THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2021-0213

TYCOLLO GRAHAM

v.

EUROSIM CONSTRUCTION ET AL

Rule 7 Appeal from the Merrimack County Superior Court
Decision on the Merits

Brief of the Appellant

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Appellant

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OTHER AUTHORITY

are met, an attorney or non-attorney representative may withdraw from an action only by leave of court. Whenever an attorney or non-attorney representative withdraws from an action, and no other Appearance is entered, the court shall notify the party by mail of such withdrawal. If the party fails to appear by himself, herself, attorney or non-attorney representative by a date fixed by the court, the court may take such action as justice may require.

(g) Other than limited representation by attorneys as allowed by Rule 17(c) and Professional Conduct Rule 1.2(f), no attorney or non-attorney representative shall be permitted to withdraw his or her Appearance in a case after the case has been assigned for trial or hearing, except upon motion to permit such withdrawal granted by the court for good cause shown, and on such terms as the court may order. Any motion to withdraw filed by counsel or non-attorney representative shall set forth the reason therefore but shall be effective only upon approval by the court. A factor which may be considered by the court in determining whether good cause for withdrawal has been shown is the client's failure to meet his or her financial obligations to pay for the attorney's services.

(h) Automatic Termination of Limited Representation....

(i) Filing Prepared for Unrepresented Party...

Super. Ct. Civ. R. 35 .....13, 15, 17, 18, 19, 20, 21, 23

Rule 35. Trial Management Conference

(I) Jury Trials

(a) In every case scheduled for jury trial, the court shall schedule a Trial Management Conference which shall take place within 14 days before jury selection, or at such other time as the court shall order. At the Conference, parties will be present or available by telephone,

prepared to discuss conduct of the trial and settlement.

(b) 14 days prior to the Trial Management Conference, unless another time is directed by the court or agreed to by the parties, all parties shall file with the court and serve on the other parties Pretrial Statements, which shall include, by numbered paragraphs, a detailed, comprehensive, and good faith statement, setting forth the following:

1. A summary of the case that can be read by the court to the jury at the beginning of trial;

2. Disputed issues of fact;

3. Applicable law;

4. Disputed issues of law;

5. Specific claims of liability by the party making the claim;

6. Defendant's specific defenses;

7. Itemized special damages;

8. Specification of injuries with a statement as to which, if any, are claimed to be permanent;

9. The status of settlement negotiations;

10. A list of all exhibits to be offered in the direct case of each party. The parties, or their counsel, shall bring exhibits, or exact copies of them, to court on the day of the Trial Management Conference for examination by opposing parties or their representatives;

11. A list of all depositions to be read into evidence;

12. A waiver of claims or defenses, if any;

13. A list of the names and addresses of all witnesses who may be called;

14. Whether there will be a request for a view and, if so, who shall pay the cost in the first instance;

15. The names and addresses of the trial attorneys or non-attorney representatives.

(c) Except for good cause shown, only witnesses listed in the Pretrial Statement will be allowed

to testify and only exhibits, so listed, will be received in evidence.

(d) Preliminary requests for instructions ...

(II) Bench Trials

The court may direct the parties to attend a Trial Management Conference in non-jury cases ...

All cases which shall have been pending upon the docket for 3 years, without any action being shown on the docket other than being placed on the trial list, shall be marked "dismissed," and notice thereof sent to the parties or representatives who have appeared in the action.

QUESTION PRESENTED

Whether Judge Tucker erred in dismissing Mr. Graham's second suit based on *res judicata* upon finding that Mr. Graham's first suit was dismissed on the merits even though the case was in its infancy, was purely procedural, and indistinguishable from a dismissal for failure to prosecute. AA [76](Plaintiff's Objection to Joint Motion to Dismiss p.1).

STATEMENT OF THE CASE AND FACTS

On appeal, Mr. Graham contends that Graham I was not dismissed on the merits. The procedural history of Graham I shows that the dismissal was early in the proceedings, made incident to the court granting a motion to withdraw, and concerned Mr. Graham's failure to identify substitute representation under Sup. Ct. Civ. R. 17 (f), which concerns notice and procedural due process matters.. The failure to file a substitute appearance is a purely procedural error indistinguishable from other procedural errors resulting in dismissal such as the failure to prosecute. [1]

The First Suit

On February 12, 2018, Mr. Graham filed suit against Appellees, Eurosim Construction ("Eurosim") and ProCon, Inc ("ProCon"), in the Grafton Superior Court, Docket No. 215-2018-CV-00039 (hereinafter "Graham I"). AA [42] (Summons). He alleged that on October 26, 2017, defendants ProCon and its subcontractor Eurosim Construction were negligent in failing to secure a stack of eight sheets of glass which fell on him. AA [44-45] (Complaint ¶7-11). Each sheet of glass weighed approximately 150 lbs or more. AA [45] (Complaint ¶9). The combined weight and resulting force of the cascading sheets caused Mr. Graham's right leg to fracture in multiple places necessitating surgical intervention. Id. (Complaint ¶11).

[1] Appellant's Appendix is abbreviated AA.

In response to the Summons in Graham I, Eurosim filed a timely appearance. ProCon did not file a timely appearance, and, on May 15, 2018, the trial court issued a default against ProCon. AA [88]. Over the course of the next thirty days, Eurosim initiated discovery by serving Mr. Graham a set of Interrogatories and Requests for the Production of Documents. (AA [94]). ProCon successfully moved to strike the default and entered the case by mid June 2018. See AA [89-92](ProCon identified in the Case Structuring and ADR Order, 6/19/2018). On June 20, 2018, the trial court issued notice of its approved Case Structuring and ADR Order (AA [89-92](CSCO)) and a Notice of Jury Trial. AA [93](Notice of Jury Trial). The case's discovery period was scheduled to last for more than a year as deadline was set to August 1, 2019. AA [89]. The trial court scheduled a jury trial to take place during the month of August 2019. AA [93].

On September 19, 2018, Mr. Graham's attorney of record, Michael P. Rainboth, filed a Motion to Withdraw. AA [64-65]. ProCon and Eurosim did not file an objection to the motion. On October 30, 2018, the trial court granted the motion. AA [67]. On October 30, 2018, in a notice captioned "Rule 17(d) [sic] Notice", the Clerk of Court notified the remaining parties that Mr. Graham's attorney had withdrawn and that no other appearance had been entered. AA [69]. The notice informed Mr. Graham:

> "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." AA [69].

The notice, dated October 30, 2018, should have identified Rule 17(f) not 17(d). See Super. Ct. Civ. R. 17, amended effective January 1, 2018. By Clerk's Notice dated December 5, 2018, the trial court (Macleod, J.) found that Mr. Graham or his attorney did not file an appearance by November 19th and dismissed the lawsuit:

> "Following the withdrawal of plaintiff's counsel from this case, the Clerk's Office issued a Rule 17(d) Notice [sic] directing the plaintiff to appear by himself or through

> an attorney or non-attorney representative by November 19, 2018. See Index #19. The plaintiff or his attorney having failed to file an appearance by the deadline, the Complaint is dismissed. SO ORDERED." AA [71]

Following the procedural dismissal, neither ProCon nor Eurosim filed requests for final judgment or any request that the dismissal be entered with prejudice. At the time of dismissal, Mr. Graham's cause of action was only fourteen months old.

The Second Suit

On November 18, 2019, well within the applicable three-year Statute of Limitations (RSA 508:4), Mr. Graham filed a second suit in the Merrimack County Superior Court Docket No. 217-2019-CV-00790, (hereinafter "Graham II"). AA [3]. Mr. Graham named defendants ProCon, Eurosim Construction, and the property owner Route 120 Hotel, LLC. AA [53]. It is not disputed that Mr. Graham alleged the same cause of action set forth in Graham I.

On December 31, 2019, ProCon's attorney filed his appearance and answer. AA [8]. Eurosim did not file a timely appearance and/or answer and was defaulted. ProCon later moved to strike the default entered against it. AA [10]. On January 23, 2020, the procedural default was vacated. Id. [2] On March 5, 2020, Mr. Graham, ProCon, and Eurosim submitted a stipulated Case Structuring and ADR Order which the trial court approved. The parties exchanged and completed written discovery requests through early June 2020.

On June 19, 2020, six months after filing its Answer, ProCon belatedly filed a motion to amend its statement of affirmative defenses to add *res judicata*. AA [16](Order Granting Mot. Amend., p. 2). Over Mr. Graham's objection, the trial court granted the motion. AA [17]. Due to Route 120 Hotel's late entry and the intention of defendants ProCon and Eurosim to file a joint motion to dismiss on *res judicata* grounds, the parties filed an assented-to motion to amend the

[2] Route 120 Hotel, LLC also defaulted. It filed a motion to strike the procedural default on May 21, 2020, which the court granted. AA [10]. The defendant is no longer in the lawsuit. AA [99] ("Neither Party" Docket Markings).

case structuring order which the court granted on July 23, 2020. AA [18]. The amended case structuring order provided that the defendants ProCon and Eurosim would file their joint dispositive motion no later than September 18, 2020. AA [20].

On August 12, 2020, Eurosim and ProCon filed a Joint Motion to Dismiss (AA [24]) and Joint Memorandum of Law. AA [27]. In their joint motion, the defendants argued that Graham II was barred by the doctrine of *res judicata* because Graham I involved the same defendants, same cause of action, and erroneously proposed that Judge MacLeod's order, because it was silent on the matter, was presumed to be dismissed on the merits. AA [35](Joint Memorandum of Law, ¶28)(citing Riverbend Condo Assoc. v. Groundhog Landscaping & Prop. Maintenance, Inc., 239 A.3d 989 (2020). Mr. Graham objected to the defendants' joint motion. Mr. Graham argued that under New Hampshire law *res judicata* did not permit the application of the legal presumption urged by the defendants. AA [82](Plf.'s Obj. ¶18-20). To properly determine the applicability of *res judicata,* Judge MacLeod's order must be read within the context of the case's procedural history. At the time of dismissal, Graham I was early in the proceedings and concerned a violation of Super. Crt. Civ. R. 17(f), a purely procedural rule concerning the identity of a substitute party representative which, as a means of effecting notice of representation, did not touch upon the substance of the merits of the case. Mr. Graham's purely procedural error effectively halted the proceedings in a manner indistinguishable from the failure to prosecute -which is not *res judicata*. Id. On February 17, 2021, the Court (Tucker, J.) appeared to adopt the defendants' argument and granted their joint motion to dismiss. AA [97].

STANDARD OF REVIEW

"When a litigant moves to dismiss based exclusively upon *res judicata*, which is an affirmative defense, the movant bears the burden of proving its application." Riverbend Condo Assoc., 239 A.3d at 992 (citing Gray v. Kelly, 161 N.H. 160, 164 (2010)). The applicability of res judicata is a question of law reviewed de novo. See Berthiaume v. McCormack, 153 N.H. 239, 244 (2006) and Meier v. Town of Littleton, 154 N.H. 340, 342 (2006).

SUMMARY OF ARGUMENT

On appeal, Mr. Graham challenges Judge Tucker's finding that the defendants established their burden of proving the applicability of *res judicata*. An examination of the procedural history of Graham I shows that Judge MacLeod did not dismiss the case on the merits or, alternatively, the defendants did not meet their burden to prove the applicability of *res judicata*.

Early in Graham I, on October 30, 2018, approximately three months after the trial court vacated ProCon's procedural default, Mr. Graham's attorney filed a motion to withdraw from representation. Upon finding no prejudice to ProCon and Eurosim, the trial court granted the motion and, thereon, issued Mr. Graham a "Rule 17(d) [sic] Notice" asking him or an attorney to file a substitute appearance by November 19, 2018. The case was roughly one year beyond the date of the accident giving rise to the suit. The notice was addressed to an unrepresented party, cited the wrong subpart of the court rule, and generally notified Mr. Graham that the court "may take such action as justice may require." AA [69]. The notice did not state his case may be forever barred. Mr. Graham did not identify a substitute representative, and the trial court issued a dismissal without indicating whether Mr. Graham was barred from filing a second suit. Within one year after the date of dismissal, November 18, 2019, Mr. Graham filed a second suit well within the applicable statute of limitations. Defendants ProCon and Eurosim moved to dismiss the second suit urging the application of an unfounded belief that this Court in Riverbend held that "when a dismissal order is silent as to its intended effect it is presumed to be with prejudice." AA [35](Joint Memorandum of Law, ¶29). In his order granting the defendant's motion, Judge Tucker seems to have adopted the defendants' erroneous reasoning.

When a dismissal order is silent as 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. See Riverbend Condo Assoc., 239 A.3d at 992. In Foster and Riverbend, this Court upheld the findings of *res judicata* based on the procedural "circumstances present" in those cases. Id. Procedural factors unique to Riverbend and Foster concerned, *inter alia*, the trial court's written warning that it would impose sanctions of dismissal or nonsuit for violating

Super. Ct. Civ. R. 35. Equally important, the plaintiffs in theses cases violated the orders on the eve of trial. By contrast, the trial court in Graham I did not specifically notify Mr. Graham that his case would be dismissed or nonsuited. The case was early in the proceedings. In granting the motion to withdraw, the trial court in Graham I had determined that ProCon and Eurosim were not prejudiced. The trial court's notice is premised upon Super. Ct. Civ. R. 17(f), which, unlike Super. Ct. Civ. R. 35, concerns a purely procedural matter resting on the identity of substitute representation and, as such, does not concern the substance of the merits of a case. Finally, there is no evidence offered by ProCon and Eurosim that they suffered any material prejudice not knowing whether Mr. Graham had a new representative. In view of the circumstances, Mr. Graham's failure to notify the court of substitute representation had the effect of placing a hold on the proceedings in the same way a case is dismissed for failing to prosecute. Under New Hampshire law, dismissal for failure to prosecute does not bar a second suit. Carveth v. Latham, 110 N.H. 232, 234 (1970)(holding that an involuntary dismissal for failure to prosecute is not res judicata); see also Doggett v. Town of North Hampton Zoning Board of Adjustment, 138 N.H. 744 (1994). and Town of Plaistow v. Riddle, 141 N.H. 307, 310 (1996).

Therefore, within the context of the procedural history of Graham I, the dismissal did not bar the second suit.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANTS SUSTAINED THEIR BURDEN TO PROVE THAT THE PROCEDURAL DISMISSAL IN GRAHAM I CONSTITUTED A FINAL DECISION ON THE MERITS.

The trial court erred in dismissing Mr. Graham's second suit based on *res judicata* upon finding that Mr. Graham's first suit was decided on the merits. The procedural history of Graham I evidences a purely procedural dismissal early in the litigation resting on Mr. Graham's failure to identify substitute representation under Sup. Ct. Civ. R. 17 (f). Because the defendants ProCon and Eurosim were not prejudiced, the circumstances are in line with conduct resembling Mr. Graham's failure to prosecute his claim.

A. SURVEY OF APPLICABLE LAW: RES JUDICATA

To succeed in their motion to dismiss, ProCon and Eurosim carry the burden of proving the applicability of the doctrine of *res judicata*. See Gray, 161 N.H. at 164. When implicated, a final judgment in a prior suit can serve to bar a second suit involving the same parties and cause of action. Concrete Constructors, Inc. v. The Manchester Bank, 117 N.H. 670, 672 (1977). The doctrine applies if three elements are satisfied: (1) the parties to the first and second suits are the same or in privity; (2) the cause of action in the first suit is before the court in the second suit; and, (3) the first suit resulted in a final judgment on the merits. Meier, 154 N.H. at 342. The sole issue on appeal is whether Judge Tucker properly found that the defendants met their burden to prove that the order of dismissal in Graham I, made pursuant to Sup. Ct. Civ. R. 17(f), constituted a final judgment on the merits and, therefore, bars Graham II.

It is well settled in this jurisdiction that a former judgment is not conclusive upon a matter in issue unless it is deemed "on the merits." See McAuliffe v. Colonial Imports, Inc., 116 N.H. 398, 399 (1976). New Hampshire courts "make every effort to reach a judgment on the merits, to achieve the ends of justice unobstructed by imaginary barriers of form." Roberts v. General Motors Corporation, 140 N.H. 723, 729(1996)(quoting In re Proposed Rules of Civil Procedure,139 N.H. 512, 516 (1995); see also e.g. Adams v. Sullivan, 110 N.H. 101, 105 (1970)(under RSA 508:10, the so-called “savings statute”, the diligent litigant is enured the right to a hearing in court until she reaches a judgment on the merits); see e.g. Roberts, 140 N.H. at 783 (multiple use of saving statute is permissible to revive claim because each dismissal was not a decision on the merits). An examination of the procedural history of both Graham I and Graham II reveals that both ProCon and Eurosim, despite procedural violations, some of which touched upon the substance of the merits of the case, were nevertheless permitted to strike defaults and/or were allowed to amend pleadings (six months late) to include the affirmative defense of *res judicata*. These same defendants endeavor to deprive Mr. Graham of his day in court by relying on a procedural violation.

While New Hampshire jurisprudence strives to achieve the ends of justice by making

every effort to reach a judgment on the merits, there are exceptions to the general rule. Only in specific circumstances can a former judgment based on a court-ordered dismissal be treated as a judgment on the merits and, therefore, can bar a second suit on the same action. For example, it is plain that consent or voluntary judgment resulting from docket markings is deemed final. Waters v. Hedberg, 126 N.H. 546, 548-49(1985). Also, a dismissal entered "with prejudice" is considered a judgment on the merits barring a second suit. See Moulton-Garland v. Cabletron Systems, 143 N.H. 540, 542 (1999). A trial court has the power to involuntarily dismiss a lawsuit with prejudice when a party has not complied with court rules. See Roberts, 140 N.H. at727 (1996)(citing the unique procedural history of Foster, 136 N.H. at 730); see also e.g. Barton v. Barton, 125 N.H. 433, 435 (1984)(a default judgment entered for failure of a party to comply with the superior court discovery rules is a substantive decision on the merits of the case); see e.g. State v. Consolidated Recycling, Inc., 144 N.H. 467, 469 (1999)(default entered for failure to file a timely answer to an equity petition had the effect of a decree *pro confesso* constituting an admission of all material and well-plead allegations of fact); see e.g. Parker v. Roberts, 63 N.H. 431, 434 (1885)(a default appearance admits all the material allegations of the writ.). These cases suggest that this Court will apply *res judicata* when there is an apparent connection to dismissal and the substance of the merits of a case.

There are examples of dismissals that do not reach the merits of a case. New Hampshire law distinguishes between 'purely procedural' dismissals, which do not bar subsequent actions, and those dismissals which are 'procedural,' but rest also on a substantive decision on the merits of the case**,** which do bar subsequent actions." Jenks v. Menard, 145 N.H. 236, 238 (2000); and In re Proposed New Hampshire Rules of Civil Procedure (Petition of New Hampshire Bar Ass'n), 139 N.H. 512, 516-17 (1995); see e.g. Carveth, 110 N.H. at 234 (1970)(holding that an involuntary dismissal for failure to prosecute is not an adjudication resting on the substance of the merits of the case and not a bar to a second suit under the above statute.); see e.g. Doggett, 138 N.H. at 744 (involuntary dismissal for lack of prosecution after almost five years of inactivity does not bar a second suit under RSA 508:10, the so-called "savings statute."); see e.g. Town of Plaistow, 141 N.H. at 310 (holding that an involuntary dismissal for failure to prosecute

does not constitute a final judgment barring subsequent litigation); see e.g. South Willow Properties, LLC v. Burlington Coat Factory of New Hampshire, LLC, 159 N.H. 494, 499 (2009)(holding that an involuntary dismissal based on a defect in an eviction notice is not a decision on the merits); see e.g. Appeal of Silva, 172 N.H. 183, 191 (2019); see e.g. Berg v. Kelley, 134 N.H. 255, 258 (1991)(holding that an involuntary dismissal upon a defective writ not containing the signature of the superior court clerk did not rest upon the substance of the merits of the case); see e.g. ERG, Inc. v. Barnes, 137 N.H. 186, 189 (1993)(involuntary dismissal for failure to name an individual defendant does not bar subsequent actions). The foregoing cases, many of which are discussed within the context of RSA 508:10, the so-called savings statute, appear to have one thing in common: purely procedural violations concerning matters premised on issues of notice or procedural due process are not *res judicata*.

This Court has yet to decide whether an involuntary dismissal entered as a result of the failure to identify substitute counsel under Super. Ct. Civ. R. 17(f) bars a second suit. Mr. Graham contends that within the context of the procedural history in Graham I, the involuntary dismissal under Super. Ct. Civ. R. 17(f) was purely procedural and is, therefore, not a decision on the merits for purposes of *res judicata*. His failure to identify substitute representation effectively brought a halt to the proceedings without prejudice to ProCon and Eurosim and, as such, is indistinguishable from dismissal arising out of the failure to prosecute.

B. STANDARD OF REVIEW: WHEN THE TEXT OF THE ORDER OF DISMISSAL DOES NOT INDICATE ITS INTENDED EFFECT.

The order of dismissal in Graham I does not indicate within its text whether Judge Macleod, Jr. had in mind to bar Mr. Graham from filing a second suit on the same action. AA [69](" ... The plaintiff or his attorney having failed to file an appearance by the deadline, the Complaint is dismissed."). Had the order specified whether the dismissal was issued with our without prejudice, the appeal could have been avoided. See Riverbend Condo Assoc., 239 A.3d at 993(reminding trial courts to indicate the intent of the dismissal). Notwithstanding, there is ample evidence in the procedural history of Graham I to establish that Judge MacLeod's

dismissal was not intended to bar Graham II.

It is clear that the burden is on ProCon and Eurosim to prove that the dismissal in Graham I was intended to bar Mr. Graham from filing a second suit on the same action. Riverbend Condo Assoc., 239 A.3d at 992 (citing Gray, 161 N.H. at 164). Under such circumstances where the intended effect of an order is not made expressly known in its text, this Court rejects the legal presumption urged by the defendants ProCon and Eurosim in their joint motion to dismiss. The defendants, citing Foster, 136 N.H. at 728, argued in their joint motion that they satisfied their burden of proving the applicability of *res judicata* because a "dismissal order is presumed to be 'with prejudice' when silent as to its intended effect." AA [34](Joint Memorandum of Law, ¶[25). Their interpretation of Foster is erroneous.

This Court requires a case-by-case examination focused on the entire procedural history of the first suit. See Riverbend Condo Assoc., 239 A.3d at 992 (emphasizing that the holdings in Foster and Riverbend were based on the "circumstances present" in those cases which concerned violations of court orders made pursuant to Super. Ct. Civ. R. 35 at a time when the litigants were at the doorstep of trial.). Consideration of the entirety of the procedural history of a case is prudent for the same reasons ambiguous statutes and/or contracts are read as a whole to include policy considerations and circumstances surrounding the creation of same. See e.g. Rankin v. S. St. Downtown Holdings, Inc., 215 A.3d 882, 885 (2019)("We interpret statutory provisions in the context of the overall statutory scheme.") and see e.g. In re Taber-McCarthy, 160 N.H. 112 (2010)(in the event of an ambiguity "a court should examine the contract as a whole, the circumstances surrounding execution and the object intended by the agreement, while keeping in mind the goal of giving effect to the intention of the parties."). Looking to Foster and Riverbend for guidance, the proper examination of the procedural history necessarily involves consideration of a case's procedural history which includes, the procedural posture at the time of dismissal, the text of the court orders, the conduct of the parties, evidence of prejudice if any, and the purpose of the rule that is the basis of the order of dismissal. Id. To better see this, a closer look at Riverbend and Foster is helpful.

Riverbend affirmed the trial court's finding that an involuntary dismissal for failure to

attend a court-ordered, pre-trial hearing made pursuant to Super. Ct. Civ. R. 35 was based on the unique procedural history of the case. See Riverbend Condo Assoc., 239 A.3d at 992 (relying on the nearly identical circumstances examined in Foster, 136 N.H. at 729 (1993)(holding that a procedural dismissal for failure to submit court-ordered pretrial statements pursuant to Super. Ct. Civ. R. 35 is a decision on the merits). Foster and Riverbend, unlike the 'purely procedural' cases cited by Mr. Graham, *supra*, have something in common: there is ample evidence to support the trial court's finding that the violations touched upon the substance of the merits of the case. First, by rule, the trial management conference is to be scheduled to take place within 14 days of the scheduled trial. See Super. Ct. Civ. R. 35, I (a). A trial is the culmination of months, if not years, of preparation involving discovery and often legal contests over applicable law. At this juncture, parties are presumed to be prepared to prove the merits of their respective claims and defenses. Within this procedural context, a pretrial conference ordered under Super. Ct. Civ. R. 35 primarily concerns examination, review, and discussion of the subject matter pertaining to a summary of the case, disputed issues of fact, applicable law, defenses, witnesses, exhibits and more. Id. at I (b). The failure to produce a pretrial statement and/or choosing not to appear at the conference, without excuse, is tantamount to default warranting the application of *res judicata*.

Second, in Foster and Riverbend, this Court affirmed the applicability of *res judicata* because, in part, the parties had notice of the sanctions which were particular and sufficient to warn the parties that a Super. Ct. Civ. R. 35 violation on the eve of trial could result in a dismissal on the merits. Riverbend's procedural history shows that the case structuring order directly informed the parties that the case could be dismissed: "failure to appear at the trial management conference or trial may result in dismissal, default or other sanctions." Riverbend Condo Assoc., 239 A.3d at 990. Similarly, in Foster, the trial court specifically ordered the parties to produce pretrial statements or the noncomplying party would be "defaulted/nonsuited." Foster, 136 N.H. at 729. Specific warnings like these concerning the expectation of parties on the eve of trial draw special attention to the gravity of the procedural circumstances upon which a potential violation may result in dismissal with prejudice. By contrast, Super. Ct. Civ. R. 17(f)

generally warns litigants: "If the party fails to appear by himself, herself, attorney or non-attorney representative by a date fixed by the court, the court may take such action as justice may require." It is also worth emphasizing, that attorney withdrawals are made with oversight of the court which is charged to determine whether parties will be prejudiced in granting the motion. See State v. Emanuel, 139 N.H. 57, 60 (1994)("[o]nce the trial court has determined that good cause for withdrawal exists, an inquiry must be made to determine whether allowing withdrawal will unfairly prejudice the defendant."). Therefore, notice to a non-represented party made pursuant to Super. Ct. Civ. R. 17(f) is issued under circumstances where the trial court has previously determined that prejudice and/or default is not at issue.

Thirdly, in Foster and Riverbend, another important procedural consideration weighed heavily in affirming *res judicata*. In Riverbend, the trial court denied the plaintiff's motion to reopen and no appeal of the denial was filed. Riverbend Condo Assoc., 239 A.3d at 992-93 (explaining that in denying the motion to reopen the trial court in the first suit chose not to exercise its equity powers to waive the application of Rule 35 and, as such, indicated a final judgment on its dismissal). In Foster, the plaintiff filed two motions for reconsideration following dismissal incident to inexcusable neglect to file a pretrial statement. Foster, 136 N.H. at 729. Graham I contains no such pleadings or orders to affirm an inference supporting *res judicata* from which a reviewing court could determine an intent to enter a decision on the merits.

In view of the foregoing, Foster and Riverbend establish that when confronted with ambiguous orders of dismissal, trial courts must examine the procedural history of a case which includes consideration of a number of factors like the purpose of the court rule violated, the wording of the court order, findings of prejudice, and the case's procedural posture. Neither ProCon and Eurosim and/or Judge Tucker's order contain an examination of Graham I's procedural history. Instead, it appears the proponents of the dismissal of Graham II favored the application of a non-existent legal presumption that Judge MacLeod intended dismissal on the merits. The procedural history of Graham I shows otherwise. Mr. Graham's error in not identifying substitute representation is a purely procedural matter indistinguishable from a

failure to prosecute.

C. ANALYSIS OF THE PROCEDURAL HISTORY OF GRAHAM I

The trial court in Graham I issued a procedural dismissal pursuant to the authority afforded it under Superior Court Civil Rule 17(f). Taking into consideration the procedural history of Graham I to include the case's procedural posture at the time of dismissal, the purpose of Super. Ct. Civ. R. 17(f), evidence of prejudice, and applicable case law, the dismissal of Graham I was not a decision resting on the merits of the suit and, therefore, does not bar Mr. Graham's second suit. Mr. Graham's failure to identify substitute representation had the effect of halting the case early in the proceedings, well within the applicable statute of limitations, and without any evidence of prejudice to the defendants. *Res judicata* is not implicated under these circumstances.

i. Super. Ct. Civ. R. 17(f) is purposed to facilitate notice and procedural due process

To properly decide the legal dispute at bar examination of a case's procedural history should include considerations of the procedural court rules that prompted the dismissal. See Riverbend Condo Assoc., 239 A.3d at 990 and Foster, 136 N.H. at 729 (both cases concerned the procedural context of Super. Ct. Civ. R. 35, the pretrial statement and conference). The trial court in Graham I entered its dismissal pursuant to Super. Ct. Civ. R. 17(f), a procedural rule governing the publication of the identity of a party representative. See Super. Ct. Civ. R. 17(a) cf. (b). Super. Ct. Civ. R. 17 also governs the conditions upon which a party representative may withdraw. Id. (i,e. withdrawal by notice is permitted if no trial date has been set but otherwise permissible only by leave of court). Pertinent to the circumstances at issue in Graham I, the rule provides for appropriate judicial action when a previously represented party does not notify the court of his new representative:

> "... Whenever an attorney or non-attorney representative withdraws from an action, and no other Appearance is entered, the court shall notify the party by mail of such

withdrawal. If the party fails to appear by himself, herself, attorney or non-attorney representative by a date fixed by the court, the court may take such action as justice may require." Super. Ct. Civ. R. 17(f)

Unlike the court procedural rules at issue in Riverbend and Foster (Rules 5 and 35[3]), no aspect of Super. Ct. Civ. R. 17(f) appears to rest upon the substance of the merits of a case. Super. Ct. Civ. R. 17(f) demands the timely publication of the identity of a party representative because it is through the new representative that future discovery requests, motions, court notices, and orders are served in the mail and/or sent electronically to a party. See Douglas v. Douglas, 143 N.H. 419, 423 (1999)(due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties and afford them an opportunity to present their claims and defenses). Not knowing the identity of a party representative impacts when and/or how the litigation will proceed to trial and effectively seizes the proceedings until such time as the substitute representative is identified and the case can proceed with some assurance that all parties are afforded an adequate opportunity to be heard during the case. This is purely procedural.

Of course, Super. Ct. Civ. R. 17(f) does not contain a specific warning to litigants that a case shall be dismissed or nonsuited. This is in stark contrast to the specific orders threatening nonsuit or dismissal in Foster and Riverbend. See Riverbend Condo Assoc., 239 A.3d at 990 and Foster, 136 N.H. at 729. Indeed, Graham I's "Rule 17(d) [sic] Notice" did not specifically notify Mr. Graham that he risked dismissal in the event he failed to respond.

ii. The procedural posture in Graham I does not support a finding of *res judicata*

Having considered the purpose of Super. Ct. Civ. R. 17(f), an examination of the procedural posture of Graham I reveals that the case was in its infancy and the defendants had not voiced any concern over prejudice before or after the issuance of the Super. Ct. Civ. R. 17(f) notice. At the time Mr. Graham's counsel filed his motion to withdraw in September 2018, the approved Case Structuring and ADR Order (AA [89]) was roughly three months old, and the

[3] Rule 35 concerns pre-trial proceedings, i.e., consideration of witness and exhibit lists and/or disputed facts and law all of which rest on the substance of the merits of a cause of action. See Barton, 125 N.H. at 480 (violation of a discovery rule can constitute a judgment on the merits for purposes of res judicata);

accident giving rise to the cause of action had not yet reached its one year anniversary. ProCon had recently entered the case after defaulting. AA[88]. There were no discovery violations before the trial court. Neither ProCon nor Eurosim opposed the motion to withdraw. In granting the motion to withdraw, the court determined that the defendants were not prejudiced. See State v. Emanuel, 139 N.H. 57 at 60. Therefore, given that Mr. Graham was no longer represented, the only question before the trial court at the time it issued the "Rule 17(d) [sic] Notice" was whether Mr. Graham desired to continue his first suit in a pro se capacity or with the assistance of new counsel. Knowing the identity of Mr. Graham's representative served to assist the court, Mr. 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 served in the mail and/or sent electronically to a party. Such concerns are purely procedural for the reasons offered above.

Since there is nothing in the Graham I procedural record establishing prejudice to defendants, the trial court's interest in noticing Rule 17(f) was purely procedural.

iii. The halt to the proceedings in Graham I is indistinguishable from failure to prosecute.

Taking into consideration the purpose of Super. Ct. Civ. R. 17(f) and Graham I's procedural history, *supra*, Mr. Graham's failure to identify substitute representation had the effect of halting the case early in the proceedings well within the applicable statute of limitations and without any evidence of prejudice to the defendants ProCon and Eurosim. Judge MacLeod entered the dismissal because it was not clear how and when Mr. Graham wished to proceed with his case. Graham I could not proceed until the substitute representative was identified to allow the case to proceed with some assurance that all parties are afforded an adequate opportunity to be heard during the case. As argued above, the circumstances are purely procedural and indistinguishable to the failure to prosecute. See Doggett, 138 N.H. at 744 (involuntary dismissal for lack of prosecution after almost five years of inactivity does not bar a second suit under RSA 508:10, the so-called "savings statute.").

There is nothing in the procedural history to suggest that the delay arising out of Mr. Graham's failure to prosecute his claim caused ProCon and Eurosim prejudice warranting dismissal with prejudice. The case was in its infancy. In the absence of Super. Ct. Civ. R. 17(f), Mr. Graham's case could have potentially remained inactive on the court docket for three years without being dismissed. See Super. Ct. Civ. R. 41. Moreover, as an alternative to identifying substitute counsel under Rule 17(f), Mr. Graham likely could have moved to voluntarily nonsuit his case to file again at a later date. Town of Plaistow, 141 N.H. at 309 ("a voluntary nonsuit arises from the plaintiff's choice and has no conclusive effect on the merits of the underlying action."). There is no apparent reason why Judge MacLeod would have denied the request had it been made by Mr. Graham in late 2018. See Cadle Co. v. Proulx, 143 N.H. 413, 416 (1999)("The mere prospect of duplicative and possibly inconvenient litigation, however, is not enough to warrant denial of the plaintiff's motion for nonsuit without prejudice."). A voluntary nonsuit is not materially different than the failure to prosecute as both circumstances are purely procedural, serve to pause the litigation, and do not bar a second suit. See Town of Plaistow, 141 N.H. at 310 (a voluntary nonsuit is only considered "with prejudice" if re-filing the suit is manifestly unjust to the defendant.). Mr. Graham filed his second suit within a year of dismissal and well within the statute of limitations applicable to his accident. AA [49].

iv. Judge Tucker's order is not supported by an examination of the procedural history of Graham I.

Review of Judge Tucker's order suggests he adopted the defendants' errant interpretation of Riverbend. In their motion to dismiss, ProCon and Eurosim offered no substantive analysis of the procedural history of Graham I. Instead, the defendants urged Judge Tucker to find that they met their burden based on an erroneous reading of Riverbend. The defendants argued that Riverbend "affirmed and expanded" the holding in Foster to mean that a dismissal order is presumed to be "with prejudice" when silent as to its intended effect. AA [35](Joint Memorandum of Law, ¶[28). Since Judge MacLeod's order was silent as to intended

effect, the defendants urged Judge Tucker to grant their motion because MacLeod's order ought to be presumed to be a dismissed with prejudice unless the circumstances of the case showed otherwise. AA [100](Order, p.4). ProCon and Eurosim's argument erroneously shifts the burden of proof onto Mr. Graham to show why his second suit is not barred by res judicata. See Riverbend Condo Assoc., 239 A.3d at 992 (citing Gray, 161 N.H. at 164)("When a litigant moves to dismiss based exclusively upon res judicata, which is an affirmative defense, the movant bears the burden of proving its application.").

It appears that Judge Tucker adopted ProCon and Eurosim's reasoning because his order begins with a finding that Mr. Graham did not prove his theory of lack of prosecution. AA [100](Order, p.4). Judge Tucker reached his conclusion because the text of Judge MacLeod's order did not "say dismissal was entered on that ground." Id. Consistent with the argument offered by ProCon and Eurosim, Judge Tucker's finding suggests that it was Mr. Graham's burden to disprove application of *res judicata*. Even if it were Mr. Graham's burden, it seems somewhat insurmountable to disprove *res judcata* by reason of the text alone when the very dispute at bar turns on the fact that Judge MacLeod's order is silent as to its intended effect. The ambiguity is the reason why this Court favors an examination of a case's procedural history over an examination of ambiguous text read in isolation.

Rather than incorporate into the order consideration of the procedural history of Graham I, Judge Tucker's substantive analysis is limited to an examination of a few sentences of the text of the "Rule 17(d) [sic] Notice" and Judge MacLeod's order of dismissal. AA [100](Order, p.4):

> "it [the order of dismissal] says, Graham was 'directed' to "appear by himself or through an attorney or non-attorney representative by November 19, 2018," and he "failed to file an appearance by the deadline." Id. [Judge Tucker then concludes:] "This reads like an order dismissing a case for "failure to obey an order." Id. (citing Foster, 136 N.H. at 730).

Nothing in the text appears to explain why failing to identify substitute representation is a violation warranting the application of *res judicata*. Contrary to Judge Tucker's apparent citation

to Foster, "the failure to obey a court order" does not necessarily result in the application of *res judicata*. Earlier in this brief, Mr. Graham identified several involuntary court dismissals based on court rule violations that were not *res judicata*.

If it was Judge Tucker's intention to cite Foster because he thought the procedural history of the case was analogous to Graham I, the comparison is not apparent. See Riverbend Condo Assoc., 239 A.3d at 992 ("Important to our holding in Foster was our examination of that case's procedural history ... whether a claim is barred by res judicata is determined on a case-by-case basis"). For the reasons offered above, the procedural history in Foster and Riverbend are very distinguishable in comparison to Graham I. Alternatively, if Judge Tucker cited Foster to stand for the proposition that a court can dismiss a case with prejudice for violating a court order, he is correct in part. See Roberts, 140 N.H. at 727 (citing the unique procedural history of Foster, 136 N.H. at 730). However, Foster does not permit a finding of *res judicata* based on any violation of a court rule. Foster undoubtedly relied on the procedural history unique to that case to sustain the lower court's finding.

Invoking Fed. R. Civ. Pro. 41(b) as a source of guidance, Judge Tucker, in his order, appears to also rely on dicta in Riverbend to conclude that since Judge MacLeod's order was silent as it its intended effect, it should be presumed to be with prejudice. AA [100](Order, p.4). The use of dicta, in the absence of a proper analysis of the procedural history in Graham I, is contrary to Foster and Riverbend. To the extent the burden of proving the applicability of *res judicata* can mean anything, it would appear that applying the federal rule without first examining the procedural history of Graham I, unnecessarily risks an unjustified burden shift to the nonmoving party. Had Judge Tucker in his order explained why an examination of the procedural history in Graham I justifiably lead him to believe that Judge MacLeod had it in mind to bar a second suit, the finding would be based on something, even if the procedural history was examined incorrectly. Even that is not the case here. Judge Tucker seemingly attempts to bootstrap his finding by invoking the federal rule. To do so is error.

Finally, it is also important to emphasize that Foster and Riverbend do not necessarily

stand for the proposition that trial courts in deciding the applicability of *res judicata* are narrowly bound to discern the precise intent of an order of dismissal when it is silent to its intended effect. Such a narrow focus of purpose likely lends itself to the indiscriminate use of the legal presumption urged by ProCon and Eurosim and seemingly adopted by Judge Tucker. The Graham I Super. Ct. Civ. R. 17 Notice specifically indicated to Mr. Graham that if he did not identify a substitute representative the "court may take such action as justice may require" which, when putting aside the ambiguity of Judge MacLeod's order of dismissal, is another way of saying that the court would do the right thing under the circumstances. For the reasons set forth above, justice does not require the application of *res judicata* especially when ProCon and Eurosim have offered no material evidence of prejudice and Mr. Graham's cause of action is well within the applicable statute of limitations.

CONCLUSION

For all of the reasons stated, Judge Tucker's order ought to be reversed and this Court should find that Mr. Graham's second suit is not barred by application of *res judicata*.

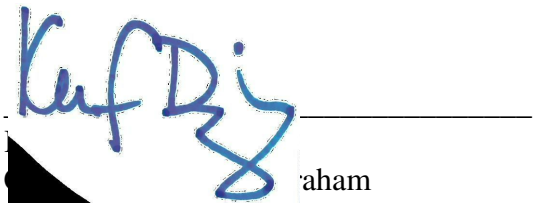
REQUEST FOR ORAL ARGUMENT

The appellant requests oral argument.

CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with 16(11) because this brief contains approximately 7,230 words exclusive of pages containing the table of contents, table of authorities, text of pertinent statutes. I also hereby certify that the brief complies with 16(3)(i) because the decision that is being appealed is in writing and included in the addendum to the brief.

Respectfully Submitted,



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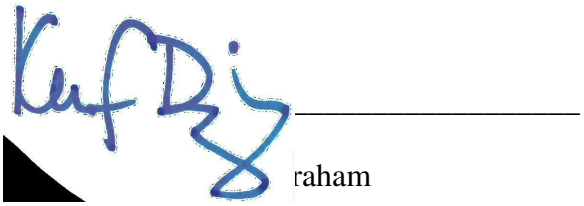
CERTIFICATE OF SERVICE

I hereby certify that on this date that an electronic copy of the foregoing brief is being timely provided to counsel for Appellees.



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ADDENDUM

The State of New Hampshire

JUDICIAL BRANCH

MERRIMACK COUNTY SUPERIOR COURT

NO. 217–2019-CV-790

TYCOLLO GRAHAM

v.

EUROSIM CONSTRUCTION,
PROCON, INC., and
ROUTE 120 HOTEL, LLC.

ORDER

Re: Motion of Eurosim Construction and PROCON, Inc. to Dismiss Counts I and II (doc. no. 26)

Tycollo Graham was preparing for a painting job at the site of a hotel under construction when glass panels intended for use as shower doors fell on his leg and injured him. He sued a subcontractor, Eurosim Construction, and the general contractor, PROCON, Inc. in separate counts for negligence based on their failure to secure the glass or to warn him the panels could fall.

Eurosim and PROCON move to dismiss the claims on grounds of res judicata. "The doctrine of res judicata prevents parties from relitigating matters actually litigated and matters that could have been litigated in the first action. It 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 both instances; and (3) the first action ended with a final judgment on

the merits." *Finn v. Ballentine Partners, LLC*, 169 N.H. 128, 147 (2016) (quotation omitted). Eurosim and PROCON contend Graham sued them on identical grounds in Grafton Superior Court and saw that case dismissed when neither he nor his representative filed an appearance after his attorney withdrew from the case. The defendants say the dismissal was a judgement on the merits that bars this new lawsuit. Only this criterion is in issue, as Graham does not dispute that the Grafton court case and this one involve identical parties and the same claims. The defendants bear the burden of proving their assertion that res judicata applies. *Riverbend Condo Assoc. v. Groundhog Landscaping & Prop. Maint.*, 173 N.H. 372, 374-75 (2020).

The background facts are straightforward. In February 2018, Graham sued the defendants in Grafton County Superior Court. A Case Structuring and ADR order issued, with discovery deadlines and trial set for August 2019. Pl. Obj., Exhibits B, C. On August 7, 2018, Graham filed answers to Eurosim's interrogatories. *Id*. Exhibit D.

On October 30, 2018, the court (MacLeod, J.) granted a motion by Graham's counsel to withdraw. Def. Memorandum on Mot. Dism., Exhibit E. On the same date, the court issued a notice advising that with his counsel's withdrawal and the absence of a substitute appearance, **"[i]**f 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*. Exhibit F. See SUPER. CT. CIV. R. 17(f).

On December 4, 2018, the court dismissed the complaint. It cited the Rule 17 notice "directing the plaintiff to appear by himself or through an attorney or non-attorney representative by November 19, 2018," and Graham's failure "to file an appearance by the deadline." Def. Memorandum, Exhibit G. The order does not say whether the dismissal was with or without prejudice. Graham did not ask for reconsideration or appeal the dismissal. On November 18, 2019, he filed what the parties agree is an essentially identical lawsuit in this court.

The defendants characterize the dismissal as a judgment on the merits, as it is based on the violation of a court order entered to enforce a procedural rule. In *Barton v. Barton*, 125 N.H. 433, 435 (1984) the State Supreme Court found a default judgment entered because the defendant "failed to comply with the superior court discovery rules constitutes a judgment on the merits," such that "a second suit alleging the same cause of action is barred by the doctrine of *res judicata.*" And in *Foster v. Bedell*, 136 N.H. 728, 730 (1993), a dismissal for failure to file a pretrial statement was deemed a judgment on the merits because 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." Accord, *Riverbend Condo Assoc.*, 173 N.H. at 376 (dismissal for failure to appear at final trial management conference was judgment on the merits.)

Citing *Riverbend*, the defendants also note the Supreme Court's approval of the trial court's reference to Federal Rule of Civil Procedure 41(b) and its presumption that an

involuntary dismissal is with prejudice unless it is "for lack of jurisdiction, improper venue, or failure to join a party," or "the court specifies otherwise" *Id*. at 377. So, unless the circumstances of the case show the court intended the dismissal to be without prejudice, an order that is silent on the point weighs generally in favor of dismissal with prejudice.

Graham likens the dismissal order to one for lack of prosecution, which like a voluntary nonsuit is generally not a final judgment on the merits or a bar to a subsequent suit. *Town of Plaistow v. Riddle*, 141 N.H. 307, 310 (1996). But the order does not say dismissal was entered on that ground, and its wording makes Graham's violation of a court order its basis — it says, Graham was "directed" to "appear by himself or through an attorney or non-attorney representative by November 19, 2018," and he "failed to file an appearance by the deadline." Def. Mem. on Mot. Dism., Exhibit G. This reads like an order dismissing a case for "failure to obey an order." *Foster v. Bedell*, 136 N.H. at 730. And even though it is dicta, the Supreme Court's receptiveness in *Riverbend* to FED. R. CIV. PRO. 41(b) as a source for guidance on the issue tilts the scale even more in favor of a dismissal with prejudice.

The motion to dismiss Counts I and II is *granted*.

SO ORDERED.

DATE: FEBRUARY 17, 2021

JUDGE BRIAN T. TUCKER

Clerk's Notice of Decision
Document Sent to Parties
on 02/18/2021