THE STATE OF NEW HAMPSHIRE

SUPREME COURT

CASE NO. 2021-0213

TYCOLLO GRAHAM

v.

EUROSIM CONSTRUCTION, ET AL.

RULE 7 APPEAL FROM A DECISION AND ORDER OF
THE NEW HAMPSHIRE SUPERIOR COURT

BRIEF OF APPELLEES
EUROSIM CONSTRUCTION & PROCON, INC.

David W. Johnston, Esq., Bar No. 9334
Trevor J. Brown, Esq., Bar No. 269231
Sulloway & Hollis, P.L.L.C.
9 Capital Street
Concord, NH 03301
(603) 224-2341

Peter J. Hamilton, Esq. Bar No. 266609
O'Connor & Associates, L.L.C.
325 Boston Post Road
Sudbury, MA 01776
(978) 443-3510

Oral Argument By: Trevor J. Brown, Esq.

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STATEMENT OF THE CASE

This is an appeal by Tycollo Graham ("Graham") challenging dismissal by the Superior Court of his second lawsuit against Eurosim Construction ("Eurosim") and ProCon, Inc. ("ProCon") on the basis of *res judicata*.

Graham originally filed suit in February 2018 in the Grafton County Superior Court alleging negligence against Eurosim and ProCon. On September 19, 2018, Graham's counsel moved to withdraw; the Court granted that motion on October 30, 2018. On that same day, the Court ordered Graham to enter an appearance – either with new counsel or *pro se* – by November 19, 2018. Graham failed to do so. After giving him an additional two-week period to comply, on December 4, 2018, the Court dismissed Graham's first lawsuit for failure to adhere to the Court's order and the Superior Court Rules requiring an appearance be filed. Graham did not file a motion for reconsideration of the dismissal, nor did he request any other post-decision relief under Rule 12(e) of the Superior Court Rules.

More than 11 months later, on November 18, 2019, Graham – represented by new counsel – filed suit in the Merrimack County Superior Court. As with his first suit, Graham named Eurosim and ProCon as defendants, in addition to a third defendant not named in the first action, Route 120 Hotel, LLC. Graham again alleged negligence on the part of the defendants in his second suit.

On August 21, 2020, Eurosim and ProCon jointly moved to dismiss Graham's second lawsuit on the basis of *res judicata* given that he had previously brought suit against them for the same cause of action, and the

first suit had been resolved with a final judgment on the merits. Graham filed an objection. By order dated February 17, 2021, the Superior Court granted Eurosim and ProCon's motion to dismiss.

On appeal, Graham contends that the Superior Court erred in dismissing his second lawsuit based on his erroneous understanding that the dismissal of his first action was not a final judgment on the merits.

STATEMENT OF FACTS

In October 2017, Eurosim and ProCon were engaged to work on a hotel project in Lebanon, New Hampshire. Eurosim was a subcontractor tasked with installing shower panels and completing tile and glass work; ProCon was engaged as the general contractor. Graham was not an employee or agent of either Eurosim or ProCon, but was working as a painter for another subcontractor. Graham Appd'x at 43-49; 51-58.[1] Graham alleges that on or about October 26, 2017, he was working at the hotel construction site when several glass panels fell on his leg resulting in a fracture to his right fibula. *Id.*

On February 12, 2018, Graham filed his first lawsuit related to this incident in the Grafton County Superior Court, naming Eurosim and ProCon as defendants. *Id.* at 43-49. He alleged one count of negligence against Eurosim and one count of negligence against ProCon. *Id.*

With respect to the first lawsuit, counsel for Graham, Eurosim and ProCon submitted a joint proposed Case Structuring and ADR Order on

[1] Where appropriate, Eurosim and ProCon cite to Graham's Appendix: "Graham's Appd'x at [Page Number]." Materials not included in Graham's Appendix are included in Eurosim and ProCon's Appendix, filed contemporaneously herewith: "Appellees' Appd'x at [Page Number]."

June 12, 2018, setting discovery deadlines and a proposed trial date. Appellees' Appd'x at 10. The Court approved that proposal by order dated June 19, 2018; a Notice of Jury Trial was issued on June 20, 2018, scheduling trial for August 2019. *Id.* at 13-14. On May 18, 2018, counsel for Eurosim propounded interrogatories on Graham; responses were provided on August 7, 2018. *Id.* at 15. On September 4, 2018, Graham belatedly provided his Rule 22 Automatic Disclosure to the defendants. *Id.* at 18.

On September 19, 2018, Graham's counsel moved to withdraw. Graham Appd'x at 64-65. The Court granted that motion by order dated October 30, 2018. *Id.* at 67.

On the same day as the Court granted Graham's motion to withdraw, the Court ordered as follows:

> Please be advised that the court has been informed that Michael Rainboth, Esquire AND Brian Buonamano, Esquire has withdrawn from this case as attorney for Tycollo Graham and no other appearance has been entered. If Tycollo Graham or an attorney fail to file an appearance by November 19, 2018, the court may take such action as justice may require.

Id. at 69 – Rule 17(d) Notice (emphasis added).[2]

The Court's order – with a copy to Graham – made clear that if he did not enter an appearance by November 19, 2018, either with new counsel or *pro se*, that the Court could take "such action as justice may require." *Id.*

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[2] While the October 30, 2018 Court order was captioned as a "Rule 17(d) Notice," the reference was to an older version of the Superior Court Rules. Effective January 1, 2018, Rule 17(d) was re-numbered to Rule 17(f).

Graham failed to file an appearance by the Court's stated deadline. After giving Graham an additional two weeks to enter an appearance, on December 4, 2018, the Court issued an order finding that "[t]he plaintiff or his attorney having failed to file an appearance by the deadline, the Complaint is dismissed." *Id.* at 71. The December 4th order did not specify whether the dismissal for failing to adhere to the Court's order and violating the Superior Court Rules amounted to an adjudication on the merits. Nevertheless, Graham failed to seek any post-decisional relief or clarification with respect to the December 4th order, despite the potential that the decision would act as a bar to future claims against the defendants.

More than 11 months after Graham's first lawsuit was dismissed, on November 18, 2019, Graham filed another lawsuit in the Merrimack County Superior Court with new counsel. *Id.* at 51-58. As with his first Complaint, Graham named Eurosim and ProCon as defendants. *Id.* He also named an additional defendant, Route 120 Hotel, LLC. *Id.* Graham's second Complaint included three causes of action, all sounding in negligence, and all stemming from the same incident that gave rise to his first suit. *See generally, id.*

On December 31, 2019, ProCon filed its Answer to Graham's second Complaint. On January 21, 2020 Eurosim filed its Answer to Graham's second Complaint. *See,* Appellees' Appd'x at 20. Among other affirmative defenses, Eurosim stated: "[t]he plaintiff's claims are barred by the doctrine of *res judicata* and/or collateral estoppel." *Id. at* ¶H.

On June 5, 2020, this Court issued its opinion in the case of *Riverbend Condo Association v. Groundhog Landscaping & Property*

Maintenance, Inc.,[3] holding that a dismissal resulting from the plaintiff violating a court order was a dismissal on the merits, even when the order was silent as to whether the dismissal was with or without prejudice. 173 N.H. 372 (2020).

Thereafter, on June 19, 2020, ProCon filed a motion to amend its Answer to include the affirmative defense of *res judicata*. Graham filed an objection, to which Eurosim filed a reply. By order dated July 10, 2020, the Court granted ProCon's motion to amend. Graham Appd'x at 73-75.

On August 21, 2020, Eurosim and ProCon jointly moved to dismiss Graham's second lawsuit on the basis of *res judicata*. The third defendant in Graham's second action, Route 120 Hotel, LLC, did not join in the motion as it was not a party to the first lawsuit. Graham filed an objection to Eurosim and ProCon's motion. By Order dated February 17, 2021, the Court granted the motion and dismissed Eurosim and ProCon from the second lawsuit, finding that *res judicata* barred Graham's claims.[4] *See,* Addendum to Graham Brief at 29 (attaching Superior Court's February 17, 2021 Order).

Graham did not move for reconsideration or other post-decisional relief with the Superior Court with respect to its February 17, 2021 order. On May 20, 2021, Graham filed a notice of appeal with this Court. His Rule 7 brief followed.

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[3] Although the Court's decision in *Riverbend Condo Association* was issued after Graham's first case was dismissed, "appellate decisions in civil cases are presumed to apply retroactively." *Hall v. Tibert*, 132 620, 621-22 (1989); *Stanley v. Walsh*, 128, N.H. 692, 693 (1986).

[4] On April 27, 2021, neither party docket markings were filed by Graham and Route 120 Hotel, LLC; the Superior Court approved the same the following day.

SUMMARY OF ARGUMENT

Tycollo Graham's first lawsuit was filed on February 12, 2018, in the Grafton County Superior Court. After months of discovery, Graham's counsel filed a motion to withdraw as counsel. On October 30, 2018, upon granting counsel's motion, the Trial Court issued an order directing Graham to file an appearance – either with new counsel or *pro se* – by a date certain. Graham Appd'x at 69. Graham failed to do so, and the Court, in the exercise of its sound discretion, dismissed that case on December 4, 2018. *Id.* at 71.

The December 4, 2018 order of dismissal did not specifically state that it was issued with prejudice, but well-established decisional law establishes that a dismissal order is presumed to be "with prejudice" when silent as to its intended effect. *See, e.g., Riverbend Condo Assoc.*, 173 N.H. at 372. Thus, the Court's December 4, 2018 order was "with prejudice" and a final judgment on the merits such that Graham's second lawsuit, which asserts the same claims against these same defendants, is barred by the doctrine of *res judicata*.

Put simply, the Merrimack County Superior Court's February 17, 2021 order dismissing Graham's second lawsuit is reasonable, lawful, and grounded in New Hampshire law. This Court should reject any arguments to the contrary and should affirm the dismissal of claims against Eurosim and ProCon.

STANDARD OF REVIEW

The applicability of *res judicata* is a question of law. *Berthiaume v. McCormack*, 153 N.H. 239, 244 (2006); *Innie v. W & R, Inc.*, 116 N.H. 315, 315-16 (1976). Therefore, this Court will conduct *de novo* review of the issue. *Berthiaume*, 153 N.H. at 244.

ARGUMENT

I. The Superior Court Properly Dismissed Tycollo Graham's Second Suit Based on *Res Judicata*, as Dismissal of His First Suit Was a Final Judgment on the Merits; Thus *Res Judicata* Bars the Instant Action.

The doctrine of *res judicata* precludes litigation 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 Partnership*, 157 N.H. 530, 533 (2008) (*citing Meier v. Town of Littleton*, 154 N.H. 340, 342 (2006)). "Spurred by considerations of judicial economy and a policy of certainty and finality in our legal system, the doctrines of *res judicata* and collateral estoppel have been established to avoid repetitive litigation so that at some point litigation over a particular controversy must come to an end." *Eastern Marine Constr. Corp. v. First S. Leasing*, 129 N.H. 270, 273 (1987) (*citing Bricker v. Crane*, 118 N.H. 249, 252 (1978)).

Three elements must be met for the doctrine of *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."

Sleeper, 157 N.H. at 533. A cause of action is barred by these principles if it arises out of the same nucleus of operative facts as the prior claim. *Finn v. Ballentine Partners, LLC*, 169 N.H. 128, 146-47 (2016).

The first two elements are not in dispute as the parties and the cause of action are the same between the two cases; points which Graham concedes in his brief. *See,* Graham's Brief at 10.

Thus, the only question before this Court is whether or not "a final judgment on the merits [was] rendered in the first action." *Sleeper*, 157 N.H. at 533. The facts of this case, the decisional law of New Hampshire, as well as the state of the law more broadly establish that this element has also been met, as the Superior Court's dismissal of Graham's first lawsuit was a final judgment on the merits, such that *res judicata* bars Graham's second lawsuit.

A. *Under New Hampshire law, because the Order dismissing Graham's first case was silent as to its intended effect, it is presumed to be made with prejudice, and thus operates as a judgment on the merits.*

It is well-established in this state that 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, and bars any attempt to revive the previous action." *Moulton-Garland v. Cabletron Systems*, 143 N.H. 540, 542 (1999) (internal citations omitted). "[A] dismissal with prejudice is deemed an adjudication on the merits for the purposes of *res judicata*, since such a dismissal is tantamount to a judgment on the merits." *Ingress v. Merrimack Mortg. Co.*, No. 2011-CV-0542, 2011 N.H. Super. LEXIS 59, *11-12 (Hillsborough Cnty. Sup. Ct. Dec. 7, 2011) (*citing*

Moore v. Lebanon, 96 N.H. 20, 22 (1949); *Oriental Bank & Trust v. Pardo-Gonzalez*, 509 F. Supp. 2d 127, 135 (D.P.R. 2007)) (internal citations omitted).

New Hampshire law recognizes that a dismissal order is presumed to be "with prejudice" when silent as to its intended effect. *Foster v. Bedell*, 136 N.H. 728 (1993) (plaintiff's failure to comply with a Court order and the resulting dismissal was a judgment on the merits, thereby barring a second action); *see also, Gray v. Kelly*, 161 N.H. 160, 164 (2010) (a default judgment can constitute *res judicata* in subsequent litigation involving the same cause of action); *McNair v. McNair*, 151 N.H. 343, 352-53 (2004) (same). In *Foster v. Bedell,* the Court held as follows:

> [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*…. 'a default, by definition, is a failure to take a step required by the rules of procedure.'

Foster, 136 N.H. at 730 (*quoting Barton v. Barton*, 125 N.H. 433, 435 (1984)).

Foster further recognized that there is "no logical reason why…an involuntary nonsuit for failure to obey a court order should be treated differently than a default for failure to obey a court order." *Foster*, 136 N.H. at 730 (*citing* 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)).

Superior Court Rule 17 requires appearances to be filed in each action; an appearance must be filed by counsel of record or by the party

himself, if self-represented. Sup. Ct. R. 17(a)-(c).[5] Here, after Graham's original counsel filed a motion to withdraw on September 19, 2018, the Superior Court ordered Graham or his attorney to file an appearance by November 19, 2018, advising that "the court may take such action as justice may require" if an appearance was not filed. Graham Appd'x at 69. Graham failed to file an appearance by the Court-appointed deadline – a point which he recognizes – and in the process violated both a Court order and the Superior Court Rules. Graham Brief at 12; Sup. Ct. R. 17. Consequently, the Superior Court appropriately dismissed Graham's Complaint on December 4, 2018. Graham Appd'x at 71.

There is nothing new about the proposition that dismissal of a case based on a violation of a Court order or Court rule amounts to a judgment on the merits. *See, e.g., Foster*, 136 N.H. at 730; *Barton*, 125 N.H. at 435; *Moulton-Garland*, 143 N.H. at 542. Indeed, Graham recognizes as much. *See,* Graham Brief at 15 ("A trial court has the power to involuntarily dismiss a lawsuit with prejudice when a party has not complied with court rules") (*citing Roberts v. General Motors Corp.*, 140 N.H. 723, 727 (1996)). And last year, this Court affirmed in *Riverbend Condo Association* that an unspecified dismissal in that case, which resulted from a party not following a court order, was a decision on the merits. The *Riverbend Condo Association* Court rejected the plaintiff's argument that it was error for the trial court to presume that the dismissal order was issued with prejudice when it was silent on that matter. *Riverbend Condo Assoc.*,

[5] *See,* Sup. Ct. R. 17(b) ("The failure of a self-represented party to file an Appearance in conformity with this rule shall result in a conditional default or other order as justice requires") (emphasis added).

173 N.H. at 378. In affirming the trial court's dismissal of the plaintiff's second action, *Riverbend Condo Association* cited *Foster* as controlling and followed "the general rule followed by other jurisdictions" that a dismissal order is presumed to be "with prejudice" when silent as to its intended effect. *Id.* at 374.

Although the Superior Court's December 4th order does not expressly state that the dismissal was made with prejudice, it is clear from this Court's prior decisions that the dismissal is presumed to be with prejudice and, therefore, a judgment on the merits.[6] Accordingly, Graham's second suit was appropriately dismissed under the doctrine of *res judicata*.

B. *The weight of authority establishes that when a dismissal order is silent, it is presumed to be made with prejudice, and thus operates as a judgment on the merits.*

While the New Hampshire Superior Court Rules do not expressly address whether an involuntary dismissal operates as an adjudication on the merits, their federal counterparts do. Federal Rule of Civil Procedure 41(b) provides that, unless the court specifies otherwise, an involuntary dismissal other than a dismissal "for lack of jurisdiction, improper venue, or failure to join a party… operates as an adjudication on the merits." Fed. R. Civ. P. 41(b) (emphasis added). As discussed in *Riverbend Condo Association*, this Court has looked approvingly on trial courts that refer to the Federal

[6] After the Superior Court dismissed Graham's first suit, no further action was required by the defendants as the entire case had been dismissed. Graham, without any legal authority, incorrectly suggests that the defendants needed to move for final judgment beyond the court's dismissal of the case. The only party that had any obligation or reason to take action after the dismissal of the first suit, however, was the plaintiff.

Rules and to other jurisdictions on issues of first impression. *Riverbend Condo Assoc.*, 173 N.H. at 377 (citations omitted); *see also, Opinion of the Justices*, 131 N.H. 573, 580-81 (1989) (*citing* Fed. R. Civ. P. 41(b) in determining that a dismissal based on the running of a statute of limitations is a judgment on the merits for purposes of applying *res judicata*).

Moreover, "the general rule followed by other jurisdictions" is unambiguous: a dismissal order is presumed to be with prejudice when silent as to its intended effect. *See, e.g., Claudio-de León v. Sistema Universitario Ana G. Méndez*, 775 F.3d 41, 49 (1st Cir. 2014); *In re GM LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 396 (S.D.N.Y. 2017) ("And while the Court was silent on the issue in its Opinion, the law deems such silence to mean dismissal with prejudice") (collecting cases); *Stratton Corp. v. Engelberth Constr.*, 2015 VT 75, ¶17 (2015) ("If the court does not specify that the dismissal is without prejudice, and it comes within the terms of the final sentence of [V.R.C.P] 41(b), the dismissal will be with prejudice. This result is reached both when the [trial] court expressly provides that dismissal was with prejudice and when it is silent on the matter.") (quotations omitted)); *Fries v. Carpenter*, 567 A.2d 437, 439 (ME 1989) (same) (*citing* M. R. Civ. P. 41(b)(3)). *Alvarez v. Galetka*, 933 P.2d 987, 990 (Utah 1997) ("it is a general rule that if a court grants an involuntary dismissal and does not specify whether it is with or without prejudice, it is assumed that the dismissal is with prejudice").

The general rule can be seen in secondary sources as well; as stated in the Restatement (Second) of Judgments:

> The rule that a defendant's judgment acts as a bar to a second action on the same claim is based largely on the ground that

> fairness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy come to an end. These considerations may impose such a requirement even though the substantive issues have not been tried, especially if the plaintiff has failed to avail himself of opportunities to pursue his remedies in the first proceeding, or has deliberately flouted orders of the court.

RESTATEMENT (SECOND) OF JUDGMENTS §19 (cited in *Foster*, 136 N.H. at 730).

In light of the foregoing, it is clear that the December 4, 2018 order of dismissal was made with prejudice, and thus operates a final judgment on the merits. Accordingly, the third and final prong of *res judicata* was met, such that dismissal of Graham's second suit was appropriate.

C. *There is no merit to Graham's argument that "a case-by-case examination of the procedural history of the first suit" is necessary to determine whether res judicata applies.*

Graham further argues that "[w]hen a dismissal order is silent to its intended effect, this Court requires a case-by-case examination of the procedural history of the first suit to determine whether *res judicata* applies." Graham Brief at 12, 17. Not only does this argument mischaracterize New Hampshire law, but it provides no valid basis to reverse the Superior Court's decision.

For this proposition, Graham cites the *Foster* and *Riverbend Condo Association* cases. While it is true that the Court considered the "circumstances present" in reaching its holdings in those cases, in neither case did this Court "require" the trial court to exam the procedural history

of the first suit in determining the applicability of *res judicata*. *Foster*, 136 N.H. at 730; *Riverbend Condo Assoc.*, 173 N.H. at 376. Rather, New Hampshire law suggests the exact opposite: when judgment is entered "with prejudice" – such as when an order is silent on the question – the order constitutes a judgment on the merits of a matter, "even if it resulted from a violation of a procedural rule." *Moulton-Garland*, 143 N.H. at 542; *Foster*, 136 N.H. at 730; *Roberts*, 140 N.H. at 727. Thus, it is unnecessary for the trial court to examine the procedural history, as suggested by Graham, if the first suit has been dismissed with prejudice. That fact alone, regardless of the circumstances, acts as a bar to a subsequent suit.

D. *The procedural history of the Superior Court's October 30th order made clear that failure to comply could result in the Court taking any "such action as justice may require," which includes dismissal.*

The Superior Court's October 30, 2018 order required Graham to file an appearance by the November 19th deadline. Graham Appd'x at 69, 71. There was no ambiguity about the directive. Contrary to Graham's suggestion that he had no "written warning" that sanctions were possible (as were provided to the litigants in *Foster* and *Riverbend Condo Association*), the October 30th order made clear that if he failed to comply, the Court could "take such action as justice may require." Graham Appd'x at 69; Graham Brief at 12, 18. This is not a restrictive phrasing of the options available to the court; rather, it broadly leaves open the possible implementation of any number of sanctions – including dismissal on the merits. *Id.* To his peril, Graham failed to adhere to the Court's order and

failed to seek reconsideration or clarification of the subsequent dismissal (assuming, *arguendo*, that he was confused as to its meaning).

Graham contends that "[t]his Court has yet to decide whether an involuntary dismissal entered as a result of the failure to identify substitute counsel under [Superior Court] Rule 17(f) bars a second suit." Graham Brief at 16. This assertion only highlights the point made above – that Graham took a risk in *assuming* that the dismissal was without prejudice. The silence of the December 4th order, however, after the failure of Graham to comply with the court's October 30 order, should be interpreted as being final and on the merits, consistent with case precedent.

II. Dismissal of Graham's First Suit Was Not "Purely Procedural" or "Indistinguishable" from a Dismissal for Failure to Prosecute. Rather, the Dismissal for Failure to Adhere to a Court Order was a Final Judgment on the Merits.

In an effort to distinguish his case from the well-established law of New Hampshire, Graham argues that the Superior Court erred in dismissing his second lawsuit because his first case was "in its infancy," and the dismissal of his first case "was purely procedural, and indistinguishable from a dismissal for failure to prosecute." Graham's Brief at 8. None of these assertions move the needle or change the fact that all of the elements of *res judicata* apply, such that his second suit was appropriately dismissed.

Graham first suggests that his first case was "in its infancy." *Id.* Not only is that inaccurate, but it has no bearing on whether or not the doctrine of *res judicata* is applicable. With respect to the first suit, the Parties submitted a joint proposed Case Structuring and ADR Order.

Appellees' Appd'x at 10. The Court approved that proposal, and set a trial date. *Id.* at 13-14. Eurosim propounded interrogatories on Graham, to which he responded. *Id.* at 15. Thereafter, on September 4, 2018, Graham provided Eurosim and ProCon with his Automatic Disclosure. *Id.* at 18. Graham's first suit was well underway when he failed to adhere to the Court's October 30th order and did not abide by Superior Court Rule 17.

All that said, the status of the first case – whether "in its infancy" or on the eve of trial (such as in *Riverbend Condo Association*) – has no bearing on applicability of *res judicata*. The only requirements for the doctrine to apply are the three elements stated in *Sleeper*: (1) the same parties in both cases; (2) the same cause of action in both cases; and (3) a final judgment on the merits issued in the first case. *See, Sleeper*, 157 N.H. at 533. The calculus does not change based on the status of the proceedings of the first lawsuit.

Second, Graham argues at length that the dismissal of his first case "was purely procedural." Graham's Brief at 8; 21-22. As discussed above, Graham is incorrect. *Supra* at 15, 19-20. The failure to adhere to a Court order and the failure to abide by the Superior Court rules are not merely "procedural" but are substantive violations which the Superior Court deemed warranted dismissal on the merits.

Graham further suggests that Superior Court Rule 17(f) is meant to "facilitate notice and procedural due process," unrelated to the merits of a case. Graham Brief at 20. Graham cites no law or rule for this proposition. He does, however, recognize the significance of the Rule: "[k]nowing the identity of Graham's representative served to assist the court, Graham and the defendants in their common interest to advance the proceedings secure

in the belief that a known representative would receive and/or respond to discovery requests, motions, court notices, and orders serviced in the mail and/or sent electronically to a party." Graham Brief at 22. How engaging with the court and opposing counsel, responding to discovery, or receiving notices and orders are "purely procedural" is unclear. What is clear, however, is that Graham's violation of Rule 17 resulted in a dismissal which was a final judgment in his first case.

Finally, Graham suggests that his failure to adhere to the Court's October 30th order and failure to abide by Rule 17 is "indistinguishable from a dismissal for failure to prosecute." Again, this is incorrect.

The text of the Superior Court's October 30, 2018 order establishes, in no uncertain terms, that Graham was required to file an appearance – either *pro se* or through counsel – or the Court could "take such action as justice may require." Graham Appd'x at 69. Graham's failure to comply with the order resulted in the Court's December 4, 2018 dismissal of his case. Graham Appd'x at 71. Contrary to his current position, Graham *was* prosecuting his first case – submitting a joint Case Structuring and ADR Order and responding to written discovery. *Supra* at 7-8, 20-21. It was Graham's failure to adhere to the Court's October 30th order and his failure to adhere to Superior Court Rule 17(f) that resulted in his first lawsuit being dismissed – not his purported "failure to prosecute."[7]

More broadly, New Hampshire's decisional law holds that an order based on failure to adhere to the Superior Court Rules is not a case of failing to prosecute. *Barton*, 125 N.H. at 435 (concluding that a default

[7] Indeed, if the Superior Court intended to dismiss Graham's first lawsuit for failure to prosecute, it could have done so.

judgment entered for failure of a party to comply with the superior court rules constitutes a judgment on the merits, thus barring a second suit alleging the same cause of action on the basis of *res judicata*); *Roberts*, 140 N.H. at 727 (the trial court has the power to dismiss an action with prejudice when the plaintiff has not complied with court rules). Graham's failure to adhere to Superior Court Rule 17 meant that the Court's dismissal was with prejudice, such that *res judicata* bars his second lawsuit. *See,* Sup. Ct. R. 17(a), (b) and (f). Graham's protestations to the contrary provide no basis to reverse the Superior Court's decision.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

For the reasons set forth above, this Court should affirm the Merrimack County Superior Court's February 17, 2021 Order dismissing Graham's claims as to Eurosim and ProCon pursuant to the doctrine of *res judicata*.

Trevor J. Brown, Esquire, will conduct oral argument on behalf of Appellee Eurosim Construction and respectfully requests fifteen (15) minutes for that argument. Given that the positions of the Appellees are aligned, ProCon, Inc. does not request additional time.

Respectfully submitted,

EUROSIM CONSTRUCTION

By Their Attorneys,
SULLOWAY & HOLLIS, P.L.L.C.

Dated: September 21, 2021 By: /s/ Trevor J. Brown

David W. Johnston, Esq. Bar No. 9334
Trevor J. Brown, Esq. Bar No. 269231
9 Capitol Street
Concord, NH 03301
(603) 224-2341
djohnston@sulloway.com
tbrown@sulloway.com

-AND-

PROCON, INC.

By Their Attorneys,
O'CONNOR & ASSOCIATES, L.L.C.

Dated: September 21, 2021 By: /s/ Peter J. Hamilton

Peter J. Hamilton, Esq. Bar No. 266609
325 Boston Post Road
Sudbury, MA 01776
(978) 443-3510
phamilton@oconnorllc.com

CERTIFICATE OF SERVICE

I hereby certify in accordance with Supreme Court Rule 26(7) that the forgoing Brief and related Appendix were transmitted electronically through the Supreme Court's electronic filing system on this day.

Dated: September 21, 2021 By: /s/ Trevor J. Brown
Trevor J. Brown, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Supreme Court Rule 16(11), that the forgoing Brief contains approximately 4,982 words, excluding cover page, table of contents, table of authorities, signature page and certifications. Counsel relied upon the word count feature of a word processing program to determine the word count.

Dated: September 21, 2021 By: /s/ Trevor J. Brown
Trevor J. Brown, Esq.