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Rockingham Superior Court
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THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Case No. 217-2020-cv-00026

David Meehan

v.

State of New Hampshire,

Department of Health and Human Services, et al

OMNIBUS NOTICE OF SUPPLEMENTAL AUTHORITY FOR DEFENDANTS SPURWINK SERVICES INCORPORATED AND CROTCHED MOUNTAIN FOUNDATION

This pleading pertains to more than five (5) cases

THIS PLEADING PERTAINS TO THE FOLLOWING CASES:

Spurwink Services Incorporated:

Case No. 217-2022-cv-00827 [JD #521]

Case No. 217-2022-cv-00141 [JD #226]

Case No. 218-2023-cv-00136 [JD #643]

Case No. 217-2023-cv-00286 [JD #330]

Case No. 217-2023-cv-00463 [JD #881]

Crotched Mountain Foundation:

Case No. 217-2023-cv-00070 [JD #89]

"Contractor Defendants" Spurwink Services Incorporated ("Spurwink") and Crotched Mountain Foundation ("Crotched"), by and through counsel, Gallagher Callahan & Gartrell, submit this Notice of Supplemental Authority regarding Judge Kennedy's recent Order granting Contractor Defendant, Mount Prospect Academy, Inc. ("Mount Prospect")'s, Motion to Dismiss

the Complaint filed in *John Doe #553 v. State of New Hampshire, et al.* (Docket No. 217-2022-cv-831) dated August 9, 2024 and attached hereto as "Exhibit A" (hereinafter referred to as the "Order"). A copy of the same was also filed in *David Meehan v. State of New Hampshire, et al.* (Docket No. 217-2020-cv-00026).

Relevant to the instant notice, John Doe #553's claims against Mount Prospect, and the underlying factual allegations, are analogous to the Plaintiffs' claims against Spurwink and Crotched in the above-referenced cases. Specifically, John Doe #553's allegations of physical abuse that he suffered at Mount Prospect Academy are similar to the allegations made by the Plaintiffs in the above-referenced cases about their treatment at The Spurwink School, New Hampshire ("Spurwink-NH") and Crotched. Moreover, John Doe #553 claims that he did not understand that his injuries were caused not just by the intentional acts of individuals, but by institutional failures on the part of the State Defendants and Mount Prospect Academy until more recently when he filed his complaint just like the Plaintiffs in the above-referenced cases.

Judge Kennedy's Order held that "Plaintiff's [John Doe #553] failure to bring his claims within the applicable time period due to being unware of the law, is not a basis to apply the discovery rule." Ex. A, at 10. Judge Kennedy further opined that "a plaintiff is likely to immediately discover an injury caused by a sudden, traumatic, violent event, and an injury which may later arise from the initial injury will not toll the statute of limitations." *Id.* at 12. Thus, Judge Kennedy dismissed John Doe #553's claims of negligence, negligent hiring, training, supervision, and retention, and breach of fiduciary duty on statute of limitations grounds because "Plaintiff's Complaint [and declaration] show[] that he already had all the information he needed to determine that Mount Prospect was the proximate cause of his injuries by the time he turned twenty in November 2013." *Id.* at 16. These findings were critical to Judge Kennedy's

conclusion that the discovery rule, nor any other tolling doctrine, tolled the statute of limitations and should apply with equal force to the instant case.

Spurwink and Crotched respectfully request that this Court consider Judge Kennedy's reasoning when evaluating and the arguments raised in support of the pending motions to dismiss in the above-referenced cases set forth in the caption of this pleading.

Respectfully submitted,

Spurwink Services, Incorporated
Crotched Mountain Foundation

By their attorneys,

GALLAGHER CALLAHAN & GARTRELL, PC

Dated: September 16, 2024 By: */s/ Jonathan Lax*

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded on this day, through the Court's electronic file and serve system, to all counsel of record.

Dated: September 16, 2024 */s/ Jonathan Lax*
Jonathan Lax Esq. (NH Bar # 14017)

Exhibit A

STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY SUPERIOR COURT

JOHN DOE 533

v.

STATE OF NEW HAMPSHIRE, et al.
217-2022-CV-831

DAVID MEEHAN v. STATE OF NEW HAMPSHIRE, et al.
(Consolidated YDC/YDSU Cases)
217-2020-CV-46

ORDER

The matter before the Court is Defendant Mount Prospect Academy Inc.'s ("Mount Prospect") Motion to Dismiss John Doe 533's ("Plaintiff") claims against it. (Docket Document 8). For the reasons set forth below the motion is GRANTED. Plaintiff's claims for negligence, negligent hiring, training, supervision and retention, and negligence are DISMISSED WITH PREJUDICE and Plaintiff's claims for aiding and abetting a breach of fiduciary duty and civil conspiracy is DISMISSED WITHOUT PREJUDICE.

Plaintiff's claims:

(A) Plaintiff's following claims against Mount Prospect, Count VIII (breach of fiduciary duty), Count XI (negligent hiring, training, supervision and retention), and Count XII (negligence) are DISMISSED WITH PREJUDICE[1] because they were filed after the expiration of the statute of limitations; and

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[1] For the purposes of the present order, the Court will assume without deciding that Plaintiff's complaint states a claim for its Counts VIII, XI, and XII.

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(B) Count X (aiding and abetting a breach of fiduciary duty) and Count XIV (civil conspiracy) are DISMISSED WITHOUT PREJUDICE for failure to state a claim upon which relief may be granted.

This Order resolves all of Plaintiff's claims against Mount Prospect.[2]

I. **<u>Defining The Complaint</u>**

The Complaint in this case consists of the following three documents:

A. A 50-page "Amended Master Complaint," filed in <u>Meehan v. State</u>, 217-2020-CV-46 on July 8, 2022 (<u>Meehan</u> Docket Document 70). (The Amended Master Complaint does not mention John Doe 533 or any of the facts about his life. Likewise, it does not contain any reference to Mount Prospect or any other contractor defendant.)

B. A 29-page "Short Form Complaint" filed in <u>John Doe 533 v. State</u>, 217-2022-CV-831 (Docket Document 1). (The Short Form Complaint contains allegations specific to Plaintiff and Mount Prospect. The Short Form Complaint contains two Addenda, as well as a separately filed, sealed Supplement that contains John Doe 533's true name and date of birth).

C. A 12-page Declaration, signed by Plaintiff, filed as Exhibit A to the Objection to the Motion to Dismiss in <u>John Doe 533 v. State</u>, 217-2022-CV-833 (Docket Document 12). The Declaration contains Plaintiff's factual response to Mount Prospect's affirmative limitations defense.

The Amended Master Complaint, the Short Form Complaint, and the Declaration, are referred to collectively as "the Complaint."

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[2] The remaining counts do not allege any claims against Mount Prospect. Counts I through VII (set forth in the Master Complaint) and Counts IX and XIII (set forth in the Short Form Complaint) assert claims against the State Defendants only.

II. Procedural History and Relevant Dates

Plaintiff was born in November 1993.[3] He turned 20 in November 2013. The Complaint in this case was filed on July 21, 2022, when Plaintiff was 28 years old.

In this case, Plaintiff claims that he was subjected to physical and psychological abuse at a residential juvenile facility operated by Mount Prospect. Plaintiff alleges that the abuse occurred during the calendar years 2006 through 2008, when he was approximately 13 to 15 years old. Plaintiff does not allege that Mount Prospect engaged in any tortious behavior after that time.

Thus, Plaintiff initially filed suit approximately 14 years after the last date of abuse, and after he had turned 20.

III. Factual Background

The following facts are taken from the Complaint.

A. Events That Occurred Prior to Placement At Mount Prospect

According to the Declaration, Plaintiff's mother's boyfriend began physically and emotionally abusing Plaintiff and his biological sister when he was between 9 to 10 years in age. The mother's boyfriend would routinely throw Plaintiff around and punch him in the stomach. Plaintiff complained to his mother, but she was unable and unwilling to stop her boyfriend's actions.

Around the time Plaintiff was 11 or 12, he began acting out in school. Plaintiff went to counseling at Genesis, where the counselors believed Plaintiff's mother, when

[3] Plaintiff's precise date of birth is provided in the Sealed Supplement to the Short Form Complaint (Docket Document 3). The court recites only the month and year of birth to protect Plaintiff's identity. The day of the month is not material to this order.

she told the counselors that Plaintiff made up the allegations against her boyfriend. Genesis believed Plaintiff was potentially suffering from ADHD, anxiety, bipolar disorder, or manic-depressive disorder. As a result, Plaintiff was prescribed very heavy medications that often left him groggy. Also, around this time, Plaintiff's mother's boyfriend's son, Kyle, began routinely sexually abusing both Plaintiff and his sister. The mother's boyfriend beat Plaintiff up after Plaintiff told other kids that Kyle molested Plaintiff and his sister.

Sometime thereafter, Plaintiff was removed from his mother's custody under a CHINS petition. Plaintiff was sent to the Youth Detention Services Unit ("YDSU") for approximately 2 to 3 months. Plaintiff alleges that YDSU staff members locked him up the entire time and he was refused any schooling.

B. Events at Defendant Mount Prospect's Facility

In 2006 through 2008, Plaintiff was placed at Mount Prospect's facility for 14 months while he was between the ages of 13 to 15. The Complaint does not clarify whether any time elapsed between Plaintiff's discharge from YDSU to his admission to Mount Prospect.

Plaintiff alleges that during his stay at Mount Prospect he was subject to violent restraints and unjustified solitary confinement. He also alleges that while at Mount Prospect, he was removed from classes and placed in a tiny room with no windows or doors at least forty times and on a nearly weekly basis. He claims a staff member would stand outside the door at all times and often denied Plaintiff's requests to use the bathroom. Additionally, Plaintiff alleges that he was beaten while restrained at least 12 times, including by a staff member known to him as Dave M. Staff members would

knee Plaintiff in the back and push him to the ground. On one occasion, Plaintiff states Dave M restrained Plaintiff by pulling his arms out at a ninety-degree angle to his side and then pulling Plaintiff's arms backwards, causing Plaintiff a shoulder injury that persists to this day.

Plaintiff also alleges that multiple staff members would bait residents into fighting so staff members could restrain and hurt the residents. Plaintiff often cried as he was restrained because of how violent and painful the restraints were. Staff members also routinely threatened Plaintiff that "things will get worse" for him if he told anyone about their actions. According to Plaintiff, staff members would cover for each other and would work together to prevent Plaintiff from telling his mother or others about the abuse he allegedly suffered. Plaintiff ran away from Mount Prospect on four occasions. After the last time Plaintiff ran away to his aunt's house, he was removed from Mount Prospect.

C. Events Occurring After Plaintiff Left Mount Prospect

After Plaintiff left Mount Prospect, he was placed at the State's Youth Detention Center ("YDC") intermittently between 2005 and 2010. Plaintiff does not allege how much time, if any, elapsed between the date he left Mount Prospect and the date he arrived at YDC.

Plaintiff alleges that while he was at YDC, he suffered even more severe physical, psychological, and sexual abuse. Plaintiff alleges that he was frequently locked away in solitary confinement. On at least ten occasions, a YDC staff member named Tony Paquette would force Plaintiff to strip naked while he was locked away in solitary confinement. In particular, Plaintiff alleges that Tony and another staff member

named Dave Wiggin would force Plaintiff to masturbate to get his clothes back. Dave would also routinely physically beat and restrain Plaintiff. Other staff members—including Joe Gardner, John Spooner, and "Bob"—also restrained and beat Plaintiff. Plaintiff aged out of YDC when he turned seventeen.

D. Plaintiff's Understanding of His Treatment at Mount Prospect

Plaintiff alleges that he believed that the abuse was "permissible and normal" because this was the way that adult staff members behaved at all of the facilities he attended. In his declaration, Plaintiff states that he did not believe that Mount Prospect's actions—or those of any other facility he was placed in—were abusive or wrongful. Plaintiff further explains that he believed these facilities had the power to do whatever they wanted to the children entrusted to their care in large part because staff members never faced any accountability for the alleged abuse perpetrated on Plaintiff. Additionally, Plaintiff alleges that he did not understand the institutional nature of the abuse he allegedly suffered and assumed that only the individual staff members were responsible.

In June 2022, Plaintiff first learned that the people in charge of the facilities he was in were responsible for his care. While Plaintiff was incarcerated, he began speaking with Pastor Scott who helped him understand that what he experienced was abuse. Around that same time, Plaintiff learned from fellow inmates that there was a lawsuit going on against the State and that others had similar experiences to Plaintiff's. Plaintiff alleges that it was only after these conversations that he realized what he suffered while at Mount Prospect and his other placements was wrong and abusive and that YDC and the non-state placements had a duty of care towards him.

According to the Declaration, Plaintiff has severe mental health issues—including PTSD, anxiety, and depression—stemming from the abuse he allegedly suffered throughout his childhood. Plaintiff began using drugs while he was 17 to "help numb the pain," eventually leading to Plaintiff's incarceration as an adult. Plaintiff further alleges that when he aged out of YDC, he did not have the necessary resources to discover the State's and the contractor defendants' roles in his alleged abuse, in large part because he was in and out of jail.

IV. Plaintiff's Negligence, Negligent Hiring, Training, Supervision and Retention, and Breach of Fiduciary Duty Claims Against Mount Prospect Are Barred By The Applicable Statutes of Limitations

A. In General

The statute of limitations is an affirmative defense. Perez v. Pike Indus., Inc., 153 N.H. 158, 160 (2005); Glines v. Bruk, 140 N.H. 180, 181 (1995). A defendant has the obligation to allege and prove that the complaint was brought after the limitations period expired. Perez, 153 N.H. at 160. If defendant meets this burden, then plaintiff has the burden to prove that the claim is timely by virtue of the discovery rule, fraudulent concealment, equitable tolling, or some other doctrine. Id.

RSA 508:8, the so-called disabilities statute, and RSA 508:4 are the two statute of limitations applicable to Plaintiff's claims. The Court will address each in turn.

B. The Disabilities Statute

RSA 508:8 provides that "an infant or mentally incompetent person may bring a personal action within 2 years after such disability is removed." In Norton v. Patten, 125 N.H. 413 (1984), the New Hampshire Supreme Court construed the term "infant" to refer to a person who has not yet reached the statutory age of majority, as defined in RSA

21-B:1. The age of majority is eighteen. Thus, as construed by Norton, RSA 508:8 extends the limitations period for minors until their twentieth birthday.

As noted above, Plaintiff turned twenty in November 2013, approximately nine years before he filed the instant case. RSA 508:8 does not contain any extension or discovery rule. Accordingly, the instant case was not filed within the limitations period established by RSA 508:8.

C. The General Statute of Limitations for Personal Actions

(i) In General

RSA 508:4 provides the statute of limitations for all personal actions. Under this statute:

> [A]ll personal actions . . . may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

The last "act or omission complained of" occurred in 2008, the year that Plaintiff left Mount Prospect. The instant case was brought more than fourteen years after the last "act or omission complained of." Thus, Mount Prospect has met its burden of showing that the instant case was filed more than three years after the conduct at issue.

This shifts the burden to Plaintiff to demonstrate grounds for the application of: (a) the discovery rule, (b) equitable tolling, (c) the doctrine of fraudulent concealment; or (d) some other doctrine extending the limitations period. Perez, 153 N.H. at 160. At this stage of the litigation, *i.e.*, the motion to dismiss stage, the Court accepts all of Plaintiff's well-pled facts, and takes all rational inferences in Plaintiff's favor.

The Court's task is to determine only whether Plaintiff has *alleged* facts which, if proven, might lengthen the limitations period to make this case timely. To be clear, if Plaintiff alleges sufficient facts to show that discovery is necessary to make this determination, the motion to dismiss on limitations grounds must be denied and the issue preserved for summary judgment on a more complete record. However, if discovery would be futile because the Complaint itself fails to even allege grounds to apply the discovery rule or other tolling doctrine, the motion to dismiss will be granted.

(ii) The Discovery Rule

As set forth above, "[o]nce the defendant has established that the statute of limitations would bar the action, the plaintiff has the burden of proving that the discovery rule applies." Troy v. Bishop Guertin High Sch., 176 N.H. 131, 136 (2023). It is well-settled that the "purpose of the discovery rule is to provide injured parties an avenue of relief when they did not and reasonably could not know of the harm or its causal link to a wrongful act or omission by another party." Petition of N.H. Div. For Children, Youth & Families, 173 N.H. 613, 618 (2020). The discovery rule is two-pronged, and both prongs must be satisfied before the statute of limitations begins to run:

> (1) a plaintiff must know or reasonably should have known that she has been injured; and (2) a plaintiff must know or reasonably should have known that her injury was proximately caused by conduct of the defendant.

Troy, 176 N.H. at 136; Lamprey v. Britton Constr., Inc., 163 N.H. 252, 257 (2012); see also Beane v. Dana S. Beane & Co., P.C., 160 N.H. 708, 713 (2010); Perez, 153 N.H. at 160; Big League Entm't, Inc. v. Brox Indus., Inc., 149 N.H. 480, 485 (2003). "Thus, the discovery rule exception does not apply unless the plaintiff did not discover, and

could not reasonably have discovered, either the alleged injury or its causal connection to the alleged negligent act." Troy, 176 N.H. at 136 (cleaned up).

The statute of limitations is not tolled due to a plaintiff's failure to acknowledge or otherwise understand their potential claims. See Sullyville, LLC v. Town of Carroll, Slip Op. No. 2019-0240, 2021 WL 1310832, at *7 (N.H. Apr. 8, 2021) (non-precedential decision stating that, "The discovery rule does not toll the statute of limitations until a plaintiff discerns the legal theory by which his or her case will proceed; rather, it tolls the statute of limitations only when the injury and its causal relationship to the defendant's act or omission remain unknown to the plaintiff."); Ouellette v. Beaupre, 977 F.3d 127, 138 (1st Cir. 2020) (applying federal law and holding that, "a plaintiff, once armed with the knowledge of his or her injury and its probable cause, cannot plead ignorance of the law to delay accrual."); Maggi v. Grafton Cty. Dep't of Corrs., 633 F. Supp. 3d 508, 516 (D.N.H. 2022) (applying RSA 508:4 and holding that "even if the court were to assume the truth of [plaintiff's] assertions about his lack of access to legal resources, that would not save his claims. His claims accrued on the date he should have reasonably known he was injured, not on the date he first learned he had a legal cause of action."); Miller v. Pac. Shore Funding, 224 F. Supp. 2d 977, 986–87 (D. Md. 2004) ("Knowledge of *facts,* however, not actual knowledge of their legal significance, starts the statute of limitations running. . . .The discovery rule, in other words, applies to discovery of *facts,* not to discovery of *law.* Knowledge of the law is presumed."); Marcum v. Columbia Gas Transmission, LLC, 549 F. Supp. 3d 408, 421, (E.D. Pa. 2021)("Plaintiffs' ignorance of a legal cause of action does not, in itself, require application of the discovery rule."). This means that the discovery rule does not reward ignorance of the law.

In this case, Plaintiff proffers many reasons why he may have not discovered the law governing his claims. However, Plaintiff's failure to bring his claims within the applicable time period due to being unaware of the law, is not a basis to apply the discovery rule.

In attempting to invoke the discovery rule, a plaintiff is "held to a duty of reasonable inquiry." Troy, 176 N.H. at 137 (citing Portsmouth Country Club v. Town of Greenland, 152 N.H. 617, 624 (2005). For discovery rule purposes, a plaintiff becomes aware of an injury as soon as he can reasonably discern that he has suffered "some harm" caused by a defendant's conduct. Beane, 160 N.H. at 713; see also Balzotti Glob. Grp., LLC v. Shepherds Hill Proponents, LLC, 173 N.H. 314, 321 (2020). The discovery rule "is not intended to toll the statute of limitations until the full extent of the plaintiff's injury has manifested itself." Troy, 176 N.H. at 136-37 (quoting Furbush v. McKittrick, 149 N.H. 426, 431 (2003)). The discovery rule is inapplicable if the plaintiff can "reasonably discern that they suffered some harm caused by the defendant's conduct." Id. at 137. Moreover, it is not necessary for a plaintiff to be "certain of this causal connection; the possibility that it existed will suffice to obviate the protections of the discovery rule." Troy, 176 N.H. at 137 (citing Beane, 160 N.H. at 713).

Moreover, while a latent injury will toll the limitations period, a patent injury will not, even if the long-term consequences of the patent injury cannot be known. See Furbush, 149 N.H. at 431; see generally Clay v. Kuhl, 727 N.E.2d 217, 222 (Ill. 2000) (applying Illinois law):

> The plaintiff contends, however, that her injuries were latent to some extent and did not fully manifest themselves until years after the abuse occurred. We do not believe that the plaintiff's alleged failure to fully discover the nature of her injuries is sufficient to delay the running of the

> limitations period. There is no requirement that a plaintiff must know the full extent of his or her injuries before suit must be brought under the applicable statute of limitations.

see also Stephens v. Clash, 796 F.3d 281, 288 (3d Cir. 2015) ("A plaintiff's ignorance regarding the full extent of his injury is irrelevant to the discovery rule's application, so long as the plaintiff discovers or should have discovered that he was injured.")

To be sure, in Rowe v. John Deere, 130 N.H.18 (1987), the plaintiff was injured when he struck his head while using machinery manufactured by the defendant. Immediately after the accident, the plaintiff was diagnosed with a depressed skull fracture. The plaintiff recovered quickly. Six years later he began to suffer grand mal seizures, purportedly as a result of the accident. The Supreme Court held that the plaintiff discovered his injury at the time of the accident, even though the measure of damages was "nominal" when compared with the potential damages for the subsequent harm. Id. at 21. Thus, a plaintiff is likely to immediately discover an injury caused by a sudden, traumatic, violent event, and an injury which may later arise from the initial injury will not toll the statute of limitations. See, e.g., Hollander v. Brown, 457 F.3d 688, 692 (7th Cir. 2006) (applying Illinois law):

> courts distinguish between injuries caused by sudden, traumatic events and those that have a late or insidious onset. For limitations purposes, a sudden, traumatic event is one that, because of its force or violence, permits the law to presume that the event immediately placed the plaintiff on notice of her injury and a right of action. When a plaintiff suffers this type of injury, her cause of action accrues on the date of the traumatic event, and the limitations period does not begin anew simply because a latent condition later may arise from the same occurrence. The rationale is that the nature and circumstances surrounding the traumatic event are such that the injured party is thereby put on notice that actionable conduct might be involved.

(internal citations and quotation marks omitted).

In this case, Plaintiff claims that he was injured as a result of Mount Prospect's failure to adequately oversee its staff with respect to hiring, training, supervision, and promulgation of policies. Thus, the "act or omission complained of" under RSA 508:4, is the breach of duty by Mount Prospect itself. According to the Complaint, that breach led to multiple beatings and painful restraints, including restraints that caused Plaintiff to cry because of the pain it produced. Additionally, the alleged breach also led to other instances of physical abuse and purported psychological abuse, including Plaintiff being locked in isolation in a tiny room at least forty times.

The physical and psychological abuse Plaintiff describes constitute injuries that are sudden, traumatic, violent, painful, and/or extremely unpleasant. There is nothing subtle or latent about these alleged events. Plaintiff knew of the assaults at the time they happened, and his own declaration demonstrates his knowledge of the physical injuries he suffered, as Plaintiff stated in his declaration that the painful restraints made him cry. Additionally, Plaintiff also recognizes that the restraints caused him a shoulder injury that he still suffers from, further demonstrating Plaintiff's awareness that he in fact suffered an injury.

Plaintiff may have been unaware of the alleged psychological and emotional long-term effects of the repeated beatings he says he endured. He may not have appreciated the long-lasting harm of the repeated isolations. But those harms were caused by the same "act or omission complained of" under RSA 508:4, which was Mount Prospect's alleged lack of care in hiring, training and supervising staff, and promulgating policies.

Under New Hampshire law, in accepting the well-pled facts in the Complaint as true, Plaintiff knew that he had been beaten and physically restrained on multiple occasions, the latest occurring in 2008. Therefore, the Court must find that Plaintiff was aware that he had been injured as a result of Mount Prospect's failure to control its staff.

Under the discovery rule, the limitations period in this case did not begin to run until Plaintiff either: (a) discovered, or (b) should have discovered through the exercise of reasonable diligence, that Mount Prospect's breach of duty was a proximate cause of his injury. Troy, 176 N.H. at 136. Knowledge of Mount Prospect's causal role cannot be automatically inferred from the fact that Plaintiff knew that his injury was caused by Mount Prospect's employees, acting overtly under color of their authority, on Mount Prospect's premises. Id. at 138. ("We decline to establish a per se rule that the plaintiff's knowledge of the abuser's employer is alone sufficient to trigger the application of the discovery rule. This inquiry presents a question of fact.").

However, "[a] plaintiff need not be certain of this causal connection; the possibility that it existed will suffice to obviate the protections of the discovery rule." Troy, 176 N.H. at 137 (quoting Beane, 160 N.H, at 713); see also Balzotti, 173 N.H. at 321; Lamprey, 163 N.H. at 257; Pichowicz v. Watson Ins. Agency, Inc., 146 N.H. 166, 168 (2001). "[T]he discovery rule employs an objective standard" to determine whether, through the exercise of reasonable diligence, a plaintiff should have discovered sufficient evidence of the defendant's role in causing his injury. Troy, 176 N.H. at 137.

In this case, the same alleged facts that state claims against Mount Prospect also demonstrate that Plaintiff knew that Mount Prospect's breach of duty was a

proximate cause of his alleged injury. Plaintiff does not complain of isolated incidents, committed in secret, by rogue staff members of a large agency.

Rather, Plaintiff claims frequent beatings, involving multiple staff members, committed openly, as well as frequent, if not constant, verbal and psychological abuse, all occurring in a single group home. In fact, Plaintiff also alleges employees often covered for one another, further highlighting what appears to be routine staff conduct at Mount Prospect. Additionally, Plaintiff alleges that staff members would often act in concert with one another to bait residents into fights to justify more violent physical restraints, suggesting an institutional prevalence and tolerance of violence. If the allegations in the Complaint are credited, as they must be at this juncture, then at the very least Mount Prospect failed to supervise its staff and monitor its facility and thereby breached both its fiduciary obligations to Plaintiff and the common law duty of reasonable care.

Plaintiff does not allege any fact that he learned about Mount Prospect since leaving its facility in 2008. He says only that: (1) he learned from fellow inmates in June 2022 that there was a lawsuit pending against the State; and (2) he only learned about the institutional responsibility of Mount Prospect after talking with a pastor sometime thereafter.

Plaintiff's remaining arguments are unpersuasive. First, Plaintiff contends that his fiduciary duty claim is tolled until he had actual knowledge of Mount Prospect's breach. The Court disagrees. New Hampshire law is clear that tolling statute of limitations period is not dependent or otherwise reliant upon the fiduciary disclosing its wrongdoing. <u>See</u> <u>Beane</u>, 160 N.H. at 714-15 ("[T]here is no support in our case law for

the proposition that a limitations period is tolled in fiduciary cases until the fiduciary discloses his or her misconduct."). As explained above, Plaintiff's Complaint shows that he already had all the information he needed to determine that Mount Prospect was the proximate cause of his injuries by the time he turned twenty in November 2013.

Ultimately, Plaintiff had sufficient information about Mount Prospect's institutional failures prior to the expiration of the statute of limitations period. Again, Plaintiff did not allege anywhere in his Complaint that he learned any new facts about Mount Prospect's role in his alleged abuse after he turned twenty. For these reasons, the Court concludes that the discovery rule did not toll the statute of limitations after the Plaintiff turned twenty in November 2013 for Plaintiff's negligence, negligent hiring, training, supervision and retention, and breach of fiduciary duty claim.

D. Fraudulent Concealment and Equitable Tolling

The Court has found: (a) the discovery rule did not toll the start of the limitations period in RSA 508:4 (the general statute of limitations for personal actions) beyond Plaintiff's twentieth birthday and, therefore, (b) the applicable limitations period is that established by RSA 508:8 (the disabilities statute) which gave Plaintiff until age 20 to file this action.

Plaintiff argues, however, that the doctrines of fraudulent concealment and equitable tolling apply here. The New Hampshire Supreme Court views the doctrines of fraudulent concealment and equitable tolling as implied exceptions to all statutes of limitation. Lakeman v. La France, 102 N.H. 300, 303 (1959) (adopting the majority rule that "fraudulent concealment of a cause of action from the one in whom it resides by the one against whom it lies constitutes an implied exception to the statute of limitations,"

and rejecting the "contrary view that fraudulent concealment does not toll the operation of the statute unless the Legislature has expressly so stated in the statute itself."). With respect to equitable tolling, the Supreme Court has explained its elements. See Portsmouth Country Club v. Town of Greenland, 152 N.H. 617, 623–24 (2005).

The doctrine of fraudulent concealment tolls the limitations period when a defendant by concealment or other action intentionally prevents the plaintiff from acquiring material information. Lamprey, 163 N.H. at 259–60; See also, Lakeman, 102 N.H. at 303-304. Thus:

> [Fraudulent concealment] requires something affirmative in nature designed or intended to prevent, and which does prevent, the discovery of facts giving rise to a cause of action—some actual artifice to prevent knowledge of the facts or some representation intended to exclude suspicion and prevent inquiry.

Lamprey, 163 N.H. at 259–60 (internal quotation marks and bracketing omitted); see also Maggi, 633 F. Supp. 3d at 516 ("The burden is on the plaintiff invoking the fraudulent concealment doctrine to present some evidence of an affirmative act on the part of the defendant to conceal or cover up the underlying wrongful conduct that gave rise to the plaintiff's asserted injury.); Sykes v. RBS Citizens, N.A., 2 F. Supp. 3d 128, 143 (D.N.H. 2014).

Even when there is fraudulent concealment, the doctrine provides little, if anything, in the way of relief that the discovery rule does not also provide. See Beane, 160 N.H. at 714 ("The fraudulent concealment rule states that when facts essential to the cause of action are fraudulently concealed, the statute of limitations is tolled until the plaintiff has discovered such facts or could have done so in the exercise of reasonable

diligence." (quoting Bricker v. Putnam, 128 N.H. 162, 165 (1986)); see also Lakeman, 102 N.H. at 303; Furbush, 149 N.H. at 431; Sykes, 2 F. Supp. 3d at 143.

In this case, Plaintiff has not pointed to any affirmative act on the part of Mount Prospect to conceal or cover up any fact. As noted above, Plaintiff has not pointed to any fact he learned after leaving Mount Prospect's facility in 2008. He only states that, after speaking with a pastor and fellow inmates, he realized that Mount Prospect as an institution was to blame for his abuse. Therefore, the doctrine of fraudulent concealment does not apply to Plaintiff's claims against Mount Prospect.

The New Hampshire Supreme Court recognized the doctrine of equitable tolling in Portsmouth Country Club, explaining that it allows a plaintiff to initiate an action beyond the statutory limitations period when that plaintiff had been "prevented in some extraordinary way from exercising his or her rights." 152 N.H. at 623 (emphasis added). The doctrine "applies principally if the plaintiff is actively misled by the defendant about the cause of action." Kierstead v. State Farm Fire & Cas. Co., 160 N.H. 681, 688 (2010).

To be eligible for equitable tolling, a plaintiff's access to the justice system must be frustrated despite the plaintiff's diligence. See, e.g., Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990)(applying federal law and holding that:

> Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

(internal footnotes omitted)); Maggi, 633 F. Supp. 3d at 518 (applying federal law and noting that, "[I]n unusual cases, certain limitations of imprisonment may rise to the level of 'extraordinary circumstance'" [but] "the usual problems inherent in being incarcerated, such as a prisoner's lack of prior legal training or limited access to legal resources in a prison's library, do not, by themselves, justify equitable tolling." (internal ellipses and citation omitted)).

In this case, Plaintiff was not prevented from discovering either necessary facts or necessary law. He was not actively misled by Mount Prospect as to his ability to access the courts. He was not threatened with retaliation for accessing the courts. He was not deprived of the ability to seek counsel or advice from third parties.

To this end, Plaintiff alleges that he did not bring suit because of his ongoing emotional distress and substance misuse disorder. However, diminished mental capacity is not grounds for equitable tolling. See Sykes, 2 F. Supp. 3d at 144, fn 18 (ruling that, "RSA 508:8 [the disabilities statute], and not the doctrine of equitable tolling, governs the statute of limitations for New Hampshire state law claims when a plaintiff is mentally incompetent."). Furthermore, even under federal law, where a plaintiff's mental condition might allow for equitable tolling, the plaintiff would have to prove that he was unable to engage in rational thought to the point where he could not cooperate with any counsel, and/or pursue his claim on his own during the limitations period." Id. Plaintiff does not allege this. Thus, the doctrine of equitable tolling does not apply.

Accordingly, Plaintiff's claims for negligence, negligent hiring, training, supervision and retention, and breach of fiduciary duty are DISMISSED WITH PREJUDICE because they are untimely.

V. The Complaint Does Not State Claims For Aiding And Abetting a Breach of Fiduciary Duty Or Civil Conspiracy

Counts X and XIV fail to state a claim upon which relief can be granted. Both of these claims require proof that Mount Prospect was engaged in deliberate, concerted action with another party to violate Plaintiff's rights. See Invest Almaz v. Temple-Inland Forest Prods. Corp., 243 F.3d 57, 82-83 (1st Cir. 2001) (stating standard for aiding and abetting a breach of fiduciary duty); Jay Edwards, Inc. v. Baker, 130 N.H. 41, 47 (1987) (describing standard for civil conspiracy). Because the Complaint alleges no material facts from which such concerted action can be inferred, as set forth below, these two counts are DISMISSED WITHOUT PREJUDICE for failure to state a claim.

A. Aiding and Abetting a Breach of Fiduciary Duty

The New Hampshire Supreme Court has not yet had occasion to recognize the tort of aiding and abetting a breach of fiduciary duty. Nonetheless, the tort is well established and defined. See, Restatement (Second) of Torts, §876(b):

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . [1] knows that the other's conduct constitutes a breach of duty and [2] gives substantial assistance or encouragement to the other so to conduct himself[.]

Courts that apply New Hampshire law predict that the New Hampshire Supreme Court will recognize this cause of action. See Invest Almaz, 243 F.3d at 82-83; Legacy Glob. Sports, LP v. St. Pierre, No. 218-2019-CV-198, 2020 WL 2027401, at *2 (Merrimack County Superior Court, Apr. 27, 2020); Clare v. Bank of New England, Slip. Op. No. 218-2013-CV-00687, 2013 N.H. Super LEXIS 22, at *3-4, 9 (Merrimack Count Superior Court, Nov. 26, 2013); HayJo S.A. de CV v. Sponge-Jet, Inc., No. 14-cv-196-JD, 2015 WL 9459918, at *4 (D.N.H. Dec. 23, 2015); Tamposi v. Denby, 974 F. Supp.

2d 51, 61 (D. Mass. 2013); In Re Felt Mfg. Co., Inc., 371 B.R. 589, 615 (Bankr. D.N.H. 2007); But see Gill v. Devine, Millimet & Branch, P.A., No 218-2012-CV-00660 (Rockingham County Superior Court, Oct. 12, 2012) (ruling that the tort of aiding and abetting a breach of fiduciary duty had not been recognized).

Assuming the recognition of aiding and abetting a breach of fiduciary duty as a viable cause of action, the Complaint does not contain facts to support it. To prevail, Plaintiff would need to prove that Mount Prospect helped another party breach its fiduciary duty. The Complaint does not allege that Mount Prospect did anything to encourage or facilitate Plaintiff's alleged abuse at YDSU or YDC.

Moreover, Mount Prospect cannot be found liable for aiding its own employees and agents in a breach of fiduciary duty. The cause of action for aiding and abetting a breach of fiduciary duty only exists to cover circumstances in which the defendant has no direct liability to the plaintiff as a fiduciary. That is not the case here. See, e.g., Mann v. GTCR Golder Rauner, L.L.C., 483 F. Supp. 2d 884, 916 (D. Ariz. 2007) (Under Delaware law, "a person who himself owes a fiduciary duty with respect to a transaction or course of conduct cannot be liable for aiding and abetting a breach of that same fiduciary duty by another because the same facts that would otherwise constitute aiding and abetting would constitute a primary breach of fiduciary duty."); In Re Amcast Indus. Corp., 365 B.R. 91, 112–13 (Bankr. S.D. Ohio 2007) (Under Ohio law "the action by its nature, . . . requires participation by a non-fiduciary defendant); In re Verestar, Inc., 343 B.R. 444, 482 (Bankr. S.D.N.Y. 2006) ("[A] claim for aiding and abetting breach of fiduciary duty can only be sustained against a non-fiduciary.").

Accordingly, for the foregoing reasons, the Complaint does not state a claim for aiding and abetting a breach of fiduciary duty, and, therefore, this Claim is DISMISSED WITHOUT PREJUDICE.

B. Civil Conspiracy

To prevail on a claim of civil conspiracy, a plaintiff must prove that:

(A) Two or more persons and/or entities agreed to either:

(1) pursue an unlawful objective or, alternatively,

(2) use unlawful means to accomplish a lawful or unlawful objective; and

(B) At least one of the conspirators committed an overt act in furtherance of this agreement; and

(C) The plaintiff was harmed as a proximate result of the agreement.

Jay Edwards, Inc., 130 N.H. at 47; see Univ. Sys. of N.H. v. U.S. Gypsum Co., 756 F. Supp. 640, 652 (D.N.H. 1991); Censabella v. Town of Weare, No. 16-cv-490-AJ, 2017 WL 3996173, at *3 (D.N.H. Sept. 8, 2017). "For a civil conspiracy to exist, there must be an underlying tort which the alleged conspirators agreed to commit." Univ. Sys., 756 F. Supp. at 652. Thus, the cause of action serves to impose liability on "all who commonly plan, take part in, further by cooperation, lend aid to, or encourage the wrongdoers' acts." Id.

The Complaint does not contain facts to support a claim for civil conspiracy. There are no facts from which the Court may infer that Mount Prospect and the State entered into an agreement to engage in concerted action by beating Plaintiff and otherwise abusing him. There are no facts suggesting that Mount Prospect ever had any conversation, let alone any agreement, with the other Defendants.

Further, Mount Prospect cannot be liable for civil conspiracy with its own employees. This is so because under the intracorporate conspiracy doctrine, Mount Prospect and its employees are considered to be the same "person." See, e.g., Hoefer v. Fluor Daniel, Inc., 92 F. Supp. 2d 1055,1057 (C.D. Cal. 2000):

> The intracorporate conspiracy doctrine provides that, as a matter of law, a corporation cannot conspire with its own employees or agents. [citation and footnote omitted]. The logic for the doctrine comes directly from the definition of a conspiracy. A conspiracy requires a meeting of minds. [citation omitted]. It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself anymore than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

see also Grider v. City of Auburn, Ala., 618 F.3d 1240, 1261 (11th Cir. 2010) ("[T]he intracorporate conspiracy doctrine holds that acts of corporate agents are attributed to the corporation itself, thereby negating the multiplicity of actors necessary for the formation of a conspiracy."); Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ., 926 F.2d 505, 509 (6th Cir. 1991) ("It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation."); Tabb v. District of Columbia, 477 F. Supp. 2d 185, 190 (D.D.C. 2007) ("[A] corporation cannot conspire with its employees[.]"); HRCC, Ltd. v. Hard Rock Cafe Int'l (USA), Inc., 302 F. Supp. 3d 1319, 1325 (M.D. Fla. 2016)("According to the intracorporate conspiracy doctrine, however, a civil conspiracy claim will not succeed where the only members of the alleged conspiracy are a corporation and/or its officers.").

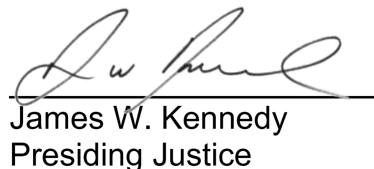
For these reasons, the claim of civil conspiracy against Mount Prospect is DISMISSED WITHOUT PREJUDICE.

VI. Conclusion

In accordance with RSA 508:4 and 508:8, Plaintiff's negligence, negligent hiring, training, supervision and retention, and breach of fiduciary duty claims against Mount Prospect are not timely, as Plaintiff filed this case well after his twentieth birthday and almost nine years after the expiration of the statute of limitations. Accordingly, these claims are DISMISSED WITH PREJUDICE.

In addition, the Complaint does not state a claim for aiding and abetting a breach of fiduciary duty or civil conspiracy. Accordingly, these claims against Mount Prospect are DISMISSED WITHOUT PREJUDICE. The Court grants Plaintiff leave to amend its complaint to correct the deficiencies outlined above only as to Plaintiff's aiding and abetting a breach of fiduciary duty and civil conspiracy claims. See ERG, Inc. v. Barnes, 137 N.H. 186, 189 (1993) ("[T]he plaintiff must be given leave to amend the writ to correct perceived deficiencies before an adverse judgment has preclusive effect."). The Plaintiff shall submit an amended complaint to the Court within thirty (30) days of the Notice of Decision on this order. Should the Plaintiff fail to amend within the timeframe allowed, dismissal as to the above counts shall become final.

August 9, 2024



James W. Kennedy
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 08/09/2024