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

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

NEW HAMPSHIRE DIVISION FOR CHILDREN, YOUTH AND FAMILIES

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ISSUE PRESENTED

Did the trial court err by finding that RSA 508:8 applies to claims against the State brought pursuant to RSA chapter 541-B?

This issue is preserved in the Motion to Dismiss of the New Hampshire Division for Children, Youth & Families ("DCYF") filed in the matter, (Appendix to Petition for Original Jurisdiction ("AP") 46-60,) as well as in DCYF's Reply in Further Support of its Motion to Dismiss (AP 79-97).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS INVOLVED

TITLE LII
ACTIONS, PROCESS, AND SERVICE OF PROCESS

CHAPTER 508
LIMITATIONS OF ACTIONS

508:1 Limitation of Chapter. –

The provisions of this chapter shall not apply to cases in which a different time is limited by statute.

508:8 Disabilities. –

An infant or mentally incompetent person may bring a personal action within 2 years after such disability is removed.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-B
CLAIMS AGAINST THE STATE

RSA 541-B:1 Definitions. –

In this chapter:

. . .

II-a. "Claim" means any request for monetary relief for either:

(a) Bodily injury, personal injury, death or property damages caused by the failure of the state or state officers, trustees, officials, employees, or members of the general court to follow the appropriate standard of care when that duty was owed to the

person making the claim, including any right of action for money damages which either expressly or by implication arises from any law, unless another remedy for such claim is expressly provided by law; or

(b) Property damages suffered by a state employee or official during the performance of that employee's or official's duties while on state business where compensation is appropriate under principles of equity and good conscience.

. . .

541-B:9 Jurisdiction. –

I. Claims under this chapter shall be brought solely in accordance with the provisions of this chapter.

. . .

541-B:14 Limitation on Action and Claims. –

. . .

IV. Any claim submitted under this chapter shall be brought within 3 years of the date of the alleged bodily injury, personal injury or property damage or the wrongful death resulting from bodily injury. As a condition precedent to commencement of the action, the agency shall be provided written notice within 180 days after the time of the injury or damage as to the date, time, and location the injury or damage occurred. The lack of written notice shall not bar a claim unless the agency can show by a preponderance of the evidence that its ability to defend against the action was substantially prejudiced thereby. Such notification may be made either by the claimant or an appropriate representative of the claimant.

STATEMENT OF THE CASE AND FACTS

The plaintiff, C.M., filed this action on behalf of his two minor children, M.M. (now age 14) and J.M. (now age 12), against DCYF and the Court Appointed Special Advocates of New Hampshire, Inc. ("CASA"). Appendix at 3, *Compl.* ¶¶1-2. The complaint alleges, in relevant part, that M.M.'s and J.M.'s mother physically, mentally, and emotionally harmed them over a period of time and that DCYF negligently failed to protect them from the mother. *Id.* at 4-21. The claims asserted against DCYF are negligence (Count I, *Id.* at 19), negligent supervision and training (Count II, *Id.* at 23), and enhanced compensatory damages (Count IV, *Id.* at 27). All of these claims are premised on alleged injuries to M.M. and J.M. that occurred no later than November 25, 2014. *Id.* at 21, ¶90. The plaintiff, the father of M.M. and J.M., filed this action nearly five years later, on October 10, 2019.

DCYF moved to dismiss plaintiff's claims arguing, among other things, that RSA 541-B:14, IV, which requires claims against the State to be brought within three years of the date of the alleged bodily or personal injury, barred those claims. C.M. moved to stay resolution of that motion to dismiss pending this Court's decision in *Willott v. State of N.H., Dept. of Health & Human Servs., Div. for Children, Youth & Families*, Case No. 2020-0042. The interlocutory appeal in *Willott* posed, in part, the question of whether RSA 508:8 applies to claims brought against the State under RSA chapter 541-B. The trial court granted the motion to stay over DCYF's objection. Appendix at 41.

On September 30, 2020, this Court decided *Petition of New Hampshire Division for Children, Youth and Families*, 173 N.H. 613 (2020) ("*Petition of DCYF*"). In *Petition of DCYF*, this Court held that the legislature intended the discovery rule as detailed in RSA 508:4, I to govern the accrual of claims under RSA 541-B:14, IV. 173 N.H. at 616-19.

On November 12, 2020, this Court issued an unpublished decision in *Willott* vacating and remanding the trial court's order of partial dismissal so the trial court could consider the impact, if any, that the decision in *Petition of DCYF* might have on the claims at issue in that case. Appendix at 116. This Court explained in *Willott* as follows:

> . . . [W]e recently held [in *Petition of DCYF*] that the discovery rule of RSA 508:4, I applies to claims brought under RSA 541-B:14, IV. We reasoned in part that RSA 508:1 (2010) bars application of the provisions of RSA chapter 508 only when the claim at issue is subject to a limitations provision that conflicts with RSA chapter 508, and that RSA 541-B:14, IV and RSA 508:4, I, which contain identical time limitations, are not in conflict. We further reasoned that the legislature's failure to expressly state that the discovery rule does not apply to RSA 541-B:14, IV, reflected its understanding that, following Opinion of the Justices[, 126 N.H. 554 (1985),] the discovery rule does apply to claims brought under RSA 541-B:14, IV.

Id. The plaintiff moved to lift the stay in this matter several months later.

On March 2, 2021, DCYF filed a renewed motion to dismiss in which it reasserted its argument that RSA 541-B:14, IV barred plaintiff's claims and argued that RSA 508:8 does not apply to claims filed against the State under RSA chapter 541-B. Appendix at 46. In objecting, the plaintiff asserted RSA 508:8 applied to the claims asserted and did not raise the

discovery rule. Appendix at 61; s*ee Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 713 (2010) ("Once the defendant has established that the statute of limitations would bar the action, the plaintiff has the burden of raising and proving that the discovery rule is applicable to an action otherwise barred by the statute of limitations.") (internal quotations omitted).

On August 27, 2021, the trial court issued an order denying DCYF's motion to dismiss and finding that RSA 508:8 applies to claims against the State brought under RSA chapter 541-B. Addendum at 28. On December 3, 2021, DCYF filed a petition for original jurisdiction seeking review of that determination in this Court. On January 7, 2022, this Court accepted that petition.

SUMMARY OF ARGUMENT

The trial court's finding that RSA 508:8 applies to claims against the State brought under RSA chapter 541-B is incorrect and should be reversed. RSA chapter 541-B contains an unambiguous three-year limitation period within which to file claims against the State. RSA 541-B:14, IV. It does not contain a limitations provision like RSA 508:8.

Thus, whether RSA 508:8 applies to claims against the State turns on a comparison between RSA 508:8 and RSA 541-B:14, IV. *See Steir v. Girl Scouts of U.S.A.*, 150 N.H. 212, 215 (2003) ("We noted in *Doggett* that the phrase "a different time" in RSA 508:1 implies a comparison between different statutory provisions, one from RSA chapter 508 and one from another chapter."). If RSA 508:8 and RSA 541-B:14, IV contain the same time limit, they are not in conflict. *See, e.g.*, *Petition of DCYF*, 173 N.H. at 617; *Willott*, Case No. 2020-0042. If RSA 508:8 and RSA 541-B:14, IV implicate two distinct time limits, they are in conflict and cannot be read together. *See, e.g.*, *Petition of DCYF*, 173 N.H. at 617; *Steir*, 150 N.H. at 215.

RSA 508:8 and RSA 541-B:14, IV implicate different time limits. RSA 508:8 permits minors to file a personal action that has accrued during their minority within two years after they turn eighteen. *See Norton v. Patten*, 125 N.H. 413, 415-16 (1984) (analyzing RSA 508:8 as a "statute of limitations" and finding that statutory amendments reducing the age of majority from twenty-one to eighteen "in effect, amended the limitations provisions of RSA 508:8 thereby shortening the period within which persons who are minors at the time of an accident may commence

actions"). RSA 541-B:14, IV contains a more specific limitation period applicable to claims against the State that requires all such claims to be filed within three years from the date they accrue. These two time limits are different. Accordingly, RSA 508:8 does not apply to claims against the State brought under RSA chapter 541-B. *See Steir*, 150 N.H. at 216 ("Because RSA 354-A:21, III provides for a more specific statute of limitations, RSA 508:8 does not apply to a claim brought on behalf of a minor pursuant to the LAD.").

Unlike in *Petition of DCYF*, there is no concern in this case that the legislature believed a provision like RSA 508:8 should or had to be in RSA chapter 541-B. In *Opinion of the Justices*, 126 N.H. 554, 558 (1985), the House of Representatives specifically asked this Court whether Part I, Article 14 of the New Hampshire Constitution permitted the State to impose the limitations contained in RSA chapter 541-B on a person injured by the negligent acts of a state official or employee. One of the statutory limitations the justices reviewed was the three-year statute of limitations contained in RSA 541-B:14, IV. In conducting that review, the justices found only that the discovery rule had to govern the accrual of claims under RSA 541-B:14, IV and stated that the statute of limitations contained in RSA 541-B:14, IV "raise[d] no other constitutional issues." *Opinion of the Justices*, 126 N.H. at 566. Presumably if the justices believed RSA 541-B:14, IV was unconstitutional because it lacked any of the other provisions in RSA chapter 508, like RSA 508:8, they would have said so.

The case law also supports that a separate statute of limitation for minors is not constitutionally required. *Steir*, 150 N.H. at 215; *see Vance v. Vance*, 108 U.S. 514, 521 (1883) (holding that United States Constitution

does not require minors to be treated differently than others for statute of limitation purposes). In fact, the default rule is that a statute of limitations runs against all persons unless the legislature makes special exception otherwise. *Steir*, 150 N.H. at 215.

RSA 541-B:14, IV supplies a three-year limitation period applicable to a special class of claims that may be filed against the State and it applies equally to all claimants. RSA 508:8 supplies a different, more expansive time limitation for minors. RSA 508:1 therefore precludes applying RSA 508:8 to RSA 541-B:14, IV. Fashioning a special exception from RSA 541-B:14, IV for certain groups of people based on their individual characteristics is a quintessential policy decision appropriately reserved to the legislature, not this Court. *Steir*, 150 N.H. at 215.

Accordingly, DCYF respectfully requests that this Court reverse the trial court's decision and hold that RSA 508:8 does not apply to claims against the State brought pursuant to RSA chapter 541-B.

STANDARD OF REVIEW

DCYF challenges the trial court's denial of its motion to dismiss. In reviewing that denial, this Court must determine "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." *Harrington v. Brooks Drugs*, 148 N.H. 101, 104 (2002). This Court assumes the truth of the plaintiff's well-pleaded allegations of fact and construes all reasonable inferences in the light most favorable to the plaintiff. *See, e.g., Hacking v. Town of Belmont*, 143 N.H. 546, 549 (1999). The Court need not, however, accept allegations in the complaint that are merely conclusions of law. *See, e.g., Konefal v. Hollis/Brookline Coop. Sch. Dist.*, 143 N.H. 256, 258 (1998). The Court "must rigorously scrutinize the pleading to determine whether, on its face, it asserts a cause of action." *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 44 (1987).

ARGUMENT

Whether RSA 508:8 applies to claims brought against the State under RSA chapter 541-B requires this Court to engage in statutory interpretation, an exercise subject to *de novo* review. *Petition of DCYF*, 173 N.H. at 615. In doing so, this Court's "first step is to examine the language of the statute, and, if possible, construe that language according to its plain and ordinary meaning." *Id.* This Court "do[es] not consider words or phrases in isolation, but within the context of the statute as a whole." *Id.* "If a statute is unambiguous, then the first step of [the Court's] analysis is also the last, and [the Court] need not consider legislative history to aid our analysis." *Id.* This Court also "refuse[s] to consider what the legislature might have said or add language that the legislature did not see fit to include." *In re James N.*, 157 N.H. 690, 693 (2008).

The statutory analysis in this case begins with the recognition that "DCYF, as a state agency, enjoys the State's sovereign immunity and is immune from suit in New Hampshire courts, unless a statute waives that immunity." *Petition of DCYF*, 173 N.H. at 616. "One such statute is RSA chapter 541-B, which, among other things, waives sovereign immunity for tort claims against state agencies in certain circumstances." *Id.* Waivers of sovereign immunity are "strictly construed" and "must evidence clear intent to grant a right to sue" the State. *Chase Home for Children v. N.H. Div. for Children, Youth and Families*, 162 N.H. 720, 730 (2011) (internal quotations omitted).

RSA chapter 541-B contains a three-year limitations period within which persons may file claims against state agencies like DCYF. RSA 541-B:14, IV. RSA 541-B:14, IV provides that "[a]ny claim submitted under this chapter shall be brought within 3 years of the date of the alleged bodily injury [or] personal injury . . . ." *Id.* RSA 541-B:14, IV is "unambiguous" and the accrual of claims under it is subject to the discovery rule. *Petition of DCYF*, 173 N.H. at 617.

RSA 541-B:14, IV bars plaintiff's claims in this case. The injuries alleged occurred, at the latest, on November 25, 2014. The plaintiff filed claims based on them against DCYF on October 10, 2019, nearly five years later. The claims are untimely under RSA 541-B:14, IV and, therefore, barred. *See Glines v. Bruk*, 140 N.H. 180, 181 (1995) (explaining that a defendant meets its burden of proving the statute of limitations bars a claim by showing that the action was not brought within the requisite limitations period). The plaintiff did not raise and show the applicability of the discovery rule below. *See id.* ("Once the defendant has established that the statute of limitations would bar the action, the plaintiff has the burden of raising and proving that the discovery rule is applicable to an action otherwise barred by the statute of limitations.").

Nonetheless, the plaintiff asserts that another limitation period—RSA 508:8—applies to his RSA 541-B claims against DCYF. Under RSA 508:1, "[t]he provisions of RSA chapter 508 . . . do not apply 'to cases in which a different time is limited by statute.'" *Petition of DCYF*, 173 N.H. at 617 (quoting RSA 508:1). "The purpose of RSA 508:1 is to make 'RSA chapter 508 the source for 'catch-all' statutes of limitations and tolling provisions, and to ensure that more specific statutes found elsewhere

remain controlling.'" *Id.* (quoting *Doggett v. Town of North Hampton*, 138 N.H. 744, 747 (1994)). RSA 508:1 "only bars application of RSA chapter 508 when the statutes being compared have 'similar, potentially conflicting, types of limits.'" *Id.* (quoting *Doggett*, 138 N.H. at 747).

The time limitations provided for in RSA 508:8 and RSA 541-B:14, IV are different. RSA 508:8 permits minors to bring accrued claims within two years after reaching the age of eighteen. *See Norton v. Patten*, 125 N.H. 413, 415-16 (1984) (finding that by reducing the age of majority from twenty-one to eighteen the legislature "in effect, amended the limitations provisions of RSA 508:8 thereby shortening the period within which persons who are minors at the time of an accident may commence actions"). RSA 541-B:14, IV requires persons to file claims against the State within three years of their accrual. RSA 508:8 and RSA 541-B:14, IV implicate two similar, conflicting types of time limitations both of which cannot be simultaneously obeyed. *See, e.g.*, *Petition of DCYF*, 173 N.H. at 617; *Steir*, 150 N.H. at 215. Accordingly, RSA 508:1 precludes RSA 508:8 from applying to claims brought under RSA 541-B:14, IV.

This Court reached the same result in *Steir*, where a minor filed a discrimination suit pursuant to the New Hampshire Law Against Discrimination (LAD). 150 N.H. at 213-14. This Court compared the limitation period set forth in RSA 508:8—two years after the disability is removed—to the 180-day limitations period contained in RSA 354-A:21, III. This Court concluded that, because the limitations period in the LAD was more specific and the legislature had not excepted minors from conforming with it, RSA 508:1 required the 180-day limitations period in

RSA 354-A:21, III to control over RSA 508:8. *Steir* controls and requires the same result in this case.

This Court's recent decision in *Petition of DCYF* also confirms this result. In *Petition of DCYF*, DCYF asked this Court to decide whether RSA 541-B:14, IV contained a discovery rule. 173 N.H. at 615. In analyzing that question, this Court compared RSA 508:4, I, which contains a discovery rule, to RSA 541-B:14, IV, which did not contain a discovery rule. *Id.* at 617-18. In doing so, this Court observed that both statutes had identical three-year time limits. *Id.* at 617. It therefore concluded that the statutes did not "contain 'potentially conflicting' types of limits" and that a plaintiff could "obey both rules without conflict." *Id.*

No similar circumstance exists in this case. The time limit contained in RSA 508:8 is materially different from the time limit contained in RSA 541-B:14, IV. RSA 508:8 functions as a special limitation period for minors giving them two years after reaching the age of majority to file an accrued personal injury action. RSA 541-B:14, IV contains only a single three-year limitation period that applies equally to all persons with accrued claims against state agencies like DCYF. RSA 508:1 therefore precludes applying RSA 508:8 to RSA 541-B:14, IV.

The manner in which RSA 508:4, I's discovery rule and RSA 508:8 operate in practice underscores this conclusion. RSA 508:4, I's discovery rule does not expand the three-year limitations period in RSA 541-B:14, IV. Rather, it merely affects when the claim accrues and, therefore, when the three-year time limit begins to run. *See Shillady v. Elliot Community Hospital*, 114 N.H. 321, 324 (1974), *superseded by statute as recognized in Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 712 (2010) (explaining

that the discovery rule avoids "undue strain upon common sense, reality, logic and simple justice to say that a cause of action has accrued to the plaintiff and has been outlawed before she was or should have been aware of its existence"). Thus, applying the discovery rule contained in RSA 508:4, I to RSA 541-B:14, IV does not change the three-year time limit in RSA 541-B:14, IV; it only affects when a claim accrues.

The same cannot be said of RSA 508:8. When the claim of a minor accrues, RSA 508:8 supplies a specific, separate limitations period within in which the minor may file suit—two years from when the disability of minority is removed. *Norton*, 125 N.H. at 417 (explaining that RSA 508:8 is a "statute of limitations protecting minors"). When RSA 508:8 applies, its limitation period runs concurrently with RSA 508:4, I, such that a minor may benefit from whichever statute supplies the longer limitation period. *See Stewart v. Robinson*, 115 F. Supp. 2d 188, 196 (D.N.H. 2000) ("[P]laintiff had either three years from the date of Stewart's injuries (*see* RSA 508:4) or two years from the date of her appointment (*see* RSA 508:8), whichever was later, to specifically identify the defendants against whom she was proceeding.").

Thus, unlike the discovery rule, RSA 508:8 supplies a different limitation period for the accrued claims of minors. Were it read into RSA chapter 541-B, it would override and conflict with the more specific three-year time limit prescribed in RSA 541-B:14, IV for accrued claims. RSA 508:8 is, therefore, different from RSA 541-B:14, IV in a way the discovery rule is not.

In reaching a contrary conclusion, the trial court did not employ the statutory construction analysis set forth in *Petition of DCYF*. Instead, it

relied on its "belie[f] that the legislature did not intend to have a rigid three-year limitation for tort claims brought on behalf of children who were just eight and ten years old at the three-year anniversary of their sister's murder." Addendum at 35. The trial court further expressed its belief that DCYF's interpretation of RSA 541- B:14, IV would "do 'violence to the apparent policy of the Legislature'" and "lead to an absurd, unfair, and unjust result." *Id.*

But the trial court's decision fails to recognize that the legislature speaks through its legislation and thus the best evidence of legislative intent resides in the unambiguous language of the statutes at issue. The trial court's decision also fails to recognize that the legislature did not pass RSA chapter 541-B to permit everyone to pursue the full extent of any tort claim he or she may have against the State without restriction; it passed RSA chapter 541-B to permit persons a limited recovery on certain tort claims subject to other statutory limitations and restrictions. *Opinion of the Justices*, 126 N.H. 554 (1985).

These limitations were subject to robust advance review in *Opinion of the Justices*, 126 N.H. 554 wherein the House of Representatives asked this Court if it was "permissible under Part I, Article 14 of the New Hampshire Constitution for the state to impose limitations on recovery by a person injured by the negligent acts of a state official or employee?" *Id.* at 558. The House also asked, "If the answer to question one is in the affirmative, are the limitations on recovery set forth in [RSA chapter 541-B] permissible under the New Hampshire Constitution." *Id.*

In reviewing the constitutionality of the various limitations contained in RSA chapter 541-B, this Court addressed: (1) the substantive

scope of liability, including six provisions in RSA 541-B:19 specifying the circumstances under which the State retains its immunity; (2) the three-year statute of limitations and the notice of claim requirement in RSA 541-B:14, IV; and (3) the damage limits contained in RSA 541-B:14, I. *Opinion of the Justices*, 126 N.H. at 562-68. In other words, the historical record is clear that the legislature viewed RSA 541-B:14, IV as a limitation on the ability of all persons to recover under the statute, contrary to the trial court's belief otherwise. In conducting its constitutional review, the Justices did not describe RSA 541-B:14, IV as absurd, unfair, or unjust because it did not contain special time limitation periods for specific groups of persons like minors. They found only that the discovery rule had to govern the accrual of claims under RSA 541-B:14, IV, found that RSA 541-B:14, IV contained a discovery rule in the same manner they had found previous statutes to contain one, and stated that the statute of limitations contained in RSA 541-B:14, IV "raise[d] no other constitutional issues." *Opinion of the Justices*, 126 N.H. at 566. Minors can and do file claims in their infancy through parents or guardians, just as C.M. has done in this case, and there is no suggestion in the record that the claims in this case could not have been brought within RSA 541-B:14, IV's three-year limitation period.

Thus, contrary to the trial court's belief otherwise, a finding that RSA 508:8 is not applicable to claims brought under RSA chapter 541-B is consistent with the legislative policy underlying RSA chapter 541-B. Such a finding is not absurd, unfair, or unjust, but provides all persons with a limited opportunity to sue the State to try to prove an entitlement to a limited recovery—an opportunity and entitlement that only exist because of

RSA chapter 541-B. As this Court recognized in *Steir*, a statute of limitations runs against all persons, even minors, unless the legislature makes specific provision otherwise. 150 N.H. at 215. The legislature has not made special provision otherwise in RSA chapter 541-B. *See id.* ("It is the prerogative of the legislature to carve out an exception to the limitation period within chapter 354–A for minors, if it wishes to do so, not the function of the court to create legislation where none exists.").

The trial court's attempt to distinguish *Steir* from this case is not persuasive. In *Steir*, this Court engaged in the same statutory construction analysis it undertook in *Petition of DCYF*. In fact, this Court relied on *Steir* in *Petition of DCYF* to illustrate why RSA 508:4, I and RSA 541-B:14, IV contained identical time limits, while RSA 508:8 and RSA 354-A:21, III contained different time limits. The trial court did not engage in the statutory construction analysis that *Petition of DCYF* and *Steir* require. It instead states that *Steir* applied only to the particular statute at issue therein and attempted to distinguish *Steir* on the ground that *Steir* compared a broader time limit to a more restrictive time limit, whereas, in this case, the flexible two-year time limit in RSA 508:8 is shorter than the time limit in RSA 541-B:14, IV.

That distinction is unavailing for at least two reasons. First, it rests incorrectly premise that the analysis of *Steir* is inapplicable to RSA 508:8's application to RSA 541-B:14, IV. That conclusion is not apparent from the face of the Court's decision in *Steir*, and is belied by the fact that this Court relied on the principles of law established in *Steir* in *Petition of DCYF* Second, the statutory construction analysis under RSA 508:1 does not require a court to answer whether a provision of RSA chapter 508 is more

expansive or restrictive than the statutory limitation period in another statute. As this Court made clear in *Petition of DCYF* and *Steir*, RSA 508:1 requires a comparison between a provision of RSA chapter 508 and another statute to determine if the time limits being compared are "different." Even if the time limit in RSA 508:8 was solely two years, that time limit is still "different" from the three-year time limit in RSA 541-B:14, IV. RSA 508:8 therefore does not apply to RSA 541-B:14, IV, and the trial court erred in concluding otherwise. This Court should therefore reverse the trial court's decision.

CONCLUSION

For all of the reasons set forth above, the trial court erred in denying DCYF's motion to dismiss. RSA 508:8 and RSA 541-B:14, IV contain different time limits. RSA 508:1 therefore precludes RSA 508:8 from applying to RSA 541-B:14, IV. The Court should therefore reverse the trial court's decision.

REQUEST FOR ORAL ARGUMENT

The State requests a fifteen-minute oral argument.

CERTIFICATE OF COMPLIANCE

Pursuant to S. Ct. Rule 16(3)(i), the written decision appealed from is attached hereto as the first document of the addendum.

Respectfully submitted,

NH DIVISION FOR CHILDREN, YOUTH, AND FAMILIES

By its attorney,

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Date: May 3, 2022

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CERTIFICATE OF COMPLIANCE

I, Lawrence P. Gagnon, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately _4,523_ words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

May 3, 2022 _/s/Lawrence P. Gagnon_____

Lawrence P. Gagnon

CERTIFICATE OF SERVICE

I, Lawrence P. Gagnon, hereby certify that two (2) copies of the foregoing Petitioner's Brief pursuant to Petition for Original Jurisdiction and Appendix were mailed this day, postage prepaid, to the following parties of record:

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May _3_, 2022 _/s/ Lawrence P. Gagnon_____
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ADDENDUM TABLE OF CONTENTS

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

C.M., a/p/n/f of M.M. and J.M.

v.

State of New Hampshire, Department of Health and Services, Division of Children, Youth, and Families, and Court Appointed Special Advocates of New Hampshire, Inc.

Docket No.: 217-2019-CV-00677

ORDER

The plaintiff, C.M., has brought this action as parent and next of friend on behalf of his children. The plaintiff brings the following four counts against the defendants, the Division of Children, Youth, and Families ("DCYF") and Court Appointed Special Advocates of New Hampshire, Inc. ("CASA"): Count I: Negligence (DCYF); Count II: Negligent Training and Supervision (DCYF); Count III: Negligent Training and Supervision (CASA); and Count IV: Enhanced Compensatory Damages (All Defendants). The defendants move to dismiss the complaint. The plaintiff objects. The Court held a hearing on the motions to dismiss on July 7, 2021. For the following reasons, the Court DENIES DCYF's motion to dismiss and GRANTS CASA's motion to dismiss.

I. Background

The plaintiff, C.M. is the father of minor children M.M. and J.M. ("the minor plaintiffs"), whom he had with Katlyn Marin (hereinafter "Katlyn"). (Compl. ¶ 1.) M.M. was born in 2007 and J.M. was born in 2009. (Id. ¶¶ 7–8.) Katlyn's other children

was born in 2007 and J.M. was born in 2009. (Id. ¶¶ 7–8.) Katlyn's other children included A, who was born in 2005, Brielle who was born in 2011, and Q who was born in 2013. (Id. ¶ 9.)

Between 2005 and 2014, DCYF received many complaints that the children were being abused and neglected. (Id. ¶¶ 11–89.) Multiple DCYF Assessments were opened and closed as unfounded, even when there was no Safety Assessment performed. (Id. ¶¶ 14–89.) Over the years, the children's school contacted DCYF many times when the children arrived at school with bruises, with allegations that their mother beat them, and stated that they were forbidden to speak with school officials. (Id. ¶¶ 14–86.) A neighbor reported to DCYF that the children were being abused physically, locked in their rooms for long periods of time, and that M.M. had bumps on his head from Katlyn slamming him to the floor. (Id. ¶¶ 27–29.) The children were frequently admitted to the hospital for injuries that Katlyn claimed were due to falling or playing. (Id. ¶¶ 29, 48, 56, 67, 79.) When DCYF did investigate these claims, the home visits were unsuccessful, as Katlyn refused to allow the caseworkers to speak with the children. (Id. ¶¶ 32, 44, 48, 87.) The caseworkers would sometimes reschedule, but then not follow through with an additional visit. (Id.)

The abuse continued over the years and in 2014, the school notified DCYF after A arrived with significant bruising and was admitted to the hospital. (Id. ¶ 48.) The hospital called the caseworker reporting that A was covered with bruises, required stitches, and that his explanation for the injuries sounded rehearsed. (Id. ¶ 50.) The caseworker's supervisor called the Nashua Police Department ("NPD") and they sought an ex parte order of the removal of A from the home, but the request was denied. (Id.)

NPD was contacted numerous times following this incident for abuse-related events. (Id. ¶ 51–88.) After A was again admitted to the hospital for injuries, NPD filed an ex parte motion to remove the children from the home, and the motion was granted. (Id. ¶ 57.) All five children were placed in emergency foster care. (Id.)

On April 11, 2014, each of the children were appointed a CASA-NH guardian ad litem. (Id. ¶ 58.) On May 5, 2014, Katlyn and her fiance, Michael Rivera were arrested and charged with assaulting A. (Id. ¶ 59.) While in foster care, the children described the abuse and neglect inflicted upon them by Katlyn and Mr. Rivera. (Id. ¶ 60.) During May 2014, multiple hearings on the matter took place. (Id. ¶ 61.) The guardians ad litem were present at the hearings, but did not file pleadings or make arguments. (Id.) The court found that DCYF failed to meet its burden of proof regarding its petition of abuse and neglect, and the petition was dismissed. (Id.)

On June 16, 2014, the children were returned to Katlyn. (Id. ¶ 62.) Throughout June and July, NPD detectives attempted to perform welfare checks, but Katlyn refused to allow them inside, or for the children to answer questions. (Id. ¶¶ 63–64.) The detectives observed bruises on Brielle's face and welts on A and M.M.'s legs. (Id. ¶ 65.) Brielle was taken to the hospital in August 2014 for a spiral fracture of her left tibia, after the school principal observed that her entire leg was wrapped in a homemade bandage and that she had multiple injuries on her body. (Id. ¶¶ 67– 68.)

In the fall of 2014, the children's pediatrician contacted DCYF to have the children removed from the home. (Id. ¶ 75.) A few weeks later, A was admitted to the hospital for multiple injuries. (Id. ¶ 79.) After receiving the hospital report, DCYF concluded that legal action was necessary to place the children outside the home and

stated that "DCYF is filing neglect petitions." (Id. ¶ 80) However, the petitions for neglect were never filed, and NPD Detective Brooks was told that DCYF would not be filing any petitions to remove the children because there was insufficient evidence to support the petitions. (Id. ¶ 85.) On November 20, 2014, Detective Brooks noted that she had been contacting DCYF for six weeks regarding the home visits, but had not received any response. (Id. ¶ 88.)

On November 25, 2014, Brielle, aged three, was brutally beaten and ultimately murdered by Katlyn over the course of several days. (Id. ¶ 90.) Brielle had been dead for "a long period of time" before she was brought to the hospital. (Id.) M.M. and J.M. witnessed the murder, which they detailed in their Victim Impact Statements. (Id. ¶ 91.) J.M. heard Brielle's screams and saw Katlyn banging Brielle's head on the floor, and then saw her dead body. (Id.) M.M. said he saw his sister's dead body and spoke of how frequently he and his siblings were beaten. (Id.) On August 29, 2016, Katlyn was found guilty of the second-degree murder of Brielle. (Id. ¶ 92.)

II. Standard of Review

When ruling on a motion to dismiss, the Court considers "whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." Clark v. N.H. Dep't of Emp't Sec., 171 N.H. 639, 645 (2019). The Court assumes the facts from "the plaintiff's pleadings to be true and construe[s] all reasonable inferences in the light most favorable to her." Id. However, the Court "need not assume the truth of statements in the plaintiff's pleadings that are merely conclusions of law." Id. The Court ultimately engages "in a threshold inquiry that tests the facts in the complaint against the applicable law." Id. The Court should grant the

"motion to dismiss if the facts pleaded do not constitute a basis for legal relief." Id.

III. Analysis

The plaintiff brings the following four counts: Count I: Negligence (DCYF); Count II: Negligent Training and Supervision (DCYF); Count III: Negligent Training and Supervision (CASA); and Count IV: Enhanced Compensatory Damages (All Defendants).

A. Claims Against DCYF

DCYF moves to dismiss the claims against it on two grounds: (1) lack of subject matter jurisdiction; and (2) the complaint fails to state a claim upon which relief can be granted. (DCYF Mot. Dismiss at 1.)

1. Sovereign Immunity

First, DCYF argues that the Court lacks subject matter jurisdiction as the plaintiff's claims are barred by sovereign immunity. (DCYF Mot. Dismiss at 4.) "DCYF, as a state agency, enjoys the State's sovereign immunity and is immune from suit in New Hampshire courts, unless a statute waives that immunity." Petition of N.H. Div. for Children, Youth & Families, 173 N.H. 613, 616 (2020). "One such statute is RSA chapter 541-B, which, among other things, waives sovereign immunity for tort claims against state agencies in certain circumstances." Id. The statute requires that "[a]ny claim submitted under this chapter be brought within 3 years of the date of the alleged injury." RSA 541-B:14, IV. DCYF argues that because Brielle's death occurred on November 25, 2014 and the Complaint was not filed until October 10, 2019, which was well over three years from the last allegation of injury suffered by J.M. or M.M., the waiver of sovereign immunity from RSA Chapter 541–B does not apply and therefore

the Court lacks subject matter jurisdiction. (DCYF Mot. Dismiss ¶¶ 12–15.)

The last date of injury suffered by J.M. and M.M. was November 25, 2014, when they witnessed the murder of their sister, at the ages of five and seven. (Compl. ¶ 90.) Pursuant to RSA 541-B:14, IV, DCYF argues the plaintiffs had until November 25, 2017 to file this claim, unless a tolling provision applied. See generally Petition, 173 N.H. at 619. Given the ages of the plaintiffs in this case, the disability tolling provision of RSA 508:8 is applicable, which provides "[a]n infant or mentally incompetent person may bring a personal action within 2 years after such disability is removed." RSA 508:8. DCYF relies on Steir v. Girl Scouts of the U.S.A., 150 N.H. 212 (2003) and the Petition Court's treatment of Steir to assert that the disability tolling provision does not apply to RSA 541-B:14, IV claims and that the three-year cutoff for tort claims strictly bars untimely claims, regardless of the plaintiffs' ages or circumstances.

In Petition, DCYF argued that the case should be dismissed because the respondent failed to bring an action within three years, as required by RSA 541-B:14, IV. Id. In that case, the respondent had been sexually abused several years before filing suit. Id. at 615. The NH Supreme Court held that "the legislature intended that the discovery rule apply to RSA 541-B:14, IV's time limitation." Id. The Court also upheld the lower court's findings that "the respondent should not have been expected to investigate DCYF's potential fault for the assaults at the time they occurred given that the mechanism of harm or injury, sexual abuse, is most readily attributable only to the actual abuser rather than to a third-party's negligence as well." Id. In reaching this conclusion, the Court distinguished the situation presented in Steir., 150 N.H. In Steir, the plaintiff argued that the disability tolling provision provided by RSA 508:8 allowed

the plaintiff to bring a claim outside the time limitations required pursuant to the New Hampshire Law Against Discrimination ("LAD"). Steir, 150 N.H. at 213–214. The Court found that because the LAD required a more specific time period of only 180 days, it controlled over the disability tolling provision of RSA 508:8. Id. at 214. The Petition Court determined that discovery rule of 508:4, I was "compatible with claims brought against the State pursuant to RSA 541-B:14, IV. Unlike in Steir, where the statutes at issue 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." Petition, 173 N.H. at 617–18.

DCYF relies on this conclusion to assert that like the plaintiffs in Petition, the plaintiffs in this case before the Court are time-barred under RSA 541-B:14, IV, as the disability tolling provision of RSA 508:8 provides a different time limit than that of RSA 541-B:14, IV, and thus the more specific three-year period found in RSA 541-B:14, IV controls. This Court finds that DCYF reads Petition too narrowly. In Petition, the New Hampshire Supreme Court was distinguishing its earlier ruling of Steir, without addressing whether the disability tolling provision is compatible with RSA 541-B:14, IV. The Court agrees with the plaintiff, that DCYF's interpretation of RSA 541-B:14, IV "effectively transfers injured minors' rights of access to the courts to their parents or guardians, who must file suit within three years of the injury lest the minor's right to redress to be forever barred." (Mem. Supp. Obj. at 14.) The disability tolling provision of RSA 508:8 is meant to remedy this very situation.

Recognizing the difficulty in bringing an action as a minor, the legislature has carved out an exception, which allows a minor to bring an action within two years after

reaching the age of majority. RSA 508:8. However, even with this statute, the legislature did not intend to foreclose minors from bringing suit until they reach the age of majority. Rather, the minor plaintiffs are allowed to bring suit within any time until two years past their reaching the age of majority. To hold otherwise, would do "violence to the apparent policy of the Legislature." Petition, 173 N.H. at 618.

This Court finds that DCYF's reliance on Steir is misplaced. Steir dealt with a particular statute, LAD, which had language that specified a more restrictive time limit of 180 days. Steir, 150 N.H. at 213–214. That case dealt only with the particular LAD statute, where the legislature determined that for claims brought under LAD, the window to file is reduced to six months. Id. The statute at issue in this case is the disability tolling provision of 508:8, where the legislature contemplated situations where minors could need a much bigger window of time to file their claim, depending on their ages, as they are given until two years past the age of majority. RSA 508:8. The Court believes that the legislature did not intend to have a rigid three-year limitation for tort claims brought on behalf of children who were just eight and ten years old at the three-year anniversary of their sister's murder. To interpret the law as the State is asking the Court to, would lead to an absurd, unfair, and unjust result. The Court holds that the legislature must have intended for New Hampshire children to have fair access to the courts. To rule otherwise would be a miscarriage of justice.

Accordingly, the Court DENIES DCYF's motion to dismiss based on sovereign immunity.

2. Failure to State a Claim: Duty of Care

Turning to DCYF's second argument, DCYF asserts that the Complaint fails to state a claim upon which relief may be granted. (DCYF Mot. Dismiss at 7.) In the Complaint, the plaintiff alleges that DCYF failed to protect M.M. and J.M. after receiving many repeated reports of child abuse and neglect. (Compl. ¶¶ 93–100.) The plaintiff states that "[a]t all times relevant to the allegations. . . DCYF and its employees and agents owed the minor children a duty to exercise reasonable care. . . of M.M. and J.M. to protect them from unreasonable and foreseeable risks of harm. . . (Id. ¶ 94.) DCYF moves to dismiss, arguing that it owed no such duty because neither M.M. nor J.M. were in the care, custody, or control of DCYF at any time when the children suffered injuries. (DCYF Mot. Dismiss ¶ 22.)

"Whether a duty exists in a particular case is a question of law." Bloom v. Casella Constr., Inc., 172 N.H. 625, 627 (2019). "When charged with determining whether a duty exists in a particular case, [the Court] necessarily encounter[s] the broader, more fundamental question of whether the plaintiff's interests are entitled to legal protection against the defendant[s'] conduct." Grady v. Jones Lang Lasalle Constr. Co., 171 N.H. 203, 207 (2018). "In making this determination, [the Court should] consider whether the societal importance of protecting the plaintiff's interest outweighs the importance of immunizing the defendant[s] from extended liability." Id.

As far as the Court can discern, the New Hampshire Supreme Court has never addressed whether, and under what circumstances, DCYF owes a duty of care to New Hampshire children. Because this presents an issue of first impression, the Court "look[s] to other jurisdictions for guidance." Sintros v. Hamon, 148 N.H. 478, 480 (2002)

(looking to other jurisdictions where the existence of duty was an issue of first impression). The vast majority of courts from other jurisdictions have held that an entity charged with investigating and protecting children from abuse and neglect, such as DCYF, owes a duty of care to conduct a competent investigation once it receives a report of suspected abuse. See, e.g., Kaho'ohanohano v. Dep't of Human Servs., State of Haw., 178 P.3d 538, 566 (Haw. 2008) (holding that there is "a duty flowing to children specifically identified to DHS as being the subject of suspected abuse"); Rees v. State, Dep't of Health and Welfare, 137 P.3d 397, 406 (Idaho 2006) (finding "a duty to competently investigate the reported child abuse because of the special relationship created once the report of suspected abuse was received"); Horridge v. St. Mary's Cnty. Dep't of Social Servs., 854 A.2d 1232, 1245 (Md. 2004) (collecting cases and holding that DSS and social workers "do have a special relationship with specific children identified in or, upon reasonable effort, identifiable from, facially reliable reports of abuse or neglect and, subject to the State Tort Claims Act, to make them liable if harm occurs because they fail in their mandated duty" (emphasis in original)).

The Court is persuaded by the case law from other jurisdictions that DCYF does, in fact, owe a duty of care to conduct a thorough and competent investigation upon receiving a report of suspected abuse or neglect. Further, New Hampshire's Child Protection Act creates a statutory duty that DCYF must investigate within 72 hours of receipt of a report of abuse, or sooner. RSA 169-C:34, I. DCYF is charged with determining whether there is probable cause to believe a child is being abused or neglected, determining the child's immediate and long-term risks, and taking appropriate protective steps. RSA 169-C:34, II(c–e).

The Court, as have other jurisdictions around the country, has the view that the legislature has created a duty flowing to children that have been specifically identified to DCYF, as potentially abused or neglected, per the Child Protection Act. The Child Protection Act states that its main function is "[p]rotecting the safety of the child;" which includes "[t]ak[ing] such action as may be necessary to prevent abuse or neglect of children." RSA 169-C:2, I. Through this statute, the legislature has charged DCYF with taking necessary actions to prevent child abuse and neglect. Therefore, the Court DENIES DCYF's motion to dismiss for lack of a duty of care.

B. Claims Against CASA

1. Whether CASA is entitled to Immunity

Moving now to the claims brought against CASA, CASA argues that it is entitled to quasi-judicial immunity, and thus all claims against it must be dismissed. "The doctrine of quasi-judicial immunity has long been recognized in this State, and has been explained as the rule of public policy which protects judicial officers and those exercising judicial functions from liability in actions of tort for wrongs committed by them when acting in that capacity." Gould v. Director, N.H. Div. of Motor Vehicles, 138 N.H. 343, 346 (1994). "A GAL [guardian ad litem], by virtue of being appointed by a judge and acting in the service of the court, acts as a government official when performing those duties delegated to the GAL by the court." Surprenant v. Mulcrone, 163 N.H. 529, 531 (2012). "In essence, the judicial immunity applicable to the appointing judge extends to the acts of the GAL thereby providing the GAL with what is called quasi-judicial immunity, a form of absolute immunity." Id.

"Judicial immunity has been extended to protect the GAL's acts of investigating,

meeting with children, making reports and recommendations to the court, and testifying in court." Id. However, while quasi-judicial immunity from individual guardian ad litems is established in New Hampshire law, the plaintiff brings suit not against individual guardian ad litems, but against CASA, as an organization.

While the New Hampshire Supreme Court has not addressed this issue, the New Hampshire Superior Court has found that "[b]ecause CASA's supervision and training is integral to the quasi-judicial function of its GALS, the Court finds it is entitled to the same immunity." T.C. & D.C. v. N.H. Dep't of Health & Human Servs., No. 216-2016-CV-743 (Hillsborough Cty. Super. Ct. North, Nov. 15, 2017) (Order at 2–4, Abramson, J.). The Superior Court also held that "[e]xposing CASA to liability could deter it from accepting future court appointments or color its recommendations, both of which would undermine the judicial process. CASA is therefore immune to the direct and vicarious claims in this case." Jennifer P. v. Spaulding Youth Center et al., No. 216-2015-CV-520 Hillsborough Cty. Super. Ct. North, Mar. 31, 2016 (Sealed Order at 11–12, Abramson, J.). Given the limited roles and responsibilities of these court-appointed volunteer guardian ad litems, who serve as a part of the court system at the judge's discretion, the Court agrees with the Hillsborough Court decisions.

In this case, especially, CASA served a very limited role. On April 11, 2014, the Circuit Court appointed CASA to serve as guardian ad litems to the minor plaintiffs in the abuse and neglect proceedings. (Compl. ¶ 58.) CASA advocates were present at the hearings in May 2014 where "[u]ltimately, the Court found that DCYF failed to meet its burden of proof regarding its petition for abuse and neglect and the petition was dismissed." (Id. ¶ 61.) It was DCYF that alone shouldered the burden of demonstrating

adequate proof to support its petition, not CASA. Further, CASA was only appointed to this case during the period of April 11, 2014 through June 16, 2014, during which time, the children all resided in foster care and not with their abuser.

As the Court agrees with the Superior Court's decisions, it finds that CASA is entitled to immunity from the plaintiff's claims. Therefore, the Court need not address CASA's argument that the Complaint fails to sufficiently establish that CASA's actions or omissions actually or proximately caused the minor plaintiffs' injuries, nor its argument that CASA did not owe a duty to the minor plaintiffs. As such, CASA's motion to dismiss is GRANTED.

IV. Conclusion

For the foregoing reasons, DCYFs motion to dismiss is DENIED and CASA's motion to dismiss is GRANTED.

SO ORDERED.

8/27/21
Date

John C. Kissinger, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 08/27/2021