STATE OF NEW HAMPSHIRE
SUPREME COURT

2009-0591

ROSEMARY GILROY

v.

TOWN OF AMHERST

Appeal From A Final Judgment
Of The Hillsborough County Superior Court, Northern Division

DEFENDANTS' BRIEF

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Oral Argument Waived

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TEXT OF RELEVANT AUTHORITIES

Superior Court Rule 62(IV)

Trial Management Conference

In every case scheduled for trial the clerk shall schedule a trial management conference at which counsel shall have their clients present or available for contact by telephone and shall be prepared to discuss and effectuate settlement and, if necessary, conduct of the trial.
In jury cases requests for instructions shall be submitted in writing at the trial management conference provided such requests pertain to unusual or complex questions of law and are not the ordinary and usual instructions given by the court. Such requests shall include an extra copy for the court. Requests shall not be submitted after the commencement of the trial except for good cause shown.

In non-jury cases, unless otherwise ordered for good cause shown, all requests for findings of fact and rulings of law shall be submitted in writing to the presiding justice at trial no later than the close of the evidence.

Failure to comply with this rule shall constitute grounds for sanctions, including entry of nonsuit, default or such other order as justice may require.

QUESTIONS PRESENTED

I. DID THE TRIAL COURT HAVE DISCRETION UNDER SUPERIOR COURT RULE 62(IV) TO DISMISS THE WRIT DUE TO PLAINTIFF'S FAILURE TO APPEAR AT FINAL PRETRIAL CONFERENCE, WHEN:

A. THE RULE EXPRESSLY ALLOWS FOR DISMISSAL;

B. THE TRIAL COURT EXPRESSLY CONSIDERED ALTERNATIVE SANCTIONS;

C. PLAINTIFF RECEIVED ACTUAL NOTICE OF THE HEARING;

D. THE NOTICE WARNED HER OF THE RISK OF DISMISSAL IF SHE FAILED TO APPEAR;

E. PLAINTIFF'S EXCUSE FOR FAILING TO APPEAR WAS THAT THE NOTICE FOR A JUNE HEARING WAS SENT DECEMBER AND, THEREFORE, SHE NEGLECTED TO WRITE THE DATE IN HER CALENDAR FOR THE FOLLOWING YEAR;

F. PLAINTIFF HAD TWICE PREVIOUSLY FAILED TO APPEAR IN RELATED CASES INVOLVING THE SAME DISPUTE WITH THE TOWN AND RECEIVED LESSER SANCTIONS, INCLUDING AWARDS OF ATTORNEYS FEES WHICH SHE REFUSED TO PAY;

G. PLAINTIFF'S LITIGATION CONDUCT UP TO THIS POINT—WHICH INCLUDED FILING MULTIPLE IMPROPER INTERLOCUTORY APPEALS AND HUNDREDS OF PAGES OF INDECIPHERABLE PLEADINGS—WAS BURDENSOME, DISRUPTIVE AND EXTREMELY DILATORY; AND

H. PLAINTIFF WAS AN EXPERIENCED *PRO SE* LITIGANT, HAVING LITIGATED AT LEAST A DOZEN OTHER CASES?

This issue was raised in Plaintiff's Brief. The Town's position is preserved by written argument. A,888.[1]

II. DID PLAINTIFF PROVIDE A SUFFICIENT RECORD OF THE HEARING AT WHICH HER CASE WAS DISMISSED TO ALLOW THIS COURT TO SECOND GUESS THE TRIAL JUDGE'S DISCRETIONARY RULING?

This issue was raised in plaintiff's brief.

[1]"A" refers to the Appendix to the Defendant's Brief.

III. DID PLAINTIFF STATE A CLAIM UNDER THE CONSUMER PROTECTION ACT WHEN SHE ALLEGED THAT A TOWN DISCRIMINATED AGAINST HER IN THE APPLICATION OF ITS LAND USE REGULATIONS, BUILDING CODE AND FIRE CODE?

This issue was raised in plaintiff's brief. The Town's position was preserved by written argument, A,383-384

IV. DID THE TRIAL COURT CORRECTLY DISMISS MOST OF PLAINTIFF'S COMMON LAW CLAIMS ON THE GROUND THAT PROPERTY OWNERS DO NOT HAVE A RIGHT TO MONETARY DAMAGES FOR CONSTRUCTION DELAYS DUE TO THE IMPROPER DENIAL OF ZONING VARIANCES AND OTHER PERMITS?

This issue was raised in plaintiff's brief. The Town's position was preserved by written argument, A,388-389.

V. DID THE TRIAL COURT CORRECTLY FIND THAT PLAINTIFF FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO HER CLAIM OF DISCRIMINATION?

This issue was raised in plaintiff's brief. The Town's position was preserved by written argument, A463-466.

VI. DID THE TRIAL COURT ERR WHEN IT DENIED THE TOWN'S MOTION FOR PARTIAL DISMISSAL ON THE GROUND OF RES JUIDICATA?

Issue preserved by written argument, A,740.

VII. DID THE TRIAL COURT ERR BY DENYING THE TOWN'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS?

Issue preserved by written argument, A,451-451.

VIII. DID THE TRIAL COURT CORRECTLY APPLY THE DOCTRINE OF COLLATERAL ESTOPPEL?

This issue was raised by the plaintiff's brief. The Town's position was preserved by written argument, A,837

STATEMENT OF THE CASE AND THE FACTS

Introduction: The central question presented in this appeal is whether the Superior Court abused its discretion when it dismissed plaintiff's lawsuit due to her failure to appear for the final pretrial conference. A,876. This court should not look at plaintiff's failure to appear in isolation, but rather should view it, as the trial court did, in the context of plaintiff's litigation conduct as a whole. Put another way, the central facts in this appeal are procedural. Therefore, the history of the case is described below in some detail.

The First 576 Paragraphs Of The Case: This case began approximately six years ago when the plaintiff filed a ninety-three page *pro se* writ consisting of 576 separately numbered paragraphs. A,1 to 95. The entire document was single spaced in **bold font**. Id. It was difficult to read because entire blocks of paragraphs were repeated on multiple occasions, sometimes verbatim, but sometimes with changes that altered their meaning.[2] Although the writ was divided into seven so-called "counts" each count contained numerous causes of action which overlapped with those set forth in every other count.

The writ revolved around plaintiffs' efforts to convert a five unit office building into a residential condominium. See, A,160-161. The property is located in Amherst, New Hampshire in a "buffer zone" between the intensely commercial strip lining Route 101-A and a quiet residential area reserved for single family homes. The structure at issue is depicted below (in a photograph introduced by the Town at a later stage of the case):

[2]For example ¶¶ 44 through 53 were repeated, virtually *verbatim*, in (a) ¶¶ 194 to 203; (b)¶¶ 273 to 282; (b) ¶¶309 to 318; (c) ¶¶388 to 397.

A,453. As the photograph shows, the building consisted of an old farmhouse connected by additions, built at different times, to a three story suite of offices. See, A, 468.

Plaintiff's writ sought $17 million dollars in damages from the Town (including a request for treble damages under the Consumer Protection Act, RSA 358-A:2 and 10, and annual interest at 12%). A,3. Boiled down to its core, the writ alleged that:

1. After purchasing the property in March, 2000, A,3, plaintiff obtained permission from the Town of Amherst ("Town") Planning Board to convert the farmhouse unit to a residential use so that she could live there.[3] A,4, 161.

2. Plaintiff was unable to attract rent paying tenants for the four office units. A,5. Plaintiff attributed this to changes in the national economy. A,5. Regardless of the reason, plaintiff was unable to generate income as commercial landlord. A,6. Plaintiff declared bankruptcy and feared foreclosure. A,6.

3. In March, 2000, shortly after purchasing the property, plaintiff applied for a zoning variance to convert the entire structure to either a five unit residential

[3]There was no dispute that this mixed residential/office use was permitted under the Town's zoning ordinance by special exception issued by the Planning Board. See, A,469 (affidavit of Town Planning Director).

condominium or a bed and breakfast. A,6. (Although not alleged in the writ, there was no dispute that the under the Town's zoning ordinance, plaintiff's property could not be used for a multi-unit residential condominium without a so-called "use variance." See, A,469.)

4. According to plaintiff, the Town initially refused to accept her application for a variance. A,6. Eventually, the Town's Zoning Board of Adjustment ("ZBA") denied the request for a variance finding that plaintiff did not meet the statutory requirement of "hardship." A,6-7.

5. Plaintiff appealed the ZBA's decision to the Superior Court which reversed the ZBA and ordered the variance for use as a residential condominium to issue. A,7. See, A,650. As plaintiff's writ alleged, her case for a variance turned on the application of this court's decision in Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001), which changed the pre-existing definition of the term "hardship." A,22-23. The Simplex decision was just a few months old when the ZBA denied plaintiff's variance on grounds of "no hardship."

6. Plaintiff alleged that after she obtained her variance, she encountered great difficulty with the Town's site plan review process. She claimed that the Town's zoning and planning administrator ("Planning Director") failed to assist her and failed to tell her that she could have a "discussion hearing" with the Planning Board. A,11-12. Eventually, plaintiff did appear for a discussion meeting with the Planning Board but she was denied the opportunity for a second such meeting. A,12.

7. Plaintiff alleged that, at the discussion hearing, the Planning Director made "fraudulent" references to plaintiff's septic system.[4] A,13. Plaintiff did not describe those alleged statements in the writ. Plaintiff also alleged that the Planning Director "shouted out" that her septic system needed to be removed and replaced. A,13.

9. Plaintiff, did not believe her septic system needed to be removed. A,13. Thus, she complained that the Town required her to incur unnecessary expenses in connection with her septic system.

10. Eventually, plaintiff's site plan was approved.[5] Likewise, plaintiff obtained DES and Town approval for the septic system that she eventually proposed.[6]

10. Plaintiff alleged that the Town Fire Department took too long to approve her sprinkler system plan. A,27.

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[4]There was no dispute that plaintiff's existing septic system was undersized and insufficient under State Department of Environmental Regulations to meet the needs of the twelve bedroom residential apartment building she ultimately proposed. See, A,470 (Affidavit of Planning Director, citing letter from DES director stating that plaintiff's present septic system was insufficient under DES regulations for the use she envisioned); A,723 (Superior Court order in related equity case, noting that *plaintiff's* proposed site plan indicated that the septic system needed to be undated with additional capacity for residential use).

[5]The fact that the Planning Board approved plaintiff's site plan is not directly alleged in the writ, but it is necessarily implied from the fact that many of plaintiff's allegations concern events that could only occur post-site plan approval. In any event, there is no dispute that the Planning Board approved plaintiff's site plan, the first time it was submitted, contingent on obtaining DES septic approval. A, 477 (Planning Board minutes).

[6]This is also not directly alleged in the writ. However, there is no dispute that plaintiff submitted an acceptable septic system design that was approved by both DES and the Town. A,470.

11. Plaintiff alleged that the Fire Department improperly required her to install an addressable alarm system. A,29. She believed the existing non-addressable system was sufficient for the planned residential use. A,29.

12. Plaintiff alleged that as a result of the Town's actions, her project was delayed for four years, causing her to lose the potential income. She claimed that the Town acted with a motive to sabotage her project and discriminated against her and in favor of other developers in town.

Plaintiff grounded her writ on the Consumer Protection Act, RSA Chapter 358-A. A,3. Plaintiff also brought a myriad of other claims, which were described by the trial court as discrimination , harassment, and intentional infliction of emotional distress. A,161.

The Town's Motion To Dismiss The First Writ: The Town moved to dismiss for failure to state a claim upon which relief could be granted. A,112. The plaintiff filed a thirty-one page, single space objection, all in **bold** font. A,128. This supplemented plaintiff's twelve page objection to the Town's Brief Statement, which was also single spaced in **bold** font. A,99.

The trial court did not dismiss plaintiff's writ. A,162-163. Instead, citing Snierson v. Scruton, 145 N.H. 73, 76 (2000), the court ordered plaintiff to file an Amended Writ containing a concise statement of her claim. A,163. The court found that "plaintiff's pleadings are prolix and confusing" and "excessively burdensome," A,161. Therefore, the court acted to ensure that plaintiff would have an opportunity to "correct perceived deficiencies." A,162, citing ERG v. Barnes, 137 N.H 186, 189 (1993).

D. The Second 348 Paragraphs Of The Case

Plaintiff responded by filing a fifty-one page Amended Writ, with 348 separately numbered paragraphs, all single spaced and all in **bold** font. A,164. The second writ once again

alleged that the Town's application of its land use and permitting regulations violated the Consumer Protection Act. A, 164. Beyond this, plaintiff grounded her claim generally on "the State of New Hampshire Statutes Annotated and Federal Laws of the United States," without specifying any particular statute or law. See e.g. A,189, 192, 208. The facts alleged in the Amended Writ were substantially similar to those in plaintiff's initial pleading.

The Town moved to dismiss the Amended Writ. A,215. The trial court responded by once again ordering plaintiff to file an amended statement of her claim. A,252. This time, however, the court addressed the merits of some of the plaintiffs' claims, noting the inapplicability of the Consumer Protection Act, A,249-250, and the lack of a general right to monetary damages for construction delays caused by the improper denial of government permits. A,250-250 (Order, citing Torromeo v. Town of Fremont, 148 N.H. 640, 643 (2002)).

Plaintiff filed a motion for reconsideration. A,253. When this motion was denied, A,273, plaintiff filed a Rule 7 Mandatory Notice of Appeal with this court. A,274, See, Gilroy v. Amherst, N.H. Supreme Court No. 2005-0266. The Notice of Appeal contained 29 separately listed questions. A,278-282 It was dismissed as an improper interlocutory appeal. A,283. Plaintiff then unsuccessfully petitioned the trial court to allow an interlocutory appeal of its ruling *denying* the Town's motion to dismiss the Amended Writ. A,284, 301.

E. The Operative 532 Paragraphs Of The Case (And The New Allegations)

In September, 2005—a full year after plaintiff filed her original 93 page writ—she filed a 75 page, 532 paragraph Second Amended Writ (once again, single spaced and in **bold font)**. A,302. The Second Amended Writ included the facts described above and as well as new allegations relating to (a) plaintiff's claims of discrimination; (b) the septic system and (c) the fire sprinkler system:

1. Plaintiff alleged that the Town discriminated against plaintiff's project and in favor of two other developments in Town (known as the Summerfield and Fells projects) A,330, 333-334

2. Plaintiff complained that the building permits that were ultimately issued by the Town unlawfully stated that certificates of occupancy would be withheld until the septic system was improved. A,327, 335. She claimed that the septic improvements demanded by the Town were "unnecessary" and costly. A,327, 335. Thus, plaintiff alleged that the Town interfered with her ability to complete the project. (Plaintiff was referring to the septic system design that she had proposed to the Planning Board and DES.)

3. Plaintiff alleged that the Town Fire Department revoked its approval of plaintiff's plans for a residential fire sprinkler system and instead required her to install a commercial sprinkler system. A,331. She claimed that the Fire Department later told one or more fire protection companies not to install the sprinkler system. A,331. According to plaintiff, the Fire Department's actions resulted in delays and unnecessary expenses.

4. More generally, plaintiff alleged that the Town treated her rudely at every juncture and otherwise acted with the intent to frustrate her project and cause her emotional distress and financial ruin. See e.g., A,341 (allegation that the demands of the Fire Department were "Taxation without representation, which caused our forefathers to declare war on Great Britain some 200 years ago."); A, 326 (allegation that plaintiff was "mocked and ridiculed" at the ZBA hearing); A,335 (allegation that Town did not want plaintiff to convert her

building to a residential use); A,348 ("It is obvious to Plaintiff that the Town of Amherst and various town official have no intention of ever allowing Plaintiff to receive an Occupancy Permit or at least to interfere as much as they are able to do so, and cause innumerable, unnecessary delays and cause years of delays to the completion.")

5. Plaintiff alleged that the stress brought on by the Town's actions caused her to suffer a stroke. A, 363. She also blamed the Town for a knee injury she sustained while doing construction work because she could not hire professionals due to the lack of a building permit. A, 363.

The Third Motion To Dismiss: The Town moved to dismiss the Second Amended Writ for failure to state a claim. A,277 The Superior Court granted this motion in part, A,415- 430, by dismissing all of plaintiff's claims with two exceptions.

The court allowed a narrowed version of plaintiff's claim of discrimination to proceed. A,418-419. Relying on Alexander v. Town of Hampstead, 129 N.H. 278, 283 (1987), the court ruled that plaintiff had to prove that (a) the Town selectively enforced its regulations and (b) did so for the conscious purpose of intentional discrimination. A,418. The court found that plaintiff's allegation that the Town gave deliberate preferential treatment to the Summerfield and Fells developments were sufficient to state a claim for relief. A,418.

The court also ruled that plaintiff's Second Amended Writ stated a claim for intentional infliction of emotional distress. A,422-243. The court noted, however, that the viability of this claim would likely depend on "[t]he extent to which the plaintiff has success in pursuing her selective enforcement claim." A,422.

Plaintiff's Second Interlocutory Appeal: The plaintiff responded to the trial court's decision on the motion to dismiss by filing another Rule 7 Mandatory Notice Of Appeal in this court (with 46 separately numbered questions presented). A,439. This court dismissed the appeal as another improperly filed interlocutory appeal. A,441. Plaintiff then unsuccessfully moved for an interlocutory appeal in Superior Court. A,444.

The Motion For Summary Judgment: The Town next moved for summary judgment. A,448. It focused on the differences between the Summerfield and Fells properties, on the one hand, and plaintiff's property on the other. Summerfield and Fells were both large scale developments of new single family detached condominiums. A,464. Fells was a 80 unit elderly housing development. A,465. Summerfield was a 77 unit 'planned unit development'. A,465.

While plaintiff complained of alleged mistreatment by the ZBA, neither Summerfield nor Fells required a zoning variance (or any other permit from the ZBA). A,464. While plaintiff complained about the cost of relocating and improving her septic system, neither of the other projects had pre-existing septic systems. A,464. Because the Summerfield and Fells developments had only single family homes, they were not required by the State Building Code to have either addressable fire alarms or fire sprinkler systems. A,464.

While plaintiff complained about incurring large costs in connection with the installation of a DES compliant septic system and a State Fire Code compliant sprinkler system, the developer of Fells had to build six private roads, upgrade two offsite intersections, install a mile long water line and give the Town a 110 acre conservation easement. A,465. The developer of Summerfield had to build seven private roads and construct water and gas lines leading to the site. A,465.

Plaintiff's site plan was approved approximately two months after she submitted an actual site plan, see, A,925-926, 943, and a total of nine months from the date of her initial application. A,469. Much of the delay resulted from the fact that plaintiff refused to supply the required plans and otherwise "argued that she was not subject to this regulation." A,469. By way of comparison, the Planning Board took nine months to approve Summerfield's application which was professionally prepared and sheparded through the permitting process. A, 465. Although Fells' application was approved in less time (six months), the difference was not so stark as to prove preferential treatment. A,465. Plaintiff presented no evidence relating to the (a) pre-applications efforts made by the Summerfield's and Fells' developers to prepare acceptable site plans; (b) the site plan applications by those developers; (c) the Planning Board hearings in their cases; or (d) the conduct of any Town board member, official or employee in connection with their applications.

Furthermore, the Town pointed out that plaintiff's five unit development (with four units slated for sale) could hardly be perceived as a market threat to either Summerfield or Fells. A,465. Although plaintiff argued that the developers of these projects could have pressured the Town into discriminating against plaintiff to stifle competition, there was no evidence that the Summerfield or Fells developers were even *aware* of plaintiff's project. A,466. In any event, plaintiff received site plan approval at a time when she could have easily completed her project and placed her units on the market before either Summerfield or Fells was constructed. A,465.

Based on this overwhelming evidence, the Superior Court granted summary judgment to the Town on the plaintiff's claim of selective enforcement and discrimination. A, 640. However, the court denied the motion with respect to plaintiff's claim for intentional infliction of emotional distress. A,642-643. The court reasoned that the plaintiff's allegations of numerous

delays and ridicule at a zoning hearing could support a finding that the Town recklessly caused severe emotional distress. A,643. *Thus, the court effectively narrowed plaintiff's Second Amended Writ to a single count of intentional infliction of emotion distress.*

Plaintiff's Third Interlocutory Appeal: Plaintiff unsuccessfully moved for reconsideration of the order granting partial summary judgment to the Town. A,645, 659. She then filed a Petition For Original Jurisdiction in this Court seeking to reverse the Superior Court's order. A,671. This court dismissed her petition. A,682.

The Town's Res Judicata Motion: At this point, the procedural history of this case becomes entwined with a factually and legally related equity case that plaintiff filed against the Town while this matter was pending. In Gilroy v. Town Of Amherst, et. al., Hillsborough County Superior Court No. 05-E-160 ("the Equity Case"), A,730-738, plaintiff alleged that the Town unlawfully delayed and frustrated her conversion of the property to a residential use by (a) requiring her to improve her septic system prior the issuance of certificates of occupancy; and (b) requiring Fire Department approval for her sprinkler system. See, A,730-736. Plaintiff asked for an "emergency" injunction to (a) allow her to obtain certificates of occupancy without first improving her septic system and (b) allow her to install a fire sprinkler system without further interference from the Town. A,737. As noted above, in the Second Amended Writ plaintiff claimed that the Town's actions with respect to the septic system and the fire sprinkler system were responsible for virtually all of the delays subsequent to the Planning Board's site plan approval.

The Superior Court denied plaintiff's request for preliminary relief and scheduled the Equity Case for a bench trial on the merits. The court held a two day trial at which four witnesses testified. A,716. Following the trial, the court granted judgment to the Town in the

form of a fourteen page narrative order. A,716-729. The court essentially found that all of the Town's actions and communications with respect to (a) the septic system and (b) the fire sprinkler and fire safety systems were done in good faith and for the sole purpose of complying with the State Building Code and Life Safety Code. A,716-729. More particularly the court found that, with respect to the septic system:

-The Planning Board properly conditioned site plan approval on the installation of a new, DES compliant septic system.[7] A,727.

-"[T]he Town's actions concerning the size of the septic system were consistent with appropriate rules and regulations…[and]…consistent with the Department of Environmental Services' position." A,726.

-The Town properly established that plaintiff's septic system had to be relocated due to applicable nitrate setback requirements and "The Petitioner did not offer any convincing evidence to the contrary. Instead, she basically did little more than express frustration that these requirements exist and that her own engineer had drawn plans calling for the movement of the chambers." A,726, *citing* N.H. Administrative Rules Env-Ws 1008.04 (relating to State mandated nitrate setbacks).

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[7]As the trial court found in the Equity Case, a property owner who converts an existing building to a multi-unit residential use must (a) have a septic system that complies with DES regulations for this use and (b) submit an application for such a system to DES along with plans and specifications. A,724, *citing* RSA 485-A:32 and 38 and N.H. Code Of Administrative Rules Env-Ws 1004.14 and 1004.17. The size of the septic system is dictated by DES regulations regarding the average daily flow volume in gallons. A,725, citing Env-Ws 1008.03. For residential structures, the average daily flow volume is 150 gallons per bedroom. Id. Plaintiff proposed a twelve bedroom use which, therefore, required a system capable of handling 1,800 gallons per day. Id. These were the same calculations that appeared on the plan that *plaintiff* submitted to DES and the Planning Board. Id.

-"[T]he Town was working with petitioner so that a compliant septic or waste disposal system could be installed[.]" A,727.

-"No improper discrimination has been established as to this or any other matter." A,727.

-"The Town has not been shown to do anything improper by requiring the petitioner to construct her septic system before she may obtain a certificate of occupancy." A,728.

As to the sprinkler system, the court found that:

-The Planning Board's site plan approval was properly conditioned on the installation of a sprinkler system that complied with the State Fire Code.[8] A,717.

-"The Town was working with petitioner to ensure that a compliant sprinkler system could be installed…[and]…all communications from the Town related to appropriate requirements and concerns in this regard." A,722.

-The Fire Department approved the plaintiff's first sprinkler plan, which was for a "residential system." A,718.

-Plaintiff then indicated she would use a commercial system rather than the approved residential system (and no commercial plan had been submitted). A,718

-Plaintiff next indicated that she would use the approved residential system and would make certain necessary changes to her building to do so. A,719.

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[8]As the Court found in the Equity Case, the State Fire Code requires that existing buildings which are converted to multi-unit dwellings with five units must be fully sprinklered. See, A,721-722 (citing RSA 135:5 which authorizes the State Fire Marshall to adopt the National Fire Protection Association ("NFPA") codes; N.H. Administrative Rules Saf-C 6008.01 and 6008.04 adopting the NFPA Life Safety Code; RSA 154:2, which requires the Town to enforce the State Fire Code; RSA 153:5, which provides that only the State Fire Marshall can grant variances from the State Fire Code; and various provisions of NFPA/State Fire Code which required plaintiff to install a compliant sprinkler system.)

-A sprinkler system installer then indicated he was quoting a commercial system for plaintiff and this confused the Fire Department because it could not determine what system plaintiff wished to install. A,720.

-Plaintiff then submitted additional plans that had been "altered from their original state" by "erasure, deletion or covering items with a blank sticker." A,720. For this reason and because the Fire Department encountered "substantial hostility" while trying to work constructively with plaintiff, the Town insisted on the involvement of an independent fire safety engineer. A,720.

-"Despite all of this, the petitioner installed some sort of sprinkler system without the requisite permits." A,720. The Fire Department offered to approve it "as built" if plaintiff would agree to provide "as built" plans and certifications. A,720-721. Plaintiff failed to do so. A,721.

Plaintiff appealed from the final judgment in the Equity case and this court affirmed by order. See, Gilroy v. Town of Amherst, No. 2006-0650, Slip. Op. (N.H. Oct. 1, 2007).

Relying on the doctrine of res judicata, the Town moved for *partial* dismissal. A,705. More particularly, the Town argued that judgment in the Equity Case extinguished all of plaintiff's claims except for those related to the ZBA's denial of her request for a variance (which was not at issue in the Equity Case). A,710-711. The trial court denied the motion, relying on this court's sixty year old decision in Morency v. Plourde, 96 N.H. 344 (1950), which held that res judicata does not bar a civil suit based on a judgment in equity obtained while a related civil suit is pending. A,756-757. The trial court did not accept the Town's view that this court's more recent decisions made no distinction between law and equity with respect to the application of res judicata principles. A,710. See, Cantry v. Hopkins, 146 N.H. 151, 155 (2001)

("Whether sounding at law or in equity, conflicting claims flowing from a common source should be determined in a single action, thus avoiding vexations litigation and conflicting judgments.")

The Motions In Limine And Plaintiff's Concurrent And Previous Litigation: After the dispositive motions were resolved, the Superior Court addressed several motions in limine. Two of these had to do with the plaintiff's concurrent and previous litigation. A,792, 814.

The court granted the Town's motion to admit evidence that the plaintiff sued David Letterman and Craig Kilborne for causing emotional distress close in time to the events in this case. A,792 (motion); A,873 (order). See, Gilroy v. Letterman et. al., U.S. District Court for the District of New Hampshire, 04-cv-135-JD ("Letterman"). In a 138 page, single spaced Complaint, plaintiff alleged that these television personalities, and numerous other media celebrities including Howard Stern and various Boston area radio hosts broke into her homes (including her unit in the Amherst building at issue in this case), stole her possessions, interfered with her personal relationships, spied on her by electronic means, ridiculed and threatened her during their broadcasts and generally engaged in a calculated plot to invade her privacy. A,793.

For example, plaintiff claimed that Howard Stern monitored her sleep by audio and video so that he could make fun of her on his television show in real time. A,794. She told the federal court that David Letterman must also have recording devices in her home because she once said the word "dream" and then she heard Letterman say the same word on television. A,793-794. She accused the Blue Man Group and "all comedians and talk show hosts on Comedy Central" of an elaborate conspiracy to (a) steal from her; (b) steal from her car; (c) damage her Amherst, NH property; and (d) drive her to a nervous breakdown through the intentional infliction of emotional distress. A,794.

Plaintiff filed the Letterman case two months prior to filing the instant lawsuit against the Town, and she continued to litigate it all the way to the U.S. Supreme Court while this case was pending. See, Letterman, No. 04-cv-135-JD, Slip. Op. (D.N.H. October 27, 2004) (dismissing the complaint as "sincere but delusional"), *aff'd by summary disposition*, Gilroy v. Letterman, No. 2004-2651, Slip. Op. (1st Cir. Feb. 25, 2005), *reconsideration den.*, No. 2004-2651, Slip. Op. (1st Cir. March 24, 2006), *cert. den.* 546 U.S. 875 (2005).

The trial court agreed with the Town that the Letterman case provided an alternative explanation for the emotional distress that plaintiff claimed she suffered as a result of the Town's conduct. A,873. The court also agreed that the Town could cross-examine the plaintiff about her allegations in Letterman for impeachment purposes.

For the same reasons, the trial court granted the Town's motion to admit another lawsuit that plaintiff brought, while this case was pending, against two of her mortgagees for intentional infliction of emotional distress. A,873. See, Gilroy v. Kasper et. al., U.S. District Court for the District of New Hampshire, 07-cv-300-PB. Plaintiff claimed that the mortgagees' unfair actions caused her great mental anguish, as well as a stroke and high blood pressure. A,815. The court also allowed evidence of another suit plaintiff brought during the same time frame against a different mortgage and a loan servicing company. A,873. See, Gilroy v. Ameriquest Mortgage Company, et. al., U.S. District Court for the District of New Hampshire, 07-cv-074-JD. Plaintiff accused them of using predatory lending practices to cause her "emotional and physical harm including three strokes that required hospitalization and related leg pain, an inability to walk, memory problems and high blood pressure." A,815-816.

The Collateral Estoppel Ruling: The trial court granted the Town's motion to collaterally estop plaintiff from re-litigating any of the facts that were conclusively determined in the Equity

Case. A,874-875. This completely resolved much of the case, because the final order in the Equity Case absolved the Town of misconduct in connection with (a) the conditional approval of plaintiff's site plan, (b) the insistence of installation of the DES approved septic system prior to issuance of a certificate of occupancy and (c) the Fire Department's actions and communications relating to plaintiff's fire sprinkler and fire safety systems. Accordingly, as a practical matter, plaintiff's claims were limited to conduct on the Town's part prior to site plan approval.

The Expert Opinion Ruling: Finally the trial court partially granted the Town's motion to exclude the plaintiff's lay opinion that the Town's conduct caused her stroke and other physical symptom. A,759. The court allowed the plaintiff to testify to her "readily observable conditions" but precluded her from "provid[ing] any medical diagnoses or testify[ing] that Defendants caused her physical symptoms or her emotional distress." A,870. Because plaintiff never disclosed an expert—and therefore had no proof of causation—the relevancy of her medical conditions remained disputed. Plaintiff's brief state's that she was working on locating an expert at the time of the final pretrial conference, approximately one week prior to the scheduled jury selection.[9] See, Plaintiff's Brief at p. 5.

The Town's Offer Of Proof In The Final Pretrial Statement: As the trial date neared, the parties' filed pretrial statements. The Town explained, by offer of proof, that it would present documentary exhibits which showed that plaintiff's application for site plan review was delayed because she refused to submit an "as built" site plan and a septic design. A,924. The Town relied on a letter from the Planning Director, written five days after plaintiff's initial application

[9]Plaintiff's brief incorrectly suggests that the trial court excluded her expert witnesses. In fact, there were no motions and no orders relating to expert witnesses. The only relevant order is the one that precluded plaintiff from personally giving expert medical opinions and expert testimony on causation. A,870. Had plaintiff disclosed an expert a week before trial, the Town would have objected to the testimony.

for site plan review was filed, requesting the site plan and septic design. A,924. Plaintiff responded with a letter that accused the Planning Director of "doing everything possible to delay my receiving any change of use certificate." A,924.

A month later the plaintiff filed a second application for site plan review (with no site plan, but with some explanation regarding the septic system). A,924. The next month, plaintiff requested a discussion meeting with the Planning Board. A,924. At this meeting she admitted that she needed to increase the capacity of her septic system and the Planning Board advised her that the Fire Department would likely require a sprinkler system. A,924-925. The Planning Board also expressed concern that plaintiff had already begun work without benefit of either site plan approval or a building permit. A,925. Finally, the Board told plaintiff that it could not act on her application until she filed a site plan and gave statutory notice to abutters. A,925.

According to the Town's offer of proof, six days after this discussion meeting, plaintiff requested a second discussion meeting. A,925. That request was denied because the Planning Board did not want to consider the matter without a plan. A,925.

Finally, seventh months after filing her initial application plaintiff filed a site plan application that could be considered by the Planning Board. A,925. It included the septic system design at issue in this case as well as a notation that the septic system would be installed prior to issuance of a certificate of occupancy. A,925-926. It also included a notation that a fire sprinkler system was needed. A,926. The plaintiff's site plan was approved two months later, thereby ending the Planning Board's involvement. A,926

The Town's offer of proof was that plaintiff then (a) used her building as an illegal rooming house, (b) made major renovations to the property without building permits, and (c) constructed a large shed/garage without either site plan approval or a building permit. A,932-

033. These matters resulted in two code enforcement actions in the Milford District Court which ended in final judgments in favor of the Town. A,933.

Plaintiff's Failure To Appear And The Dismissal Of The Case: Plaintiff failed to appear for the final pretrial management conference on June 26, 2009. By this time, plaintiff's case was five years old. The jury trial, which had been continued on five occasions, was scheduled to finally occur in one week's time.

In lieu of the trial management conference, the court held a brief hearing following which it dismissed the Second Amended Writ on the Town's oral motion. A,876. The trial judge then issued a terse written order of dismissal, citing Debutts v. Laroche, 142 N.H. 845 (1998), and stating that he had reviewed the entire court file and considered "all possible sanctions consistent with State law." A,876.

Plaintiff filed a motion to vacate the order. A,877. She conceded that she received actual notice of the hearing but claimed that she forgot about it. A,877. She blamed her faulty memory on a number of factors including her failure to write the date down on her calendar for the current year (because the notice for the June hearing came in December of the prior year). A,885. Plaintiff also requested the court to consider her *pro se* status. A,880 (plaintiff noting she lacks "a staff of attorneys, legal assistants and secretaries" to assist in her court scheduling).

The Town filed a lengthy objection to the plaintiff's motion to vacate the dismissal. A,888. The Town's factual and legal argument will be discussed in the Legal Argument section of this brief. The trial court denied the plaintiff's motion to vacate. A,910. The plaintiff then unsuccessfully moved to reconsider. A,911 (motion); A,920 (order).

Based substantially on these facts, the trial court dismissed the plaintiff's Second Amended Writ. This appeal follows.

SUMMARY OF ARGUMENT

I. Superior Court Rule 62(IV) empowers the Superior Court to dismiss a plaintiff's writ due to a failure to appear for a final pretrial conference. In this case the court considered alternative sanctions and reviewed the entire record prior to dismissing the case. The court later considered the plaintiff's motion to vacate the dismissal, in which she admitted that she (a) received actual notice of the hearing and (b) was able to attend. She blamed her non-appearance on the fact that she received the notice in December and never put it on the next year's calendar.

This negligent mistake did not occur in isolation. The plaintiff twice failed to appear in related cases and often transgressed court rules designed for sound case management. Her dilatory tactics and frequent meritless interlocutory appeals delayed and complicated the case beyond measure. When her defaults were forgiven in the past, she refused to pay attorneys fees to the Town. The trial court's order of dismissal was a sound exercise of discretion.

II. The plaintiff did not obtain a transcript of the hearing at which her writ was dismissed for her failure to appear. Thus, she has not provided the court with a sufficient record to challenge the court's written order of dismissal.

III. The trial court correctly dismissed plaintiff's Consumer Protection Act claim. The Act applies only to "unfair or deceptive act[s] or practice[s] in the conduct of any trade or commerce," RSA 358-A:2. Because a town's enforcement of zoning ordinances, land use control ordinances, building codes and fire codes is not "trade or commerce," the Consumer Protection Act is uniquely inapplicable to this case.

IV. The trial court correctly dismissed a number of common law claims which sought monetary damages resulting from construction delays caused by the allegedly improper denial of a zoning variance, site plan approval, building permits and certificates of occupancy. Generally,

the remedy for the denial of a permit is to have that denial reversed on appeal (or by mandamus). No exception to this rule applied in plaintiff's case, at least with respect to the claims that were dismissed. Accordingly, the trial court's order dismissing those claims should be affirmed.

V. The trial court correctly granted summary judgment to the town on plaintiff's discrimination and selective enforcement claim. To prevail, plaintiff had to prove both conscious, intentional discrimination based on an impermissible classification. Plaintiff lacked evidence to support her bald accusation that the Town acted to favor certain other developers. There was no evidence that her four unit apartment building was viewed as a competitive threat to those much larger projects. Further, those projects were dissimilar from plaintiff's with respect to the permits at issue in this case because (a) they did not need zoning variances, (b) they did not need sprinklers or addressable alarms and (c) they had no pre-existing septic and, therefore, had no choice but to install new systems.

Beyond this, plaintiff failed to prove that the Town acted with any discriminatory animus. She presented no evidence of discriminatory statements. She presented no evidence of any disparity between the way she was treated and the way others were treated. Thus, plaintiff failed to raise a genuine issue of material fact on this claim.

VI. The trial court erred when it denied the Town's motion for partial dismissal on grounds of res judicata. The doctrine of res judicata provides that a final judgment resolves and extinguishes every claim that a plaintiff raised *or might have raised* concerning the factual transactions at issue. The final judgment in the equity case thus precluded plaintiff from re-litigation civil claims arising from the same facts. Accordingly, the trial court should have found that plaintiff's claims concerning (a) the Planning Board's actions; (b) the septic system; and (c) the fire sprinkler and fire safety system were barred by res judicata.

The trial court instead relied on Morency v. Plourde, 96 N.H. 344 (1950) for the proposition that a final judgment in an action for prospective equitable relief is no bar to a claim for monetary damages based on past conduct. Morency made sense when plaintiffs could not obtain both types of relief in a single proceeding. But today, plaintiffs may file equitable petitions with attached claims at law. They may also add equitable claims (and requests for temporary orders) to existing civil cases. Therefore Morency should be limited to situations where it is impossible or impractical to resolve all claims arising from the same facts in the same case. The trial court's order denying the motion for partial dismissal should be reversed.

VII. The trial court should have granted summary judgment to the Town on the plaintiff's claim for intentional infliction of emotional distress ("IIED"). To prove an IIED claim a plaintiff must prove "extreme and outrageous" conduct that intentionally or recklessly causes severe emotional distress. If this court accepts the Town's res judicata or collateral estoppel arguments, then the only acts at issue would be plaintiff's claim that she was treated rudely at a ZBA hearing. While unpleasant, this does not constitute IIED.

More important, the plaintiff failed to present specific facts of "extreme and outrageous conduct." Instead she relied on invective and conclusions. While sufficient to put the Town on notice of her claim, these accusations fell short of the evidentiary *proof* required on summary judgment. The trial court's denial of summary judgment on the IIED claim should be reversed.

VIII. Plaintiff has appealed from the trial court's rulings on "all" of the motions in limine. The rulings based on the anticipated application of the rules of evidence need not be addressed because they may be re-determined by the trial judge if the case is remanded. The ruling on collateral estoppel, however, should stand because all of the elements of claim preclusion are present based the final judgment in the Equity Case.

ARGUMENT

I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT DISMISSED THE SECOND AMENDED WRIT DUE TO PLAINTIFF'S FAILURE TO APPEAR

A. Standard Of Review And Governing Law

An order dismissing a writ due to the plaintiff's failure to appear at a final pretrial conference, a few days prior to jury selection, should be reversed only if it is an unsustainable exercise of discretion. DeButts v. Laroche, 142 N.H. 845, 847 (1998).

Superior Court Rule 62(IV) states that failure to appear for a final pretrial conference "shall constitute grounds for sanctions, including entry of nonsuit, default or such other order as justice may require." In DeButts this court recognized that dismissal is an appropriate sanction for failing to appear at a Rule 62 conference. See also, Douglas v. Douglas, 143 N.H. 419 (1999) (holding that a party may be defaulted for failing to appear for a properly noticed hearing). However, dismissal is neither automatic or mandatory. Therefore, a trial court must consider other alternatives as well. DeButts, 142 N.H. at 847.

In determining whether to enter an order of dismissal, a trial court must be mindful of the need to balance competing considerations:

> It is important that cases be decided on their merits, that a party have his day in court and that rules of practice and procedure shall be tools in aid of the promotion of justice rather than barriers and traps for its denial. **It is likewise important that litigation be concluded finally and with reasonable dispatch and that the dilatory shall not be rewarded at the expense of the diligent.**

Douglas, 143 N.H. 425 (emphasis added). While New Hampshire has not adopted the boilerplate of the federal courts, it is certainly true that a court should consider: (a) The severity of the violation; (b) The legitimacy of the party's excuse; (c) Repetition of violations; (d) The deliberateness of the misconduct; (e) Mitigating excuses; (f) Prejudice to the other side; (g)

Prejudice to the operations of the court; and (h) The adequacy of lesser sanctions. See, Benitez-Garcia v. Gonzalez-Vega, 468 F.3d 1 (1st Cir. 2006) (listing factors to be considered); Robson v. Hallenbeck, 81 F.3d 1 (1st Cir. 1996) (same).

B. The Trial Court's Decision In This Case

The trial court's written order of dismissal states the court considered alternative sanctions after reviewing the entire court file. A,876. Because the order cites DeButts, it is clear that the trial judge understood his obligation to make a case-specific and fact-specific decision. Plaintiff, having chosen not to obtain a transcript of the hearing (held in lieu of the final pretrial conference), cannot reasonably dispute the court's decision.

Plaintiff argues, however, that the trial court should have granted her motion to vacate the order of dismissal because she acted negligently rather than purposely. See, Plaintiff's Brief at p. 3. In that motion plaintiff admitted that there was no emergency or other circumstance that prevented her from attending the scheduled hearing. A,877. She also admitted that she received actual notice of the hearing. A,885. The court notice was mailed to her home and had the date and time of the hearing in **bold font**. See, A,890. It warned plaintiff, again in **bold font**, that "Failure to appear for any hearing may result in dismissal or default." See, A,890. Nonetheless, because the notice for the June hearing came in December plaintiff never got around to jotting it down on the calendar. A,878. See also, Plaintiff's Brief at p. 4. Plaintiff conceded that she never bothered to check her paperwork (or review the court rules) from the time she received the notice, before Christmas, to the day of her default, in the last week in June.[10] By that time, jury

[10]Plaintiff claimed that other demands on her time excused her failure to check her file for the date of the hearing. She cited to her involvement in other litigation, her chronic medical condition, two deaths in her extended family and a 50th Anniversary party. A,878-879.

selection was just five business days away, making it logistically difficult to keep the case on the jury list in the plaintiff's absence, given the likely amount of judicial work required prior to opening statements.

The Town responded to plaintiff's motion to vacate by noting that plaintiff's failure to appear was not an isolated incident. A,892. Plaintiff had twice recently failed to appear in closely related proceedings involving the same parties and the same dispute. Plaintiff failed to appear for the second day of *trial* in the Equity Case. See, A,892, 903-A1.[11] She was defaulted and her case was dismissed. A,892, 903-A1. Plaintiff later convinced the judge to vacate the default conditioned on her payment of attorneys' fees to the Town. A,892, 903-A3. Plaintiff then refused to pay even one dollar of the amount that was due. A,892.

Plaintiff also failed to appear in a Milford District Court enforcement action arising from her unlawful and unpermitted construction of a large shed/garage on the same property. A,589-590; 892. See, Town of Amherst v. Gilroy, Milford District Court 06-CV-31. The court granted a final default judgment to the Town. A,589-590; 892. Plaintiff later moved to remove the default, stating that she failed to appear for court because she "neglected to change the June, 2006 page of Plaintiff's calendar to July 2006." See, A,892. Plaintiff then argued that she had been so busy preparing a bankruptcy petition that she forgot about the hearing. See, A,892. The District Court provisionally granted plaintiff's motion to remove the default provided that she

[11]The citation is still to the Appendix. Pages 903-A1 through 903-A6 are located immediately following page 903. Undersigned counsel apologizes for the confusing pagination.

pay the Town's attorneys' fees. A892, 903-A5. Plaintiff failed to pay even one cent of the amount that was ordered and the default judgment stood.[12] A,892.

More important, plaintiff's unexcused failures to appear are merely representative of the many ways in which she transgressed published rules and specific court orders designed for sound case management. See, DeButts, 142 N.H. at 847 ("…*pro se* litigants are responsible for knowing the content of court rules."). The result has been that this simple case was, per the clerk's office, the oldest case pending for trial in Hillsborough North and certainly one of the largest files in the building.

By her repeated filing of vexatious pleadings and procedurally improper appeals plaintiff prolonged and multiplied this case. She began this litigation with an indecipherable 93 page writ. A,1. She followed that up with a 51 page Amended writ. A,164. When instructed for a second time by the court to "specifically and clearly state cognizable causes of action, including clear and succinct factual allegations,"A,251, plaintiff instead filed an improper mandatory notice of appeal in this court. A,274.

While her improperly filed appeal was pending, plaintiff filed an untimely motion in Superior Court for reconsideration. A,253. That motion contained plenty of invective concerning events that were *not* in the Amended Writ and individuals who were *not* named as defendants (foreshadowing plaintiff's later claims regarding the septic system and fire sprinkler system). A,253-265. But the plaintiff presented no argument related to the court's requirement that she restate her claim in a concise and plain fashion.

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[12]Plaintiff subsequently filed a *pro se* appeal in this court which resulted in a reduction of the judgment against her on legal grounds. See, Town of Amherst v. Gilroy, 157 N.H. 275 (2008).

Later, when plaintiff's improperly filed appeal was finally dismissed, her next step was to file an unsuccessful motion in Superior Court for an interlocutory appeal of the order requiring her to file readable claims for relief. A,296.

After all of these machinations, plaintiff finally filed the operative writ in this case—a 75 page, single spaced behemoth containing 531 reticulated paragraphs. A,302. Much of the Second Amended Writ was palpably frivolous. For example, plaintiff sought damages because she hurt her knee while doing construction work that no contractor would perform due to the lack of a building permit. See, A,363. Ignoring the advice of the court, A,249-250, plaintiff insisted on including a Consumer Protection Act claim even though it is beyond cavil that the Town was not engaged in trade or commerce.

Plaintiff filed a second improper appeal after the trial court dismissed her Consumer Protection Act claim and otherwise narrowed her writ. A,431. When that appeal was dismissed, plaintiff filed another unsuccessful motion in the trial court for an interlocutory appeal. A,444. Plaintiff later filed a third appeal, styled as a petition for original jurisdiction after the trial court narrowed her writ further on summary judgment. A,682.

All of these meritless notices of appeal resulted in unnecessary delays. Additional delays were caused by the plaintiff's repetitive motions to continue. As explained in the Town's Objection to the motion to vacate the order of dismissal, the jury trial was continued three times at the plaintiff's request (due to chronic health concerns and to allow her to focus on other litigation) and one time at the Town's request (due to witness unavailability). A,895-896. On two occasions, as jury selection became imminent, the Town incurred thousands of dollars in attorneys fees because (a) counsel met with several witnesses for several hours each; (b) counsel prepared for trial in a case with several thousand pages of documents. A,896. Had plaintiff's

motion to vacate been granted, the Town would have expended thousands of dollars more (and fee shifting was not a workable sanction because this plaintiff twice refused to pay court ordered attorneys fees to the Town). Moreover, pushing this case into its *sixth year* would have been prejudicial in and of itself, given the fact that the Town planning department needed to remain actively involved in the continued preparation of the case.

Finally, all of plaintiff's litigation conduct in this case was part of a far broader pattern of lawsuit abuse which distinguished this plaintiff from the ordinary *pro se* litigant who made a negligent blunder. As detailed in the Town's Objection, A897-900:

(A) Plaintiff filed the Equity Case *pro se.* She lost every factual dispute and litigated it through appeal;

(B) She filed the Letterman case *pro se,* case and litigated it until the U.S. Supreme Court denied certiorari;

(C) She filed Gilroy v. Arabella Protection Ins. Co., in the Norfolk (Massachusetts) Superior Court 03-01599, *pro se.* A,899. In that case plaintiff sued an insurer for failing to pay a claim and for harassment. A,899. The court noted a "history of delays…mostly at the request of plaintiff [which] amount to an abuse of the trial management process…" A,899. In the midst of the case, plaintiff filed an improper interlocutory appeal that was dismissed by the Massachusetts Appeals Court. A,899. See, Gilroy v. Arabella Protection Ins. Co., Slip Op. 2006-J-0546 (Mass. Ct. App. Oct. 31, 2006). After plaintiff lost the Arabella the case on summary judgment, she unsuccessfully appealed. A,899. See, Gilroy v. Arabella Protection Ins. Co., No. 07-P-1257, Slip. Op. (Mass. Ct. App. November 19, 2008).

(D) She filed Gilroy v. Hillygus, U.S. District Court for the District of Massachusetts, 08-CA-11037-RWZ, *pro se*. A,899. In that case plaintiff unsuccessfully sued the attorneys who

represented the insurance company in Arabella. She claimed that responding to their discovery requests caused her health to deteriorate and also, somehow, "caused Plaintiff's construction of the N.H. premises to not become financially successful." A,899. (While the instant appeal has been pending, the federal court dismissed the Hillygus suit and the U.S. Court of Appeals affirmed by order. See, Gilroy v. Hillygus, No. 09-1974, Slip. Op. (1st Cir. February 5, 2010).)

(E) She filed Gilroy v. Newton Zoning Board of Appeals, the Middlesex (Massachusetts) Superior Court, 97-2218 *pro se*. A,900. This was an unsuccessful appeal from a local land use decision. A,900. Her case was dismissed. A,900.

(F) She filed Gilroy v. Smith, in the Middlesex (Massachusetts) Superior Court, 97-2380, *pro se*. A,900. This was a petition for petition for equitable relief that was dismissed following a hearing. A,900.

(G) She filed numerous other actions against the Town relating to the property at issue in this case, all *pro se*. These include: Gilroy v. Town of Amherst, Hillsborough County Superior Court, North, 04-E-375 (petition for injunctive relief dismissed after evidentiary temporary hearing); See, Gilroy v. Town of Amherst, Hillsborough County Superior Court, North, 04-E-0091 (unnecessary petition to extend the life of her zoning variance); Gilroy v. Town of Amherst, Hillsborough North, 02-E-187 (denial of zoning variance affirmed); Gilroy v. Town of Amherst, Hillsborough North, 02-E-578 (denial of zoning variance affirmed); Gilroy v. Town of Amherst, Hillsborough North 02-E-488 (denial of the zoning variance at issue in this case ***reversed,*** denial of another zoning variance affirmed). A,897-989.

(H) As noted above, she sued her mortgages for intentional infliction of emotional distress. A,898-899.[13]

C. Conclusion

The trial court extended plaintiff every courtesy. All that was asked in return was that she show up when required. She failed to do that. Had her non-appearance been an isolated incident, it might be forgiven. But plaintiff has made a habit of failing to appear and has otherwise abused the trial management practices of the Superior Court, the New Hampshire Supreme Court and the other venues where she has filed similar claims against insurance companies, lenders, towns and attorneys. The order of dismissal, and the denial of plaintiff's motion to vacate that order, were reasonable exercises of informed discretion.

II. PLAINTIFF FAILED TO PROVIDE THIS COURT WITH A SUFFICIENT RECORD TO DECIDE THAT THE TRIAL COURT'S EXERCISE OF DISCRETION WAS UNREASONABLE

As the appellant, plaintiff has the burden to provide this court with a sufficient record to decide her issues. See, Supreme Court Rule 13(2). See also, Bean v. Red Oak Property Management, 151 N.H. 248, 250 (2004); Rix v. Kinderworks, 136 N.H. 548, 553 (1992). In this case, plaintiff chose not to obtain a transcript of the short hearing that took place in lieu of the final trial management conference on June 26, 2009. The trial court's written order of that date indicates that the judge considered alternative sanctions. In the absence of a transcript, this court

[13]Both the Kaspar and the Ameriquest cases, cited above, were resolved while this appeal has been pending. In Kasper the U.S. District Court granted judgment to the defendants and rejected plaintiff's claims of intentional infliction of emotional distress, discrimination, fraud and violation of the Consumer Protection Act. See, Gilroy v. Kasper, Slip. Op. 07-cv-300-JL (D.N.H. August 31, 2009 and September 1, 2009). In Ameriquest, the U.S. District Court dismissed most of plaintiff's claims (including claims for intentional infliction of emotional distress, discrimination and violation of the Consumer Protection Act) but she did recover a judgment on the grounds that defendants called here at unreasonable times to collect a debt in violation of statute. The case was later settled on appeal.

must assume that the trial court made all findings necessary to support its decision. See e.g., Rix, 136 N.H. at 548:

> Our review is complicated by the scant record of the proceeding below. The moving party…is responsible for presenting a record sufficient to allow the court to decide the issue presented on appeal. … In the absence of a taped or stenographic record, we must assume that the evidence presented supported the trial court's findings, and our review is limited to legal errors apparent on the face of the record.

(citations and internal quotation marks omitted). See also, Gilroy v. Town of Amherst, No. 2006-650, Slip. Op. (N.H. 2007) (holding that this plaintiff failed to provide a sufficient record in her appeal in the Equity Case). A,741-A. Accordingly, the order of dismissal should be affirmed.

III. THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFF'S CONSUMER PROTECTION ACT CLAIM

In the event that this court reverses the trial court's order dismissing the Second Amended Writ for plaintiff's failure to appear, it will then need to consider the other issues raised in her brief. These include her contention that the trial court erred when it partially dismissed the writ for failure to state a claim upon which relief could be granted.

The trial court dismissed plaintiff's Consumer Protection Act ("CPA") claim. A,425-426. It is not entirely clear whether plaintiff continues to press her CPA claim in this court. On the one hand, she argues that it was error for the trial court to dismiss any of her claims, see, Plaintiff's Brief at p. 1, and she continues to argue that "Defendants violated [the] Consumer Protection Act." Id at 17. On the other hand, plaintiff does not develop this argument beyond this single reference to the statute.

In any event, the trial court properly dismissed the CPA claim. The CPA prohibits

"unfair or deceptive act[s] or practice[s] in the conduct of any trade or commerce," RSA 358-A:2, and provides a private cause of action to persons injured by such practices. RSA 358-A:10. Thus, the Act applies only to conduct that is committed in the course of "trade or commerce." That phrase is statutorily defined as follows:

> Trade" and "commerce" shall include the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this state.

RSA 358-A:1,II

This definition limits the reach of the Act to business contexts. See e.g., Hughes v. DiSalvo, 143 N.H. 576 (1999) (discussing the meaning of the phrase "trade or commerce" and holding that the Act does not apply to the private sale or lease of one's home); Snow v. American Morgan Horse Ass'n, Inc., 141 N.H. 467 (1996) (construing the phrase "trade or commerce"); Chase v. Dorais, 122 N.H. 600 (1982) (holding that the phrase "trade or commerce" restricts the application of the Act to business contexts).

This case involves actions taken by the Town in connection with its interpretation and enforcement of zoning, planning and building regulations. A town's enforcement of land use regulations and building codes is not "trade or commerce" within in meaning of the Consumer Protection Act. Rather, these are core governmental functions to which the Act has no applicability whatsoever. Cf: Morton v. Town of Hanover, 682 N.E.2d 889 (Mass. Ct. App. 1997) (Holding that the Massachusetts Consumer Protection Act does not apply to the regulatory activities of municipal entities because such activities do not constitute "trade or commerce."). Thus, plaintiff failed to state a claim under the Consumer Protection Act.

IV. THE TRIAL COURT CORRECTLY DISMISSED MOST OF PLAINTIFF'S COMMON LAW CLAIMS

A. Introduction

Plaintiff also asserted a number of common law claims for relief. The trial court dismissed all but two of these. It did not dismiss plaintiff's discrimination/selective enforcement claim or her claim for intentional infliction of emotional distress. Thus, the court allowed claims based on purposeful bad faith to survive, at least until summary judgment. Plaintiff appeals from the dismissal of the other claims.

The dismissed claims turned on the existence of a free standing private cause of action for monetary damages resulting from construction delays caused by the improper denial of a government permit.[14] As explained below, because no such cause of action exists, the trial court's decision was correct and should be affirmed.

B. Standard Of Review And Governing Law

The standard of review in considering a motion to dismiss is "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Harrington v. Brooks Drugs, Inc., 148 N.H. 101, 104 (2002), quoting Hobin v. Coldwell Banker Residential Affiliates, 144 N.H. 626, 628 (2000). In making this determination, the court must "assume the truth of all facts alleged by the plaintiff and construe all reasonable inferences in the light most favorable to [the plaintiff]." Graves v. Estabrook, 149 N.H. 202, 203 (2003).

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[14]Plaintiff captioned the dismissed common law causes of action as (a) "Violation of Personal Injury Law To Cause Personal And Financial Loss To Plaintiff;" (b) "Interference with quiet enjoyment," and (c) "harassment." To the extent that these claims overlapped with plaintiff's claims of discrimination/selective enforcement or intentional infliction of emotional distress, they survived dismissal. Beyond this, the dismissed claims simply alleged that the Town improperly denied plaintiff the permits that she sought and, thereby delayed and frustrated her efforts to convert her building to a multi-unit residential condominium.

The court need not, however, accept statements in the writ which are merely conclusions of law. Putnam v. University of New Hampshire, 138 N.H. 238, 239 (1994); Jay Edwards, Inc. v. Baker, 130 N.H. 41, 45 (1987); Chasan v. Village District of Eastman, 128 N.H. 807, 814 (1986). See also, Rogan v. Menino, 175 F.3d 75, 77 (1st Cir. 1999) (applying Federal R. Civ. P. 12(b)(6) and noting that in ruling on a motion to dismiss the Court must "stop short...of swallowing the plaintiff's invective hook, line, and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited.")

C. The Trial Court Correctly Dismissed The Common Law Claims

Generally, a property owner's only remedies for misapplication of zoning and building regulations is to have the town's incorrect decisions reversed on appeal or otherwise declared unenforceable by injunction, declaration or extraordinary writ. Torromeo v. Town of Fremont, 148 N.H. 640, 643 644 (2002) ("the owner's only remedy is reversal of the erroneous decision on appeal."); Smith v. Town of Wolfeboro, 136 N.H. 337, 346 (1992) (same); Dumont v. Town of Wolfeboro, 137 N.H. 1, 10 (1993) (same).

Plaintiff never had "a vested, compensable right to a reasonable decision" by Town land use authorities. Smith, at 346. What plaintiff had was a right to appeal adverse decisions, which she successfully exercised with respect to the ZBA's variance denial, and which she elected not to exercise with respect to the decisions of the Planning Board, the Planning Director and the Fire Inspector. Beyond this plaintiff's alleged economic and non-economic injuries are not compensable:

> Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are incidents of ownership. ... The delay inherent in the statutory process of obtaining subdivision approval, including appeals to the superior court and to this court, is one of the incidents of ownership. Any decrease in the value of the subject property that occurs during the pendency of governmental decision making must be borne by the property owner and does not

> give rise to a compensable taking. Consequently, we hold that the award of compensation to the owners was improper, and we reverse the trial court.

Smith, at 346. See also, Torromeo, at 643 ("An appeal of a mistaken board decision is an element of the governmental decision making process[.]"); Marino v. Goss, 120 N.H. 511, 514, (1980) ("Judicial, quasi judicial, legislative or quasi legislative acts of a town ordinarily do not subject it to claims for damages.").

An exception to this rule is made only if the municipal regulation in question is unconstitutional. Torromeo, at 643. This exception applies in cases of so called reverse or regulatory takings, but the Court has "rejected claims for damages in zoning ordinance challenges in which it was determined that no taking or inverse condemnation occurred... or where the constitutionality of the regulation was not challenged." Torromeo, at 643 (citation omitted). The Court has also rejected the proposition that damages may be awarded for losses suffered by property owners due to regulations that are invalid but non unconstitutional:

> We have also distinguished an erroneous planning board decision based upon an otherwise valid regulation from "the application of an invalid regulation," and held that the former does not constitute a compensable taking even though it may subject the property owner to a loss of value. [Smith] at 346, 615 A.2d 1252; see also Dumont v. Town of Wolfeboro, 137 N.H. 1, 10, 622 A.2d 1238 (1993). ...
>
> The plaintiffs argue that because the growth control ordinance was found to be invalid *ab initio*, this is a case of "the application of an invalid regulation" as discussed in Smith. We disagree. The context in which that term is used in Smith indicates that by "invalid regulation," we meant an unconstitutional one[.]

Torromeo, at 643.

While plaintiff's brief makes repeated references to regulatory "takings," see e.g., Plaintiff's Brief at p.19, she does not allege that the Town's zoning ordinance or building code (including the State Building Code and State Fire Code) are unconstitutional. Rather she alleges

only that particular decisions under these constitutional regulations adversely affected her. That is precisely why her claims for damages fail under Torromeo. Accordingly, this court should affirm the trial court's ruling on the motion to dismiss plaintiff's common law claims.

V. THE TRIAL COURT CORRECTLY FOUND THAT PLAINTIFF FAILED TO RAISE A GENUINE DISPUTE OF MATERIAL FACT WITH RESPECT TO HER DISCRIMINATION CLAIM

A. Standard Of Review And Governing Standards

Plaintiff has also appealed from the trial court's order granting summary judgment to the Town on her discrimination/selective enforcement claim. When a summary judgment ruling is appealed, this court reviews the trial court's application of the law to the facts de novo. Everitt v. General Elec. Co., 159 N.H. 232, 234 (2009); Maloney v. Badman, 156 N.H. 599, 602 (2007).

A trial court should grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits filed, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. See e.g., Everitt, 159 N.H. at 234; Maloney v. Badman, 156 N.H. at 602 (2007). Belhumeur v. Zilm, 157 N.H. 233, 235 (2008). A dispute of fact is "genuine" if "the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party," and "material" if it "might affect the outcome of the suit." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (construing analogous language of Federal R.Civ.P. 56). See also, Horse Pond Fish & Game Club v. Cormier, 133 N.H. 648, 653 (1990).

In ruling on a motion for summary judgment, the court must construe all materials submitted in the light most favorable to the non-moving party. Metropolitan Prop. & Liab. Ins. Co. v. Walker, 136 N.H. 594, 596 (1993). However, the non-movant "may not rest upon [the] mere allegations or denials of his pleadings, but ... must set forth specific facts showing that there

is a genuine issue for trial." RSA 491:8-a, IV; Gamble v. University of New Hampshire, 136 N.H. 9, 16-17 (1992); ERA Pat Demarais Assoc's. v. Alex. Eastman Foundation, 129 N.H. 89, 92 (1986). "Mere denials or vague and general allegations of expected proof are not enough" Omiya v. Castor, 130 N.H. 234, 237 (1987). Summary judgment is an appropriate means for avoiding the expense and time of a full trial where the pertinent facts are not in dispute and the moving party is legally entitled to relief. High Country Associates v. New Hampshire Insurance Co., 139 N.H. 39, 41 (1994).

B. The Elements Of A Discriminatory Enforcement Claim

To prevail on a claim of discriminatory enforcement of zoning and building regulations, a plaintiff must prove two elements: (a) "conscious intentional discrimination," Alexander v. Town of Hampstead, 129 N.H. 278, 283-284 (1987) and (b) an "impermissibly established classification" sufficient to trigger constitutional equal protection scrutiny. Dow v. Town of Effingham, 148 N.H. 121 (2002). See also, Bacon v. Town of Enfield, 150 N.H. 468, 474 (2004). As this court said recently in Bacon:

> In order for the plaintiff to show that the enforcement of the ordinance was discriminatory, she must show more than that it was merely historically lax. Instead, the plaintiff must show that the selective enforcement of the ordinance against her was a ***conscious intentional discrimination***. In addition, the plaintiff must assert and demonstrate that the town impermissibly established classifications and, therefore, treated similarly situated individuals in a different manner in order to set forth an equal protection claim.

150 N.H. at 474 (emphasis added, internal citations, quotation marks, brackets and parentheticals omitted).

Thus, the inconsistent or even sporadic enforcement of local regulations does not support a private cause of action for damages. "[A] municipality's failure to enforce an ordinance does

not constitute ratification of a policy of nonenforcement and, consequently, will not estop a municipality's subsequent enforcement of the ordinance." City of Concord v. Tompkins, 124 N.H. 463, 470 (1984); See also, Alexander, at 283; Rye Beach Village Dist. v. Beaudoin, 114 N.H. 1, 6 (1974).

C. In This Case Plaintiff Failed To Establish Discrimination

Plaintiff alleged that the Town discriminated her because it favored the developers of the Summerfield and Fells projects. However, as explained above in great detail, there was no substance to the *ipse dixit* that her four condominium apartments were viewed by the Town (or the developers of Fells or Summerfield) as a competitive threat to these large scale single family home developments.

Summary judgment is a time for *evidence* rather than invective and Plaintiff presented no *evidence* of (a) a discriminatory animus on the Town's part; (b) discriminatory statements by anybody associated with the Town favoring the Summerfield or Fells projects; or (c) disparate treatment.

Indeed, to the extent that plaintiff was treated differently than the other two developers, it was because her project needed different permits: (A) Neither Summerfield nor Fells needed a variance or other permit from the ZBA; (B) Neither project needed sprinkler systems or addressable alarm systems (because they consisted of single family dwellings); and (D) Neither project had pre-existing septic systems, so they both had to install newly designed DES compliant systems. Thus, plaintiff who (a) needed a variance; (b) needed a sprinkler system and addressable alarm system; and (c) had a pre-existing septic system was not similarly situated to the other two developers with respect to these matters at issue in this case.

In fairness to plaintiff, she did not limit her discrimination claim to a comparison between her project and the Summerfield and Fells projects. She alleged more generally that she was singled out for different treatment than others in her town. Yet she did not present any *evidence* of this alleged disparate treatment. She did not show (and could not show) that others received dispensation from state septic and fire safety regulations. She did not show that her applications took longer to process than others. She did not show that the Planning Director, who she accused of failing to assist her, instead provided assistance to others. She did not show that others received multiple discussion hearings before the Planning Board. She did not show that others received variances to change the use of office buildings to residential apartment buildings. In short she presented no *evidence* of a disparity between her case and anybody else's.

Recognizing this, plaintiff argues throughout her brief that discrimination may be proven even without evidence that another specific person actually received better treatment. That is not disputed. For example, if a hypothetical town were to deny permits and delay ZBA and Planning Board hearings due to the applicant's race (or color, gender, religion, ethnicity, disability, sexual orientation, etc.), it would hardly matter that no other individuals ever requested a similar permit.

But in this case, plaintiff has not presented any evidence that she was discriminated against based on *any* criteria, let alone an unlawful one. Plaintiff had two and half years between the time she filed her initial writ and the court's ruling on summary judgment. During this time she had the opportunity for depositions, interrogatories and full discovery. At the end of the day, however, she simply could not find *proof* of "conscious intentional discrimination" based on an "impermissibly established classification." Bacon, 150 N.H. at 474. The trial court's order granting summary judgment to the Town on plaintiff's claims of discrimination and selective enforcement should be affirmed.

VI. THE TRIAL COURT ERRED WHEN IT DENIED THE TOWN'S MOTION FOR PARTIAL DISMISSAL ON GROUNDS OF RES JUDICATA

A. Introduction

The Town has filed a cross-appeal from the trial court's denial of its motion for partial dismissal on grounds of res judicata. The Town's disagreement with the trial court is limited to a single question of law which should be reviewed by this court *de novo.*

B. Governing Principles

The doctrine of res judicata was established "to avoid repetitive litigation so that at some point litigation over a particular controversy must come to an end." Eastern Marine Construction Corp. v. First Southern Leasing, 129 N.H. 270, 273 (1987). See also, Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 454 (2002). "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." Eastern Marine, 129 N.H. at 273. See also, Berthiaume v. McCormack, ___ N.H. ___, 891 A.2d 539, 551 (2006).

Thus, a valid judgment "finally negatives" every claim or defense that was, or that might have been raised. See, Boucher v. Bailey, 117 N.H. 590, 591 (1977); Osman v. Gagnon, 152 N.H. 359, 362 (2005). Put another way, "the doctrine of res judicata encompasses not only issues actually litigated in a prior proceeding, but also issues which could have been raised, based on the factual transaction in question." Taylor v. Nutting, 133 N.H. 451, 456-457 (1990), citing Eastern Marine, 129 N.H. at 275. See also, Town of Durham v. Cutter, 121 N.H. 243, 246 (1981).

Three conditions must be met for res judicata to apply: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both

instances; and (3) a final judgment on the merits must have been rendered on the first action. Osman, 152 N.H. at 362; Brzica, 147 N.H. at 454; In re Juvenile 2004-637, 152 N.H. 805, 808 (2005).

C. All Three Elements Were Met In This Case

All three of these elements were met in this case. With respect to the first element (e.g. identity of parties), the parties in the Equity Case and the instant case were, in fact, identical. With respect to the last element (e.g. a final judgment), the Equity Case ended in a judgment, following a full evidentiary *trial* and that judgment was affirmed on appeal. That leaves only the middle element (e.g. same cause of action) in dispute.

The trial court found that the Equity Case involved a different cause of action because it was brought to prevent further harm rather than to collect monetary damages. A,756-757, citing Morency v. Plourde, 96 N.H. 344 (1950). The trial court's view does not comport with this court's more contemporary approach to res judicata. Under this court's recent case law, two cases involve the same "cause of action" for res judicata purposes if they arise from the same set of factual transactions. Eastern Marine, 129 N.H., 275. "[O]nce a party has exercised the right to recover based upon a particular factual transaction, that party is barred from seeking further recovery, even though the type of remedy or theory of relief may be different." Radkay v. Confalone, 133 N.H. 294, 298 (1990). See also, Goffin v. Tofte, 146 N.H. 415, 417 (2001).

This is true regardless of whether one case was brought in equity and the second at law. See e.g., Canty v. Hopkins, 146 N.H. 151, 155 (2001) ("Whether sounding at law or in equity, conflicting claims flowing from a common source should be determined in a single action, thus avoiding vexatious litigation and conflicting judgments."). In short, the res judicata doctrine functions not only in its traditional role of preventing repeat claims, but also as a compulsory

joinder requirement for closely related claims. AVX Corp. v. Cabot Corp., 424 F.3d 28, 31 (1st Cir. 2005).

The rule in Morency v. Plourde was sound when one could not join a claim for damages with a prayer for an emergency injunction to prevent ongoing harm. A contrary rule would force a plaintiff to choose between prospective equitable relief in the short term or monetary damages down the road. However, the practice today is to permit petitions in equity that include claims at law. Likewise, modern practice allows plaintiffs to add equitable claims (and motions for temporary orders) to existing civil cases. These practices have changed not only in the sixty years since Morency, but even in the twenty-three years since Eastern Marine Construction (although admittedly the Superior Court rules themselves have remained static.).

In Eastern Marine¸ this court distinguished Morency and found that it remained good law notwithstanding the adoption of the "same set of factual transactions test." In today's procedural environment, if Morency has continued vitality it is properly limited to situations in which the plaintiff cannot legally join, or cannot be reasonably expected to join equitable and legal claims.

Plaintiff's cause of action in the Equity Case, for res judicata purposes, included all equitable and legal claims that were, or could have been, asserted in connection with (a) the Planning Board's conditional approval of plaintiff's site plan; (b) the Fire Department's actions in approving plaintiff's fire safety system; and (c) the Planning Board's actions in approving plaintiff's septic system.

The instant case includes the same cause of action as the Equity Case. However, the instant case also includes claims relating to the ZBA's denial of plaintiff's application for a variance. Accordingly, the doctrine of res judicata should apply to all of plaintiff's claims in this

case, with the exception of those relating to the ZBA's denial of the variance. The trial court's order to the contrary should be reversed.

VII. THE TRIAL COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT TO THE TOWN ON PLAINTIFF'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The Town appeals from the trial court's denial of summary judgment on plaintiff's claim of intentional infliction of emotional distress ("IIED"). The standard of review for summary judgment rulings is set forth above a p. 38.

In Morancy v. Morancy, 134 N.H. 493, 495 (1991), this court adopted the Restatement definition of IIED:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to another results from it, for such bodily harm.

Restatement (Second) of Torts §46 (1965). See also, Konefal v. Hollis/Brookline Co-op. Sch. Dist., 143 N.H. 256, 261 (1998). Thus, to survive summary judgment, plaintiff was required to prove through evidence that: (a) The Town's conduct was "extreme and outrageous;" (b) The Town acted either intentionally or recklessly with respect to the risk that its actions would cause severe emotional distress to the plaintiff; and (b) The plaintiff in fact suffered "severe emotional distress." Further, because "some degree of transient and trivial emotional distress is a part of the price of living among people[,] [t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." Morancy, 134 N.H. at 496 (emphasis added) quoting Restatement §46 (j).

In this case, the trial court erred by finding that the plaintiff presented evidence of "extreme and outrageous conduct" and "intentional or reckless action." A,643. The court reasoned that even though plaintiff failed to prove that the Town acted with a discriminatory

motive, a jury could still find IIED based on (a) her bald allegation that she was "mocked" at a ZBA hearing, (b) the "number of alleged delays" and (c) the instances in which plaintiff claimed that the Town "changed its position in certain matters," related to the fire alarm and sprinkler systems. A,642-643.

As a threshold matter, if this court reverses the trial court's res judicata ruling, the factual basis for the IIED claim will be limited to events that occurred at the ZBA hearing. See, p.44-45, above. The claim would be similarly limited if this court leaves the trial court's collateral estoppel ruling intact. See, p 47-48, below. Either way, plaintiff would be left with a claim that she was "mocked" in some unspecified manner at a hearing. While unpleasant, this would hardly meet plaintiff's burden on summary judgment.

More important, the trial court erred by treating plaintiff's bombastic and conclusory polemic as a factual offer of proof. When confronted with a summary judgment motion, a plaintiff must provide the court with specific facts rather than bald denials and conclusions. Omiya v. Castor, 130 N.H. 234, 237 (1987). Plaintiff did not provide a factual basis for her claim that the Town's actions were "extreme and outrageous." Indeed, the trial court order itself did not list any specific acts that could properly be characterized in that manner. Therefore, this court should reverse the trial court's ruling denying the Town's motion for summary judgment on the IIED claim.

VIII. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S COLLATERAL ESTOPPEL RULING

Plaintiff's brief challenges *all* of the trial court's rulings on the Town's motions in limine. Because most of those rulings involved the anticipated application of the rules of evidence, they will be open to redetermination by the trial judge if this case is remanded. Therefore, while the Town believes the rulings were correct, no argument is necessary at this stage of the case.

However, one of the motions in limine was grounded on the doctrine of collateral estoppel, based on the factual findings in the Equity Case. See, pp. 14-16, above; A,837. This court should affirm that ruling because all of the requirements of collateral estoppel were met.

The doctrine of collateral estoppel bars a party to a prior action from relitigating any issue or fact that actually litigated and determined in the prior action. Grossman v. Murray, 141 N.H. 265, 269-270 (1996), quoting Daigle v. City of Portsmouth, 129 N.H. 561, 570 (1987). See also, Stewart v. Bader, 154 N.H. 75 (2006); Dennis v. R.I. Hosp. Trust Nat. Bank, 744 F.2d 893, 899 (1st Cir.1984). This doctrine of issue preclusion stands in contrast to claim preclusion, or res judicata, which bars the relitigation of any claim that was, *or might have been* raised in litigation between the same parties. See, Grossman, 141 N.H. at 269-270. For claim preclusion, the prior and present litigation must both involve the same underlying cause of action. For issue preclusion, only the issues need to be identical.

"For collateral estoppel to apply, three basic conditions must be satisfied: (1) the issue subject to estoppel must be identical in each action; (2) the first action must have resolved the issue finally on the merits; and (3) the party to be estopped must have appeared as a party in the first action, or have been in privity with someone who did so." Stewart v. Bader, 154 N.H. at 80-81. These elements are part of the more general rule that allows collateral estoppel only against a party that had a full and fair prior opportunity to litigate the issue or fact in question. Id.

In this case, the plaintiff had a full and fair opportunity litigate the Equity Case. Indeed she had a two day trial and an appeal. Each and every fact that was set forth in the motion in limine was taken from the final order in the Equity Case and was necessary to sustain the court's judgment. Thus, all of the elements necessary for collateral estoppel have been met. This court should affirm the trial court's ruling.

CONCLUSION

1. This court should affirm the trial court's dismissal of Plaintiff's Second Amended Writ for her failure to appear.

2. Alternatively, this court should (a) affirm the trial court's order partially granting the Town's motion to dismiss the Second Amended Writ for failure to state a claim; (b) affirm the trial court's order granting summary judgment to the Town on the discrimination/selective enforcement claim; and (c) reverse the trial court's order denying the Town's motion for summary judgment on the IIED claim.

3. Alternatively, if any of plaintiff's claims are remanded for trial, this court should (a) reverse the trial court's ruling on the Town's motion for partial dismissal on grounds of res judicata and (b) affirm the trial court's ruling on the Town's motion in limine seeking collateral estoppel effect.

Respectfully Submitted,

TOWN OF AMHERST;

TOWN OF AMHERST ZONING BOARD OF ADJUSTMENT;

TOWN OF AMHERST PLANNING BOARD,

By their attorneys

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CERTIFICATE OF SERVICE

I, Andrew R. Schulman, hereby certify that I have served a two copies of this Brief on March 5, 2010, by mailing it, first class postage prepaid, to counsel for the plaintiff, William E. Aivalikles, 60 Main Street, Suite 230 Nashua NH 030601 and also by email attachment on the same date.

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Andrew R. Schulman

ADDENDUM

A. Superior Court Order of November 28, 2005
(partially dismissing Second Amended Writ) A-1

B. Superior Court Order of November 6, 2006
(partially granting summary judgment) A-18

C. Superior Court Order of October 3, 2007
(denying motion for partial dismissal on grounds of res judicata) A-39

D. Superior Court Order of July 10,2008
(on motions in limine) A-44

E. Superior Court Order of June 26, 2009
(dismissing Second Amended Writ for plaintiff's failure to appear) A-53

F. Superior Court Order of July 10, 2009
(denying motion to vacate default) A-54

G. Superior Court Order of July 22, 2009
(denying motion for reconsideration) A-55

H. Superior Court Order of July 26, 2006 in 05-E-160 (the Equity Case)
(final order) A-56