THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2012-0754

In re Estate of Jack M. Bergquist

RULE 7 MANDATORY APPEAL OF 1ST CIRCUIT – PROBATE DIVISION – LANCASTER
FINAL DECISION

BRIEF OF THE ESTATE/APPELLEE ESTATE OF JACK M. BERGQUIST

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

NEW HAMPSHIRE CASES

NEW HAMPSHIRE STATUTES

OTHER STATE STATUTES

CONSTITUTIONS AND RULES

SECONDARY SOURCES

QUESTIONS PRESENTED

1. Whether the 1st Circuit Court – Probate Division at Lancaster, erred in denying Petitioner, Eddie Nash & Sons, Inc., their request to retroactively modify the March 20, 2003 Order for Payments to include post-judgment interest?
Preserved: Estate of Jack M. Bergquist's Objection to Claim of Eddie Nash & Sons, Inc. Dated February 29, 2012; Transcript of August 30, 2012 Hearing on Claim at 1st Circuit Court – Probate Division at Lancaster - p. 7.

2. Whether a Plaintiff can retroactively modify an Order for Payments under RSA 524:6-a to include post-judgment interest after the original Judgment has been entered?
Preserved: Estate of Jack M. Bergquist's Objection to Claim of Eddie Nash & Sons, Inc. Dated February 29, 2012; Transcript of August 30, 2012 Hearing on Claim at 1st Circuit Court – Probate Division at Lancaster – p. 6 & 7.

Title 56.

PROBATE COURTS AND DECEDENTS' ESTATES

Chapter 552. PROBATE OF WILLS

Title 56

PROBATE COURTS AND DECEDENTS' ESTATES

Chapter 556. SUITS BY AND AGAINST ADMINISTRATORS

TITLE LIII
PROCEEDINGS IN COURT

CHAPTER 524
JUDGMENTS

Section 524:6-a

524:6-a Periodic Payment of Judgments. – Whenever judgment is rendered against any person in this state, the court in which the judgment is rendered shall either at the time of rendition of the judgment inquire of the defendant as to the defendant's ability to pay the judgment in full or, upon petition of the plaintiff after judgment, order the defendant to appear in court for such inquiry. The court may at either time order the defendant to make such periodic payments as the court in its discretion deems appropriate. If the court orders the defendant to make periodic payments at the time of rendition of judgment, the order shall not provide for payments to begin until after the appeal period has expired. Failure to make such periodic payments shall constitute civil contempt of court unless the judge, upon inquiry, finds that the failure was the result of a change in circumstances, or the failure was not intentional or in bad faith, or for other good cause. The court may order the appropriate agencies to make an investigation and recommendation as to the defendant's ability to pay the judgment. The judgment may be enforced against any property of any kind of the debtor, except such property as is now exempt from attachment or execution. Unless the parties otherwise agree, after an order for periodic payments has been issued by the court, no writ of execution shall be issued by the court without prior notice to the defendant.

Rhode Island Long-Arm Statute

R.I. Gen. Laws § 9-5-33

§ 9-5-33. Jurisdiction over foreign corporations and over nonresident individuals, partnerships, or associations

(a) Every foreign corporation, every individual not a resident of this state or his or her executor or administrator, and every partnership or association, composed of any person or persons not such residents, that shall have the necessary minimum contacts with the state of Rhode Island, shall be subject to the jurisdiction of the state of Rhode Island, and the courts of this state shall hold such foreign corporations and such nonresident individuals or their executors or administrators, and such partnerships or associations amenable to suit in Rhode Island in every case not contrary to the provisions of the constitution or laws of the United States.

(b) Service of process may be made on any such foreign corporation, nonresident individual or his or her executor or administrator, and such partnership or association within or without the state in the manner provided by any applicable procedural rule or in the manner prescribed by order of the court in which the action is brought.

(c) Nothing herein shall limit or affect the right to serve process upon the nonresident individual or his or her executor or administrator, or the partnership or association, or a foreign corporation within this state or without this state in any manner now or hereafter permitted by law.

RULES OF THE CIRCUIT COURT OF THE STATE OF NEW HAMPSHIRE -- DISTRICT DIVISION

GENERAL RULES

Rule 1.11. Appeals to the Supreme Court.

A. When a question of law is to be transferred after a decision on the merits, all appeals shall be deemed waived and final judgment shall be entered on the thirty-first day from the date on the Clerk's written notice that the Court has made the decision on the merits, unless the party aggrieved enters a notice of appeal in the Supreme Court within thirty days from the date on the Clerk's written notice of the Court's decision that aggrieves the party, pursuant to Supreme Court Rule 7, and mails the number of copies provided for by the rules of the Supreme Court to the Clerk thereof. The Court shall not grant any requests for extensions of time to file an appeal document in the Supreme Court or requests for late entry of an appeal document in the Supreme Court; such requests shall be filed with the Supreme Court. See Supreme Court Rule 21(6).

B. Whenever any question of law is to be transferred by interlocutory appeal from a ruling or by interlocutory transfer without ruling, counsel shall seasonably prepare and file with the Clerk of the District Court the interlocutory appeal statement or interlocutory transfer statement pursuant to Supreme Court Rule 8 and Supreme Court Rule 9, and after the Court has signed the statement, counsel shall mail the number of copies provided for by the rules of the Supreme Court to the Clerk thereof.

RULES OF THE CIRCUIT COURT OF THE STATE OF NEW HAMPSHIRE -- DISTRICT DIVISION

SMALL CLAIMS ACTIONS

Rule 4.27. Appeals.

Any party to a small claim judgment may, at the time judgment is declared or within 30 days of the notice of judgment date, appeal therefrom to the supreme court. The district court shall not grant any requests for extensions of time to file an appeal document in the supreme court or requests for late entry of an appeal document in the supreme court; such requests shall be filed with the supreme court. See Supreme Court Rule 21(6).

RULES OF THE CIRCUIT COURT OF THE STATE OF NEW HAMPSHIRE -- DISTRICT DIVISION

GENERAL RULES

Rule 1.21. Periodic Payments.

(1) A judgment creditor who seeks an order for periodic payments under RSA 524:6-a shall file a Motion for Periodic Payments, setting out specific grounds for relief. An unsatisfied execution is not required as a prerequisite for such a motion. Such a motion shall be made orally in court if the defendant is present when the verdict or judgment is awarded; in which case, the court shall conduct a hearing, pursuant to subdivision (3).

Comment

A "Motion for Periodic Payments" form that may be used to comply with this paragraph is available at the clerk's office of any Circuit Court and on the Judicial Branch website at (http://www.courts.state.nh.us/district/forms/allforms.htm#civil)

(2) Upon the filing of a written motion under subdivision (1), a notice of hearing will issue, requiring the judgment debtor to appear at a time and date named therein and to submit to an examination relative to the judgment debtor's property and ability to pay the judgment. The judgment creditor shall cause the notice of hearing to be served either in-hand or by certified mail, restricted delivery, return receipt requested. If the judgment creditor elects to serve the notice of hearing by certified mail, restricted delivery, return receipt requested, and if the return receipt is returned without indication that the notice of hearing has been properly served, then in-hand service shall be required.

(3) On hearing, the judgment debtor may be required to submit an affidavit which conforms to the Affidavit of Assets and Liabilities form and may be examined under oath as to the judgment debtor's property and ability to pay the judgment. Either party may introduce oral and written evidence as the court deems relevant. Technical rules of evidence do not apply.

Comment

The "Affidavit of Assets and Liabilities" form referred to in this paragraph is available at the clerk's office of any Circuit Court and on the Judicial Branch website at (http://www.courts.state.nh.us/district/forms/allforms.htm#civil)

(4) If the judgment debtor fails to appear at the hearing, the court may proceed, and orders may be made in the judgment debtor's absence or an order for arrest may be issued. Attendance by the plaintiff or plaintiff's counsel shall not be required unless ordered by the court.

(5) If the court is satisfied that the judgment debtor has property not exempt from attachment or execution, the court may order the property to be produced or so much thereof as may be sufficient to satisfy the judgment and cost of the proceedings so it may be taken on execution. If the judgment debtor is able to make periodic payments on the judgment, the court may, after allowing the judgment debtor an appropriate amount for support and support of the judgment debtor's family, if any, order the judgment debtor to make such periodic payments as are deemed as appropriate. The court may order a combination of the foregoing.

(6) The court may prescribe the times, places, amounts of payments and other details in making any order. The court may at any time review, revise, modify, suspend or revoke any order. Failure to obey any lawful order of the court without just cause shall constitute a contempt of court. Contempt proceedings may be initiated by the judgment creditor by motion or Affidavit of Noncompliance and will result in the issuance of an order of notice to appear before the court to show cause why the defendant should not be held in contempt of court. The judgment creditor shall cause the order of notice to be served either in-hand or by certified mail, restricted delivery, return receipt requested. If the judgment creditor elects to serve the order of notice by certified mail, restricted delivery, return receipt requested, and if the return receipt is returned without indication that the order of notice has been properly served, then in-hand service shall be required.

Comment

An "Affidavit of Noncompliance" form that may be used to comply with this paragraph is available at the clerk's office of any Circuit Court and on the Judicial Branch website at (http://www.courts.state.nh.us/district/forms/allforms.htm#civil)

(7) At the contempt hearing following an order to show cause, the court may require an investigation by probation or other appropriate agency. The court, after hearing, may find the defendant in contempt and may make such orders as are appropriate, including a commitment to the house of correction until contempt is discharged.

(8) A sentence for contempt shall not end the proceedings nor satisfy any order for periodic payments. Future violations of the order on which the sentence was founded may likewise be dealt with as a contempt.

(9) If a motion for periodic payments is denied for want of property or ability to pay, the judgment creditor shall not file another motion against the same debtor upon the same judgment within three months unless the court otherwise allows for good cause.

(10) All costs and fees incurred by the plaintiff in carrying out the provisions of this rule shall be paid by the defendant.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

At some point in 1994, Jack M. Bergquist entered into a promissory note and security agreement with Eddie Nash and Sons, Inc. for the purchase of a an unidentified piece of heavy equipment (Small Claims Complaint against Jack Bergquist – Colebrook Dist. Ct., 11/16/2011). The loan went into default, and Eddie Nash and Sons, Inc. initiated a small claims action against Mr. Bergquist stating "Agreement dated 2/5/2001 not paid as agreed" on or about November 16, 2001 in the Colebrook District Court. *Id*. A default judgment was issued on or about February 21, 2002, in the amount of $5,136.99. (Judgment on Small Claims – Colebrook Dist. Ct., 2/21/2002). This judgment included the $5,000 in claimed damages, costs of $65.50, and interest of $71.49. *Id*. No request was made to include post judgment interest at this time by Eddie Nash & Sons. *Id*. On or about September 2, 2002, Eddie Nash & Sons, Inc. filed a Motion for Periodic Payments. (Motion for Periodic Payments – Colebrook Dist. Ct., 9/2/02). Eddie Nash & Sons, Inc. did not include a request for post-judgment interest to be added to the Judgment as part of their Motion for Periodic Payments. *Id*. On or about March 20, 2003, the Colebrook District Court issued an Order for Payments ordering monthly payments of $50.00 to be paid by the Defendant, Jack M. Bergquist. (Order for Payments – Colebrook Dist. Ct, 3/20/2003). This Order did not include any calculation for post-judgment interest, and Eddie Nash & Sons did not appeal the Court's order requesting that post-judgment interest should have been added. *Id*.

Jack M. Bergquist proceeded to pay this monthly amount from March of 2003 through May of 2011. (Appellant's Brief, p. 4). Unfortunately, Mr. Bergquist passed away in June of 2011, leaving a balance owed on the March 20, 2003 Order for Payments. (Trans. P. 4-5). On or about February 29, 2012, Susan Nash, as President of Eddie Nash & Sons, Inc., submitted a creditor's claim against the Estate of Jack M. Bergquist in the amount of $16,591.30. (Claim of

Eddie Nash and Sons, Inc. - 9/1/2011). This included a claim for $3,697.57 for "Balance of Court Judgment", $1,468.30 for "Insurance Payments and Check Fees", $7,718.49 for "Unpaid equipment rent", and $3,706.94 for "Depreciation of Equipment". *Id*. On or about February 29, 2012, William B. Parnell, Esquire filed his Appearance. (Appearance of William B. Parnell on behalf of Estate of Jack M. Bergquist – 2/30/12). Through counsel, the Estate of Jack M. Bergquist filed an Objection to Eddie Nash & Sons claim against the Estate. (Objection to Claim of Eddie Nash and Sons - 2/29/12). After the objection was filed, Eddie Nash and Sons amended their claim against the Estate to $3,697.57 and requested the Court cancel the hearing on the claim. (Amended Claim of Eddie Nash and Sons, Inc., 8/20/12). For the first time since the March 20, 2003 Order for Payments was issued by the Colebrook District Court, Eddie Nash and Sons requested post-judgment interest to be added on to the amount they claimed the Estate owed them. *Id*. Susan Nash also claimed the assent of the Estate's counsel in requesting the cancellation of the hearing as the result of filing the amended claim. (Assent to Cancel Hearing on Aug. 30, 2012, 8/27/12). Due to concerns about the veracity of opposing counsel's assent, the Lancaster Probate Court was forced to issue a letter stating that "Due to concerns with the assent form the hearing for 8/30/12 remains as scheduled". (Letter from 1st Circuit – Probate Division at Lancaster – 8/28/12). In response to this action by Susan Nash, the Estate filed a Motion for Sanctions Against Eddie Nash and Sons, stating Susan Nash knowingly misrepresented that counsel for the Estate has assented to the cancellation of the hearing. (Motion for Sanctions, 8/28/12). A hearing was held at the Lancaster Probate Court on all issues on August 30, 2012. (Letter from 1st Circuit – Probate Division at Lancaster – 8/28/12). At the hearing, Susan Nash appeared and requested the Court order the Estate to pay the remaining balance on the March 20, 2003 Order for Payments. (Trans. 5). Ms. Nash also reiterated her new request to include post-

judgment interest on the balance owed by the Estate. (Trans. 11). The Court rightly asked Susan Nash whether the original judgment provided for continuing interest, or referenced that the original Small Claims Judgment did not identify continuing interest, approximately nine times during the course of the August 30, 2012 hearing. (Trans. 11, 16, 17, 18, 20). Ms. Nash finally replied that "It doesn't use them words". (Trans. 20). The Court again pointed to the Colebrook District Court order stating $71.48 in initial interest was included, but that there was no other order on post-judgment interest. (Trans. 16, 17, 18, 20). Ms. Nash claimed that the March 20, 2003 Order for Payments "indirectly" ordered continuing post-judgment interest, but failed to point to any request made by Eddie Nash and Sons or the Court's Orders. (Trans. 18).

The Lancaster Probate Court found that the Estate of Jack M. Bergquist owed Eddie Nash and Sons $544.21. (1st Circuit Court – Probate Division at Lancaster – Notice of Decision, 9/24/12). The Court denied their request to retroactively modify the March 20, 2003 Order for Payments to include post-judgment interest, and Eddie Nash and Sons appealed. *Id*.

SUMMARY OF ARGUMENTS

Eddie Nash and Sons claim for post-judgment interest is barred by the doctrine of *res judicata*. The final Order on Payments was issued on March 20, 2003, and at no point in the underlying Small Claims action against Jack M. Bergquist did Eddie Nash and Sons request post-judgment interest. Accordingly, their attempt to claim anew that post-judgment interest was awarded in an attempt to retroactively modify the March 20, 2003 Order is without merit and must be denied.

Secondly, even if the attempt to collaterally attack the underlying Small Claims Judgment and subsequent Order for Payments is not barred by res judicata, the attempt to modify the Order for Payments is contrary to the purpose of RSA 524:6-a, which is to set a fixed set of scheduled payments for the debtor/defendant to pay off the judgment rendered against them.

ARGUMENT

I. Eddie Nash & Sons claim for post-judgment interest is barred by the doctrine of Res Judicata.

"The doctrine of res judicata prevents parties from re-litigating matters actually litigated and matters that *could have* been litigated in the first action." *Morgenroth & Assoc's v. State,* 126 N.H. 266, 269, (1985) (quotation omitted; emphasis added). Res judicata is a question of law, which is reviewed de novo. *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." *Bricker v. Crane,* 118 N.H. 249, 252, 387 A.2d 321, 323 (1978) (citing *University of New Hampshire v. April,* 115 N.H. 576, 578, (1975); Restatement (Second) of Judgments ch. 3 § 48, Comment a (Tent.Draft No. 1, 1973)). The essence of the doctrine of res judicata is that "a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action." *Id* at 252-53, (quoting *Concrete Constructors, Inc. v. The Manchester Bank,* 117 N.H. 670, 672, 377 A.2d 612, 614 (1977)). Res judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action. *Id*. For res judicata to apply, three elements must be met: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered in the first action. *Id.*

A. The Estate of Jack M. Bergquest is the Legal equivalent of Jack M. Bergquist, and thus the parties to the small claims action and this subsequent creditor action against the estate are the same.

In the first instance, it is axiomatic that the Estate stands in place of the decedent, in respect to both claims of the estate and claims against the estate. (SEE: RSA 552 and RSA 556, *generally*). Moreover, other states have found that the Estate stands in place for the decedent in certain circumstances. (R.I. Gen. Laws § 9-5-33(a)).

Further, the relationship between party and non-party implied by a finding of privity in the estoppel context has been described as one of "virtual representation," *Aerojet-General Corporation v. Askew,* 511 F.2d 710, 719 (5th Cir.1975), cert. denied, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975), and "substantial identity," *United States v. ITT Rayonier, Inc.,* 627 F.2d 996, 1003 (9th Cir.1980) (quoting *Chicago, R.I. & P. Ry. v. Schendel,* 270 U.S. 611, 621, 46 S.Ct. 420, 424, 70 L.Ed. 757 (1926)). These conclusory phrases imply not a formal, but a functional relationship, in which, at a minimum, the interests of the non-party "were in fact represented and protected in the [prior] litigation...." *Waters v. Hedberg,* 126 N.H. 546, 549, 496 A.2d 333, 335 (1985).

The original small claims complaint was filed against Jack M. Bergquist in 2001 by Eddie Nash and Sons. A subsequent judgment and order for payments was issued against Mr. Bergquist as a result of that small claims complaint. Mr. Bergquist paid all payments owed under the Order for Payments until his death in 2011. Upon the opening of the Estate of Jack Bergquist, Eddie Nash & Sons filed a claim against the Estate in connection with the 2001 small claims action. It is clear that the parties to the action in 2001, and the parties involved in the matter now pending, are the same legally for purposes of this appeal. Moreover, even if this Court finds the Estate

does not stand in the shoes of the decedent, Jack Bergquist, the two parties are in privity with each other. Both Eddie Nash & Sons and Jack Bergquist were both parties to the underlying small claims complaint. Thus, both parties represented and protected their rights in the prior litigation. Functionally, they are equivalent parties and thus the first prong of the res judicata test is satisfied.

B. The same cause of action was before the court in the small claims action, and in the subsequent claim against the Estate of Jack M. Bergquist.

New Hampshire has defined "cause of action" as "all theories on which relief could be claimed on the basis of the factual transaction in question". *Eastern Marine Const. Corp. v. First Southern Leasing*, 129 N.H. 270, 275 (1987). New Hampshire has chosen in the past to "expressly follow what we consider to be the modern and better view, and hold that the term "cause of action" means the right to recover, regardless of the theory of recovery." *Id* at 274. A theory of recovery therefore must be pleaded, or be subject to bar. *Id.* (See also: Restatement (Second) of Judgments ch. 3 §§ 24, 25 (1980)). We therefore reject the view that the term is synonymous with the particular legal theory in which a party's claim for relief is framed. *Id.* Thus the present trend is to define cause of action collectively to refer to all theories on which relief could be claimed on the basis of the factual transaction in question. *Morgenroth & Assoc's v. State,* 126 N.H. 266, (1985); (See also: Restatement (Second) of Judgments ch. 3 § 24, Comment 'a' at 197). Under such an analysis, a subsequent suit based upon the same cause of action as a prior suit is barred "even though the plaintiff is prepared in the second action (1) to present evidence or grounds or theories of the case not presented in the first action, or (2) to seek remedies or forms of relief not demanded in the first action." *Id*. § 25, at 209. This Court chose to adopt this modern definition of "cause of action" as representative of the prevailing trend.

Eastern Marine Const. Corp., at 275. Thus, the term connotes "[f]acts which give rise to one or more relations of right-duty between two or more persons." BLACKS LAW DICTIONARY 201 (5th ed. 1979). *Id.* It does not describe a mere label or theory applied to those facts. *Id.* Support for this view can be found in earlier decisions of this court. For example, in *Lougee v. Beres*, 113 N.H. 712, (1973), the plaintiff, after bringing an unsuccessful action for an accounting, brought a second action employing a constructive trust theory. *Id.* In holding that the second action was barred by res judicata, this court noted: "Although the words 'constructive trust' do not appear in [the first] action no other basis for recovery is apparent.... If we are to assume that the plaintiff now seeks to recover on the basis of a new theory or remedy, she still cannot escape the bar of the judgment against her in the first action arising out of the same transaction and based upon the same allegations of fact." *Id.* at 714. *Lougee* thus endorses the modern view that "a change in labels is not sufficient to remove the effect of the prior adjudication." *Id.* (quoting *Grace v. Grace*, 394 F.2d 127, 128 (2d Cir.1968)); see also *Boucher v. Bailey*, 117 N.H. 590, 592, 375 A.2d 1160, 1162 (1977) (endorsing the Second Restatement view).

This entire matter arises out of the purchase by Jack Bergquist of heavy equipment from Eddie Nash and Sons on or around 1994. The loan went into default, and Eddie Nash and Sons brought a small claims complaint against Mr. Bergquist. Mr. Bergquist did not answer the complaint, and a default judgment was entered against him on or about February 21, 2002 for $5,136.99. Mr. Bergquist did not pay this judgment, and a Motion for Periodic Payments was filed by Eddie Nash and Sons. On or about March 20, 2003, an Order for Payments was issued by the Colebrook District Court. The original small claims complaint did not contain any request for post-judgment interest. The Motion for Periodic Payments did not contain any request for post judgment interest. The default judgment was a final judgment on the merits of Eddie Nash

and Sons claim. The relief requested by Eddie Nash and Sons was ordered by the Court as part of its final Order for payments in 2003. No appeal was filed on the small claims judgment, nor was any appeal filed after the Order for Payments. Mr. Bergquist continued to make his court ordered payments until his demise in 2011. Upon his demise, Eddie Nash and sons then attempted to re-litigate the final judgment entered in March of 2003 through a claim against Mr. Bergquist's Estate. Eddie Nash and Sons filed a claim against the Estate of Jack Bergquist claiming $16,591.30 was still owed on the judgment. This claim was later amended after receipt of the Estate's Objection to the claim, which was filed on or about February 29, 2012. Both the original claim and subsequent amended claim, for the very first time, requested post-judgment interest be added to the final judgment of the Colebrook District Court more than nine years after the original judgment was entered.

In reviewing the record in this matter, the claim against the Estate of Jack Bergquist arises out of the same factual transaction as the original small claims complaint against Mr. Bergquist. Eddie Nash and Sons fully litigated the issue to the Colebrook District Court, requesting a judgment, costs, and interest. Eddie Nash and Sons were required to raise all theories on which relief could be claimed on the basis of the factual transaction in question at the time they filed the small claims complaint. Eddie Nash and Sons attempt to "change the labels" of their request does not create a new cause of action, it merely attempts to give them a second bite at recovery from the Estate of the Defendant in the first small claims action. This attempted resurrection of the 2003 judgment does not raise any new factual transaction, and is just an attempt to re-litigate the issue of damages in a second attempt at recovery. Accordingly, the claim against the Estate of Jack M. Bergquist by Eddie Nash and Sons arises out of the same

cause of action as the original small claims matter, and thus satisfies the second prong of the res judicata analysis.

C. The February 21, 2002 Small Claims Judgment, and subsequent Order of Payments in March of 2003 were Final Judgments on the Merits.

A final judgment on the merits has been analyzed more in depth in the context of collateral estoppel by our courts, and focuses on the more general requirement that a party against whom estoppel is pleaded must have had a full and fair prior opportunity to litigate the issue or fact in question. *Daigle v. City of Portsmouth*, 129 N.H. 561, 570, (1987). It has been held that docket markings are a final judgment on the merits for the purpose of applying res judicata. *Cathedral of the Beechwoods v. Pare*, 138 N.H. 389, 391, (1994). This court has held that the dismissal of a writ for failure to state a cause of action is a dismissal on the merits. *Colebrook Water Co. v. Commissioner of Dep't of Pub. Works*, 114 N.H. 392, 394-95, (1974). "A dismissal for failure to state a cause of action does not rest upon a purely procedural ground, but rather upon the conclusion of the trial judge that the cause alleged is without substantive merit." Id. at 395. This Court also considers a dismissal based on a statute of limitations as a judgment on the merits for purposes of applying res judicata. *Weeks v. Harriman*, 65 N.H. 91, (1888).

Further, Rule 1.11 of the Rules of the Circuit Court – District Division states, in pertinent part: "When a question of law is to be transferred after a decision on the merits, all appeals shall be deemed waived and final judgment shall be entered on the thirty-first day from the date on the Clerk's written notice that the Court has made the decision on the merits, unless the party aggrieved enters a notice of appeal in the Supreme Court within thirty days from the date on the Clerk's written notice of the Court's decision that aggrieves the party, pursuant to Supreme Court Rule 7, and mails the number of copies provided for by the rules of the Supreme Court to the

Clerk thereof." *Rule 1.11 – Appeals to Supreme Court.* Further, Rule 4.27 of the Rules of the Circuit Court – District Division – Small Claims Actions states in pertinent part: "Any party to a small claim judgment may, at the time judgment is declared or within 30 days of the notice of judgment date, appeal therefrom to the supreme court. The district court shall not grant any requests for extensions of time to file an appeal document in the Supreme Court or requests for late entry of an appeal document in the Supreme Court; such requests shall be filed with the Supreme Court." *Rule 4.27 – Small Claims Actions – Appeals –Records Requirement*. Thus, if the decision on the Small Claims action or Order for payments is not appealed within thirty (30) days then it becomes final. *Id*. However, it is important to note that Eddie Nash and Sons do not contest that the small claims action reached a final judgment. (See: *Appellant's Brief,* p. 8).

It is also important at this point to note that the case Eddie Nash and Sons relies upon the most involved a specific request for post-judgment interest as part of the writ of summons filed by the Plaintiff. *Nault v. N&L Development Company*, 146 N.H. 35 (2001). In *Nault*, the Plaintiffs filed a writ to recover both a deficiency on a judgment they obtained in a civil case less than a year before, and included in that writ a specific request for post judgment interest. *Id* at 36. Both parties filed motions for summary judgment on the issue of post judgment interest, and specifically brought the subject to the attention of the Court. *Id* at 36-37.

Unlike the plaintiff in *Nault*, Eddie Nash and Sons never requested post judgment interest at any stage in the small claims litigation. Eddie Nash and Sons filed a small claims action against Mr. Bergquist in February of 2001. They presented a specific claim against him for failure to pay according to a promissory note he agreed to. They secured judgment in that matter in the amount of $5,136.99. They had a full, fair and complete opportunity to litigate the issue of post-judgment interest at that time. They chose not to pursue post judgment interest. Then, in September of

2002, Eddie Nash and Sons was given yet another chance to request post-judgment interest in their Motion for Periodic Payments. Again, Eddie Nash and Sons chose not to request post-judgment interest. The Order for Payments from the Colebrook District Court became final on or about March 20, 2003, and no appeal was filed by either party. Both Eddie Nash and Sons and Mr. Bergquist had a full, fair and complete opportunity to support their rights in the above matter. Accordingly, the judgment of the Colebrook District Court is a final judgment on the merits.

The parties to the action in 2001 were the same. Eddie Nash and Sons is the same entity as it was in 2001 when the original small claims action was filed. Mr. Bergquist and his estate stand in the same shoes legally. The factual circumstances that led to the small claims action are the exact same that led to the cause of action that Eddie Nash and Sons wishes to re-litigate now. The previous case involved Mr. Bergquist failing to pay their February 5, 2001 agreement. Eddie Nash and Sons proceeded with a small claims action on the promissory note from that agreement, and obtained a judgment. They then obtained an Order for Payments requiring Mr. Bergquist to pay a fixed monthly amount. The judgment and subsequent Order for payments are final judgments on the merits, as both parties had a full, fair and complete opportunity to litigate their claims. Accordingly, the doctrine of res judicata bars Eddie Nash and Sons from now re-litigating the issue of post-judgment interest where they failed to pursue that right in the original action.

II. Eddie Nash and Sons attempt to retroactively modify the Colebrook District Court's March 20, 2003 Order for Payments is contrary to the purposes of RSA 524:6-a, and must be denied.

RSA 524:6-a governs periodic payment of judgments, and states in pertinent part: "Whenever a judgment is rendered against any person in this state, the court in which the judgment is rendered shall either at the time of rendition of the judgment inquire of the defendant as to the defendant's ability to pay the judgment in full or, upon petition of the plaintiff after judgment, order the defendant to appear in court for such inquiry. The court may at either time order the defendant to make such periodic payments at the court in its discretion deems appropriate. If the court order the defendant to make periodic payments at the time of rendition of judgment, the order shall not provide for payments to begin until after the appeal period has expired. ". See *RSA 524:6-a*. This Court has found that RSA 524:6-a was created to "give judgment creditors a new method of obtaining payment, not a new source of payment." *Sheedy v. Merrimack County Sup. Court*, 128 N.H. 51, 55 (1986). The Court is tasked with determining whether a defendant has the "ability to pay", and in fixing an "appropriate" payment. *Id*. Further, under Court rules, a hearing is to be held where the Court examines the judgment debtor's ability to pay the judgment and whether the defendant has property that is not exempt from execution. *Rules of the Circuit Court – District Division – General Rules – Rule 1.21 – Periodic Payment*. "The Court may prescribe the times, places, amounts of payments, and other details in making the order". *Id* at par. 6. "If the judgment debtor is able to make periodic payments on the judgment, the court may, after allowing the judgment debtor appropriate amount for support and support of judgment debtor's family, if any, order the judgment debtor to make such periodic payments as are deemed appropriate". *Id* at par. 5.

Appellant's argument identifies that "ordinarily… *upon motion of a party*, interest is to be awarded as part of all judgments. *State v. Peter Salvucci & Sons, Inc.*, 111 N.H. 259, 262 (1971) (emphasis added). A motion for specific post-judgment interest was filed in *Nault*, and both parties filed Motions for summary judgment on the issue. *Nault v. N&L Development Company*, 146 N.H. 35 (2001). This need for a motion of a party requesting post-judgment interest is also noted in *Mast Road Grain & Building*, where the plaintiff and defendant both fully litigated and raised the issue of whether the judgment interest rate of 10% or the interest rate claimed by the plaintiff of 24% was proper. *Mast Road Grain & Building Materials Co., Inc. v. Ray Piet, Inc.*, 126 N.H. 194 (1985).

The Order for Payments is designed to provide the plaintiff with specific, fixed, periodic payments from a defendant on a judgment. The order for payments against Mr. Bergquist in March of 2003 did establish monthly payments in the amount of $50.00. This fixed amount allows the defendant to pay his obligation to plaintiff in specific set amounts, which allows the defendant to reimburse the plaintiff for the judgment they obtained. The purpose of fixing the amount is to provide the court, plaintiff and defendant a specific set schedule that they can utilize to obtain finality in their cases. For the plaintiff, it provides a way of obtaining redress on a judgment they obtained that otherwise they may have been unable to execute on. For the Defendant, it sets a fixed payment that the Defendant can rightly refer to when determining when his obligation has been met.

In November of 2001, Eddie Nash and Sons pursued their rights under the promissory note and obtained a judgment against Mr. Bergquist. This judgment was not paid, and Eddie Nash and Sons filed a Motion for Periodic payments. Under the statute, this amount was to be a set amount of periodic payments, generally monthly, that allows the defendant to pay his

judgment to the plaintiff. Consistent with the policy and provisions of RSA 524:6-a, the then defendant, Jack Bergquist, paid his monthly obligation consistently until his untimely demise in 2011. Allowing Eddie Nash and Sons some ten years later to revisit the Order for Payment, reopen it, and retroactively modify the judgment is unjust and not consistent with the policies of RSA 524:6-a which is to provide structure for both the aggrieved party and the judgment debtor. Contrary to the purposes of the periodic payment statute, Eddie Nash and Sons seeks to now, ten years later, tack on additional expenses and interest not accounted for in the original order. This attempted runaround of RSA 524:6-a cannot stand, and is contrary to the purpose of the legislature in allowing periodic payments.

CONCLUSION

In accord with the foregoing, this Court should affirm the August 20, 2012 decision of the 1st Circuit Court - Lancaster Probate Division, and grant such other further relief as this Court deems fair and just.

Respectfully Submitted,
Estate of Jack M. Bergquist
By and through its attorneys,
Parnell & McKay, PLLC

_____
Date

_____
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REQUEST FOR ORAL ARGUMENT AND CERTFICATION

Counsel for the Estate of Jack M. Bergquist states that Oral Argument should not bec necessary and this matter can be decided on the briefs. However, if Oral Argument is granted, the Estate requests that Attorney William B. Parnell or Attorney Rory J. Parnell be given fifteen (15) minutes for oral argument because the issues in this case should be decisively determined in this jurisdiction.

I hereby certify a copy of the foregoing has been sent via first class mail, postage prepaid, to Jonathan S. Frizzell, Esquire, Carol Ann Stickney, Brett Bergquist, Bart Bergquist, Susan Nash, and Allen Rexford.

_____ _____

Date Rory J. Parnell

APPENDIX