THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2021-0563

Petition for the New Hampshire Division for Children, Youth and Families

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APPEAL PURSUANT TO A PETITION FOR ORIGINAL JURISDICTION UNDER SUPREME COURT RULE 11 FROM THE MERRIMACK COUNTY SUPERIOR COURT

REPLY BRIEF FOR THE NEW HAMPSHIRE DIVISION OF CHILDREN, YOUTH, & FAMILIES

NEW HAMPSHIRE DIVISION FOR CHILDREN, YOUTH AND FAMILIES

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I. THE STATUTORY CONSTRUCTION ANALYSIS SET FORTH IN *PETITION OF NEW HAMPSHIRE DIVISION FOR CHILDREN, YOUTH AND FAMILIES, 173 N.H. 613 (2020)*, CONTROLS THE OUTCOME OF THIS APPEAL.

This appeal presents a discrete legal issue: whether RSA 508:8 applies to claims against the State brought under RSA chapter 541-B. This Court set forth a straightforward statutory construction analysis in *Petition of New Hampshire Division for Children, Youth and Families*, 173 N.H. 613 (2020) ("*Petition of DCYF*") that controls the answer to that question. The trial court did not meaningfully engage that analysis in its decision, and appellee likewise does not do so on appeal. Instead, appellee spends approximately half his brief reciting the factual allegations, advances mostly policy-based arguments in support of the trial court's decision, and asks this Court to elevate a purpose that finds no support in RSA chapter 541-B or its legislative history over the unambiguous language of the statutes at issue. This Court should follow the statutory construction analysis set forth in *Petition of DCYF* and find that RSA 508:8 does not apply to RSA chapter 541-B.

The appellee's chief policy-based argument contends that, if the Court does not make RSA 508:8 applicable to suits under RSA chapter 541-B, the claims minors have against the State will terminate before those minors have a chance to discover their existence. DCYF disagrees with this assertion. This Court has already held in *Petition of DCYF* that the discovery rule applies to claims against the State under RSA chapter 541-

B. "[T]he discovery rule tolls the limitations period until a plaintiff discovers, or should reasonably have discovered, the causal connection between the harm and the defendant's negligent or wrongful act." *Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 713 (2010).

Minors also have legal guardians who could bring claims against the State within the three-year limitation period on their behalf. *See Booth v. United States*, 914 F.3d 1199, 1205-07 (9th Cir. 2019) (holding minority tolling inapplicable to two-year limitations period in Federal Tort Claims Act and explaining that "the parent or guardian holds a legal duty to take action on behalf of the minor child" in such cases). Indeed, the father of the minors in this case did so here. The attorney who originally filed this lawsuit, *see* State's Appendix at 27, also brought suit on behalf of the minors' deceased sibling in *Boucher, et al. v. State of New Hampshire, Department of Health and Human Services, Division of Children, Youth, and Families, et al.*, Hillsborough County, Northern District, Docket No. 216-2017-CV-00859 (N.H. Super. Ct., filed Nov. 21, 2017). It is therefore unclear why this suit was not filed within the limitations period.

Additionally, on a case-by-case basis, equitable tolling may apply where "[p]articular circumstances connected to one's age" could support the doctrine, such as where "a minor is abandoned by his parents and/or guardians and so left unprotected," where a minor is a ward of the state and without a guardian or next friend, or where the minor's guardian has interests adverse to the minor. *Booth*, 914 F.3d at 1207; *see Portsmouth Country Club v. Town of Greenland*, 152 N.H. 617, 623 (2005) ("'[E]quitable tolling, which allows a plaintiff to initiate an action beyond the statute of

limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights . . . .'") (quoting 51 Am. Jur.2d *Limitations of Actions*, § 174 (2000)).

The appellee's blanket, unsupported assertion that all minors will have their claims against the State prematurely terminated is without support.

The appellee also contends that, if the statute of limitations bars the claims in this case, that result is unfair or unjust, and that feeling is understandable. Whenever sovereign immunity or the statute of limitations forecloses a plaintiff's action such a result may feel unfair or unjust. But sovereign immunity and statutes of limitations exist for a reason.

Sovereign immunity protects the fiscal integrity of the State, and particularized waivers of it contain predictable liability principles that legislators and executive branch officials rely on to balance the State's budget and predict agency operational expenses and needs. *See, e.g.*, *Opinion of the Justices*, 126 N.H. at 560 ("[i]f the State incurred significant liability, the payment of these costs could impair the financial ability of the State to render government services"); *Sousa v. State*, 115 N.H. 340 (1975) (explaining that waivers of state sovereign immunity "strik[e] . . . a balance between granting relief to injured claimants and protecting the solvency of the State" and implicate "[e]xtremely broad considerations of public policy and government administration").

Statutes of limitation "reflect the fact that it becomes more difficult and time-consuming both to defend against and to try claims as evidence disappears and memories fade with the passage of time." *Keeton v. Hustler Magazine, Inc.*, 131 N.H. 6, 14 (1988).

"Such statutes thus represent the legislature's attempt to achieve a balance among State interests in protecting both . . . courts and defendants generally against stale claims and in insuring a reasonable period during which plaintiffs may seek recovery on otherwise sound causes of action." *Id.*

The legislature is charged with crafting legislation to balance these important State and individual interests against the interests of those injured by the State. In crafting RSA chapter 541-B, the legislature weighed those benefits and burdens and determined that a three-year limitation period, plus a discovery rule, struck the correct balance between the two. *See Deere & Co. v. State*, 168 N.H. 460, 470 (2015) ("The wisdom and reasonableness of the legislative scheme are for the legislature, not the courts, to determine." (citations and quotation marks omitted)). If the legislature today believes a different balance should be struck, it is its "prerogative . . . to carve out an exception to the limitation period . . . for minors," *Steir v. Girl Scouts of the U.S.A.*, 150 N.H. 212, 215 (2003), not the Court's role to create legislation where none exists.

The appellee advances a purely purpose-driven approach to the issue presented that represents an extreme departure from this Court's precedents and should be rejected. This Court has not permitted "a broad statutory purpose" to "'override the specific language chosen by the legislature,'" *State v. Moore*, 173 N.H. 386, 393 (2020) (quoting *Appeal of Town of Lincoln*, 172 N.H. 244, 251 (2019)), because it "'frustrates rather than effectuates the legislative intent [of a statute] simplistically to assume that whatever furthers the statute's primary objective must be the law.'" *Appeal of Town of Lincoln*, 172 N.H. at 251 (quoting *State v. Dor*, 165 N.H. 198, 205 (2013)).

The legislature did not pass RSA chapter 541-B to give persons injured by the State the exact same rights and remedies against the State that private persons and entities enjoy vis-a-vis other private persons and entities, as the appellee suggests. The legislature passed RSA chapter 541-B to permit persons injured by the State a limited recovery on certain claims subject to other statutory limitations. The legislature sought this Court's advice as to whether these statutory limitations were constitutional. *Opinion of the Justices*, 126 N.H. 554 (1985). In addressing the three-year limitation period in RSA 541-B:14, IV, this Court advised "that the 'discovery rule' governs the accrual of causes of action under this limitations provision" and concluded as follows: "Since the limitations period is otherwise equivalent to the period accorded personal injury actions against private tortfeasors, RSA 508:4, it raises no other constitutional issues." *Id.*

This Court's advice in *Opinion of the Justices* became part of RSA chapter 541-B's legislative history, N.H.H.R. Jour. 696-703 (1985), and this Court has regarded that advice as significant in construing RSA 541-B:14, IV, *see Petition of DCYF*, 173 N.H. at 619 ("we believe that the legislature took us at our word [in *Opinion of the Justices*, 126 N.H. 554, 566 (1985)] and enacted the amended version of RSA 541-B:14, IV understanding that the discovery rule would apply to claims brought under it. If the legislature had disagreed with our interpretation, it would have explicitly stated that the discovery rule does not apply to actions brought under RSA chapter 541-B.").

In *Opinion of the Justices*, this Court identified no other constitutional defect and did not express the need for RSA chapter 541-B to contain special limitation exceptions or tolling provisions for certain groups of people. This Court should therefore reject the

appellee's policy-based arguments and find that RSA 508:8 does not apply to RSA 541-B:14, IV consistent with the statutory construction analysis in *Petition of DCYF*.

II. RSA 541-B:14, IV DOES NOT REQUIRE RSA 508:8 TO BE APPLIED TO IT IN ORDER FOR RSA 541-B:14, IV TO BE CONSTITUTIONAL.

The appellee suggests that if RSA 508:8 is not applied to RSA 541-B:14, IV then RSA 541-B:14, IV may be constitutionally deficient. The appellee cites *Carson v. Maurer*, 120 N.H. 925 (1980), for this proposition. The appellee is incorrect.

Sousa v. State, 115 N.H. 340, 342-44 (1975), holds that the even-handed application of absolute sovereign immunity to all persons on the same terms does not violate Part I, Article 14 or the equal protection provisions of the New Hampshire Constitution. In so holding, this Court concluded that sovereign immunity did not violate plaintiffs' rights to equal protection "as all those who are similarly situated [*i.e.*, all those persons injured by the State] are similarly treated." *Id.* at 344. This Court held that "conformably to the laws" as used in Part I, Article 14 means that the remedies to which people have a right are limited to those remedies available under the "statutory and common law applicable at the time the injury is sustained." *Id.* at 343.

Sovereign immunity is the law of the State. RSA 99-D:1. RSA chapter 541-B supplies a limited statutory waiver of sovereign immunity for a damages remedy against the State that is uniformly applicable to all persons injured by the State and may be pursued within three years of the date of injury, subject to a discovery rule. RSA 541-B:14, IV. RSA chapter 541-B does not treat similarly situated persons differently, *Sousa*, 115 N.H. at 344, and therefore poses no equal protection problem. *Id.*; *see McGraw v.*

Exeter Region Co-op Sch. Dist., 145 N.H. 709, 711 (2001) ("The first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently.").

Part I, Article 14 also poses no constitutional obstacle. RSA chapter 541-B creates a statutory private remedy against the State where a remedy does not otherwise exist. Every person has access to that statutory remedy under the same circumstances: they must file their RSA 541-B claim in the proper forum, RSA 541-B:9, within the proper time, RSA 541-B:14, IV, and may not recover more than the statutory damages caps, RSA 541-B:14, I. Under Part I, Article 14, the appellant's right to a remedy exists "conformably to" RSA chapter 541-B and RSA 99-D:1. Accordingly, RSA chapter 541-B is not unconstitutional under Part I, Article 14, consistent with *Sousa*, 115 N.H. at 343, and other cases holding that Part I, Article 14 "only requires a remedy that conforms to the statutory and common law rights applicable at the time of the injury." *Ocasion v. Federal Express Corp.*, 162 N.H. 436, 448 (2011).

RSA chapter 541-B also does not extinguish or restrict any common law rights of the appellee. This Court's decision in *Carson* has no bearing on this case for this reason. In *Carson*, the legislature passed a two-year statute of limitations for medical malpractice actions that: (1) made "the discovery rule unavailable to all medical malpractice plaintiffs except those whose actions are based upon the discovery of a foreign object in the injured person's body"; (2) applied the limitation period to all persons regardless of minority or other legal disability; and (3) gave children less than eight years old at the time of the alleged negligence until their tenth birthday to commence an action. 120 N.H. at 935.

This statute severely reduced the time within which plaintiffs could bring common law medical malpractice claims under RSA 508:4, I and RSA 508:8 and granted the discovery rule only to a certain class of medical malpractice plaintiffs.

This Court held the new statute: (1) "invalid insofar as it makes the discovery rule unavailable to all medical malpractice plaintiffs except those whose actions are based upon the discovery of a foreign object in the injured person's body"; (2) "unconstitutional insofar as it extinguishes rights conferred by RSA 508:8." *Id.* at 936. With respect to this second holding, the Court reasoned that "the legislature may not, consistent with equal protection principles, deny only this class of medical malpractice plaintiffs the protection afforded all other persons by [RSA 508:8]." *Id.*

This Court subsequently held that *Carson* does not apply in cases where a common law right of recovery has not been superseded or restricted by a legislative act. *Appeal of Bosselait*, 130 N.H. 604, 612 (1988). This Court explained:

> But to see why the present case bears no comparison with *Carson* and *Estabrook*, it is only necessary to recall that those cases dealt with selective restrictions on common law rights of action to recover for injuries. Here, on the contrary, we are not dealing with any common law right of recovery that was superseded by the unemployment compensation scheme, for the latter is entirely a creation of statute and dependent upon statute for its content. *Carson* and *Estabrook* therefore have no bearing on the case.

Id.

The same is true of RSA chapter 541-B. Claims against the State for damages were not available at common law and were barred entirely by sovereign immunity. Only the legislature may waive sovereign immunity by statute. *XTL-NH, Inc. v. N.H. State Liquor Comm'n*, 170 N.H. 653, 656 (2018). Thus, RSA chapter 541-B did not supersede or restrict

any common law right of recovery. Rather, RSA chapter 541-B granted a statutory right of recovery where one did not otherwise exist, subject to specific terms and conditions. In crafting that statutory right to recovery, the State is entitled to set the terms and conditions on which it may be pursued. *Id.*; *Wooster v. Plymouth*, 62 N.H. 193, 205 (1882).

Accordingly, because this case does not implicate any common law right of recovery, *Carson* is inapplicable, and no other constitutional defect arises if RSA 508:8 is held inapplicable to RSA 541-B:14, IV.

III. RSA 508:8 AND RSA 541-B:14, IV CONTAIN SIMILAR, BUT CONFLICTING TYPES OF LIMITATIONS; RSA 508:8, THEREFORE, DOES NOT APPLY TO RSA CHAPTER 541-B.

The appellee also contends in his brief that DCYF's argument hinges on whether RSA 508:8 is characterized as a statute of limitations or not. DCYF disagrees with that assertion.

This Court has characterized RSA 508:8 in several different ways over time. It has referred to RSA 508:8 as a statute of limitations, *Desaulnier v. Manchester School District*, 140 N.H. 336, 338 (1995); *Norton v. Patten*, 125 N.H. 413, 417 (1984); *Paju v. Ricker*, 110 N.H. 310, 312-13 (1970); *Stephan v. Sears Roebuck & Co.*, 110 N.H. 248, 250 (1970); *Vickers v. Vickers*, 109 N.H. 69, 70 (1968); a saving statute, *Carson v. Maurer*, 120 N.H. 925, 936 (1980); a tolling provision, *Petition of DCYF*, 173 N.H. at 617-18; *Steir*, 150 N.H. at 214-15; and an exception granted to minors, *id.* at 215.

Regardless of how the parties or this Court characterize RSA 508:8, what matters is how RSA 508:8 operates. RSA 508:8 provides minors with two years after the disability of minority is removed to file a personal action. It does not suspend the general

limitation period for personal actions in RSA 508:4, does not incorporate RSA 508:4 into it, and will not always operate to save a minor's claim. But, as this Court explained in *Petition of DCYF* when distinguishing *Steir*, RSA 508:8 contains a distinct limitation period. *See Petition of DCYF*, 173 N.H. at 617-18 ("Unlike in *Steir*, where the statutes at issue [RSA 508:8 and RSA 354-A:21] implicated two distinct limitations periods, the statutes at issue in this case both involve three-year time limits and RSA 541-B:14, IV does not include a specific discovery rule.").

The same holds true in this case. The statutes at issue, RSA 508:8 and RSA 541-B:14, IV, implicate two distinct, conflicting limitations periods. RSA 541-B:14, IV, therefore, controls because it provides for a "more specific statute of limitations" applicable to claims against the State. *Steir*, 150 N.H. at 215.

CONCLUSION

For all the reasons stated in its opening, and further stated in this reply brief, DCYF respectfully requests that this Court reverse the superior court's decision and remand the matter to the trial court for further proceedings.

Respectfully submitted,

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Date: July 29, 2022

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CERTIFICATE OF COMPLIANCE

I, Anthony J. Galdieri, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains 3,000 words or less, exclusive of the cover, table of contents, table of citations, signature block, and certificates. Counsel relied upon the word count of the computer program used to prepare this brief.

July 29, 2022

/s/ Anthony J. Galdieri
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CERTIFICATE OF SERVICE

I, Anthony J. Galdieri, hereby certify that this reply brief was served on all counsel of record for the appellee through this Court's electronic filing system.

Date: July 29, 2022

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