiff did not appeal the first disposition. Id. Also akin to the instant scenario, the Fosters then filed a second suit and the defense successfully moved for dismissal, based on principles of *res judicata*. Id. In reviewing the same arguments that are before the court again in this matter, the Foster Court wrote:

> The plaintiff argues that under RSA 508:10, a second action is permitted after a judgment of nonsuit. HN1 RSA 508:10, the so-called "saving statute," provides: "If judgment is

5 This court noted that while a designation [as being "with" or "without prejudice"] "would have prevented much of the confusion," 136 N.H. at 730, 621 A.2d at 937, the trial court in the second filing indicated it would "carefully review the file and emphasized that it would grant the motion to dismiss if there were an indication in the file that any of the orders in the previous lawsuit could be construed as being without prejudice." Id. Here, Judge Anderson similarly inquired and review the procedural history, including the fact that the plaintiff moved to re-open the matter with the same presiding judge (Abramson, J.) that had dismissed the litigation for rules non-compliance. Moreover, Foster added that "[a] voluntary nonsuit, if allowed by the court, is not a bar to a second action[,]" something the appellant failed to obtain [or even request] during disposition of *Riverbend I*. Id. (emphasis added). Accord Town of Plaistow v. Riddle, 141 N.H. 307, 681 A.2d 650 (1996) (holding that a voluntary non-suit is not a bar to 2d suit). See T.11.

> rendered against the plaintiff in an action brought within the time limited therefor, or upon a writ of error thereon, and the right of action is not barred by the judgment, a new action may be brought thereon in one year after the judgment." Thus, the sole issue on appeal is whether a nonsuit for failure to file a pretrial statement is a judgment on the merits, thereby barring by *res judicata* a second suit alleging the same cause of action.
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> In Barton v. Barton, 125 N.H. 433, 435, 480 A.2d 199, 200 (1984), this court held that a default judgment entered against the plaintiff for failure to comply with the superior court discovery rules constitutes a judgment on the merits and, thus, a second suit alleging the same cause of action is barred by the doctrine of *res judicata*. As we pointed out, "a default, by definition, is a failure to take a step required by the rules of procedure." Id. Despite the application of differing terminology, we see no logical reason why, under circumstances present here, an involuntary nonsuit for failure to obey a court order should be treated differently than a default for failure to obey a court order. See *Restatement* (Second) *of Judgments* § 19 (1980) (judgment for defendant based on failure of plaintiff to obey an order of the court bars another action on the same claim).

Id. at 729-30, 621 A.2d at 937. That decision, on all fours with the instant situation and as interpreted since its issuance[6], confirms the propriety of Judge Anderson's dismissal of *Riverbend II* and militates against current appellate arguments which are unduly reliant on labels and "terminology." Id. at 730, 621 A.2d at 937 ("We hold that the Fosters' failure to comply with the court's order on the filing of pretrial statements and the resulting dismissal was a judgment on the merits precluding them from availing

6 Ziniker v. Waldo, 2007 U.S. Dist. LEXIS 8623 at 10*, 2007 WL 445558 (D.Or. Feb. 6, 2007) ("Other state courts have held that a saving statute does not constitute an exception to the doctrine of res judicata for judgments of dismissal on the merits. Foster v. Bedell, 136 NH 728, 730, 621 A.2d 936, 937, *cert denied*, 510 U.S. 844, 114 S. Ct. 133, 126 L. Ed. 2d 96 (1993) (dismissal for failure to file pretrial statements was a judgment on the merits, precluding application of saving statute)[.]")

themselves of the saving statute. The trial court did not err in dismissing the second suit, which the plaintiff concedes is identical to the first, on grounds of *res judicata*.") (emphasis added). Accord Barton v. Barton[7].

Cognizant of such precedent, the need to evidence diligence in pursuing a suit when resorting to use of RSA 508:10 and the tactical decision made by this appellant, the procedural measures and sequencing in *Riverbend I* further support this *res judicata* dismissal. This court, in Moulton-Garland v. Cabletron Sys., Inc., 143 N.H. 540, 542, 736 A.2d 1219, 1220-21 (1999), reasoned as follows:

> The sole test under RSA 508:10 is "whether the right of action is, or is not, barred by the first judgment." Town of Plaistow v. Riddle, 141 N.H. 307, 310, 681 A.2d 650, 652 (1996) (quotation omitted). Although the saving statute protects the "diligent suitor" and is liberally construed in favor of litigating the merits of an action, see Roberts v. General Motors Corp., 140 N.H. 723, 725, 673 A.2d 779, 781 (1996) (quotation omitted), it cannot revive a lawsuit in which a final judgment on the merits has been rendered, see Foster v. Bedell, 136 N.H. 728, 729-30, 621 A.2d 936, 938, *cert. denied*, 510 U.S. 844, 126 L. Ed. 2d 96, 114 S. Ct. 133 (1993). A judgment entered "with prejudice" constitutes a judgment on the merits of a matter, even if it resulted from a violation of a procedural rule, see Roberts, 140 N.H. at 727, 673 A.2d at 782; Foster, 136 N.H. at 730, 621 A.2d at 938, and bars any attempt to revive the previous action, cf. Town of Plaistow, 141 N.H. at 310, 681 A.2d at 653. Therefore, if a court enters judgment "with prejudice," and no claims pled

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7 In Barton, this court reversed the trial court's denial of a defendant's motion to dismiss (premised on *res judicata*), the disposition in the first case entered via a "default" judgment due to the plaintiff's failure to answer discovery. 125 N.H. at 433-34, 480 A.2d at 199-200 (emphasis added). There, the plaintiff moved to set aside the default judgment (within 10 days after judgment), but the court found that counsel's neglect did not constitute grounds for such relief. Id. Addressing whether such disposition was "on the merits," the Barton Court observed that "a default, by definition, is a failure to take a step required by the rules of procedure." Id. at 435, 480 A.2d at 200. Accordingly, this court deemed the prior dismissal (irrespective of nomenclature) preclusive. Id. That standard applies equally here, where the dismissal stemmed from non-compliance with rules, orders and pretrial requirements (just before scheduled trial).

> within that lawsuit are segregated from that judgment, the saving statute cannot revive that suit regardless of whether the second suit asserts the same facts as the first. Cf. Roberts, 140 N.H. at 724-26, 673 A.2d at 783 (multiple use of saving statute permissible to revive claim for which plaintiff accepted voluntary nonsuit but segregated from others dismissed on summary judgment because it was "virtually always on the active docket").

Id. Accord Jenks v. Menard, 1998 WL 35422665 at *1 (N.H. Super. Ct. June 16, 1998) (reasoning that "[t]he procedural posture of that case when disposed of" warranted a finding that the disposition was entered "with prejudice," despite silence on such term). A review of the measures undertaken by similarly situated plaintiffs, such as those in Foster and in Barton, exhibit more reasonable diligence than Riverbend's measures.

Against this backdrop and in a bid to obfuscate controlling precedent, Riverbend argues that the prior dismissal was: 1. not a final judgment; 2. not on the merits; 3. not "with prejudice;" and 4.was actually a failure to prosecute[8]. See Brief, *passim*. However, arguing that the absence of "with prejudice" language in the dismissal order issued in *Riverbend I* (Brief, p. 10-11) ignores that counsel submitted its motion to re-open to the *same* presiding judge who adjudicated the original disposition; in such a situation, her honor remained free to exercise and apply Superior Court Rule 1, but instead denied the styled relief, thus leaving the need to appeal, which Riverbend failed to do [leaving any lack of clarity or unreasonable exercise of discretion unpreserved and now abandoned]. So too is

8 Riverbend gave no notice to the trial court of its now asserted decision to forego prosecution in *Riverbend I*, did not request a voluntary non-suit, nor make this argument in its "motion to re-open," constituting a failure to preserve this argument for purposes of appellate review. Riverbend relies on Carveth v. Latham, 110 N.H. 232, 233-34, 265 A.2d 1, 2-3 (1970), see Brief at p. 17, a case in which counsel but not their parties presented for an issues to court trial in district court (rendering testimony impossible), a situation vastly different than that at bar.

Riverbend's attempt to align its conduct with Donovan rather than Barton (Brief, p. 11-12) unavailing; those cases [and others[9] abstracted by Riverbend] dealt with different forms of default and ignore the fundamental discretion a trial judge retains to determine the bases for and impact of *brevis* disposition for non-compliance, Roberts, 140 N.H. at 727, 673 A.2d at 782 ("The court also has the power to dismiss an action with prejudice where the plaintiff has not complied with court rules."). The particular circumstances evident in the appellant's cited cases further undermine its arguments, particularly when contrasted[10] with Riverbend's conscious choices in this litigation. Tr.10. Plaintiff's sophistic argument that the disposition in *Riverbend I* did not issue "on the merits" (Brief, p. 13-15) ignores precedent from this court and its own failure to move to reconsider and/or appeal the first dismissal (including its lack of categorization as being "with" or "without prejudice"). Ultimately, the trial court in both *Riverbend I* and *Riverbend II* had the occasion to determine whether the circumstances supported the view of the first disposition as having been with or without prejudice; Judge Abramson, by conduct, treated the

9 See, e.g., Roberts v. GMC, 140 N.H. 723, 727, 673 A.2d 779 (1996), recognized that the court has authority to dismiss a case with prejudice where there is non-compliance with the applicable procedural rules, but that case examined the use of the "savings statute" as to a second and third filing (though recognizing the litigation to have been "virtually always on the active docket"), rather than the specific issue currently before this court; moreover, "Roberts followed the suggestion of the trial judge and accepted a voluntary nonsuit on [his] remaining claim in his first suit. Id. at 724,673 A.2d at 780 (emphasis added).

10 In Donovan v. Canobie Lake Park Corp., 127 N.H. 762, 508 A.2d 1043 (1986), a rarely cited case which forms the linchpin of Riverbend's argument, this court observed that "the defendant's counsel apparently represented in good faith to the court that the plaintiff would be able to refile his action even if the conditional default were made final." Id. at 763, 508 A.2d at 1044 (emphasis added). That contrasts critically with the record here. See Tr.10. Additionally, Donovan focused its review on the import of a default *order*, rather than a default *judgment*. Id. See also Cole v. Hobson, 143 N.H. 14, 16, 719 A.2d 560, -- (1998) ("The defendant does not challenge the entry of default against her, but rather argues that it does not constitute a final judgment on the merits.") (*citing* Donovan). The dismissal at bar here was final and conclusive, not a mere default order.

outcome as the latter and Judge Anderson, by written order, engaged in the requisite analysis and concurred in this perspective.

As reasoned by the trial court, the plaintiff's reliance on distinguishable cases was and is unavailing. Judge Abramson properly dismissed the prior iteration of this case [*n.b.*, she did not issue an order of default], then upheld that dismissal and Judge Anderson properly ruled such disposition to be a final decision on the merits, supportive of the *res judicata* bar. This court's prior decisions, the disposition below and learned treatise all buttress the basis for affirming Judge Anderson's reasoning and this result. Accord Gordon J. MacDonald, 5 *New Hampshire Practice: Wiebusch on New Hampshire Civil Practice & Procedure* § 35.01 at p. 35-1 (4th ed. Matthew Bender & Co., 2014) ("In addition, if neither party appears at a hearing … the court may dismiss the case."). Id. at § 32.14 at p. 32-12 (noting that a "voluntary" non-suit is a final judgment) & § 33.12 at p. 33-13 (noting that: "A default judgment is a final judgment on the merits, conclusive as to the rights of the parties and their privies and constitutes an absolute bar to the subsequent litigation on the same cause of action."). As noted in such learned treatise:

> Former Superior Court Rule 62 generally provided that a failure of counsel to file a timely and complete pretrial statement or to attend a structuring conference or trial management conference, or failure to comply with any other provision of that Rule constituted grounds for sanctions, including entry of non-suit, default, or such other order as justice may require. A violation of pretrial requirements is now subject to Superior Court Rule 1(c), which authorizes the court to "take such action as justice requires."

Id. at § 29.08 at p. 29-12 to 29-13 (footnote and citations omitted).

Admittedly, both counsel failed to file pretrial statements and attend the long-scheduled trial management conference, but the plaintiff's conduct *after* dismissal of *Riverbend I* ultimately and conclusively compounds the

necessity of *res judicata* application. Had the plaintiff disagreed with the court's bases for or authority to dismiss the prior suit and/or its ability to sustain such disposition [when addressing the motion to "re-open"], the proper avenue was via a properly formulated and timely motion to reconsider and/or an appeal to this court[11] -- neither of which Riverbend pursued. The question may be posed as to how Riverbend could sincerely believe it retained the ability to file a second case after the presiding judge promptly denied its motion to re-open its first filing. Per Foster v. Bedell and Barton v. Barton, the lower court properly dismissed *Riverbend II* on *res judicata* grounds and such precedent, coupled with examination of the record below (in both the first and second iteration of this litigation) and principles of jurisprudence warrant summarily affirming that decision.

CONCLUSION

For the reasons stated herein, appellee/defendant Groundhog Landscaping and Property Maintenance, Inc. respectfully requests that this Honorable Court affirm the order of dismissal issued by the trial court (Anderson, J.) and hold that principles of *res judicata* precluded appellant/plaintiff's second suit arising out of the same operative facts.

ORAL ARGUMENT

Per Supreme Court Rule 15 (3) (h), the undersigned certifies that he does not believe that oral argument is necessary for full consideration of this appeal; the undersigned notes that the appellant-plaintiff has likewise waived oral argument. See Brief at p. 18.

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11 Once Riverbend opted to forego a proper appeal of the dismissal of its first complaint, such disposition ripened into a final decision on the merits, warranting preclusive effect. Cf. Gadson v. Royal/Concord Gardens, No. CV-96-001-M, Order at p. 7 (D.N.H. Nov. 20, 1996).

Respectfully submitted

Groundhog Landscaping & Property Maintenance, Inc.

By its attorneys,

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Date: September 18, 2019

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CERTIFICATIONS

Per Supreme Court Rule 16 (10), I hereby certify that electronic copies of this brief are being provided to appellant's counsel of record, Attorneys Joseph Prieto and Wesley Gardner, via e-filing/electronic means on this date.

Per Supreme Court Rules 16 (1) & 16 (11), I hereby certify that this brief has been prepared using the mandatory13 point font (Times New Roman), a 1.5 line spacing setting and the use of 1 & 1/2" inch margins (left-side aligned), with a word count of less than 9,500 words [5,906].

/S/ John A. Curran
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