THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS **SUPERIOR COURT**
NORTHERN DISTRICT

Holly June Connell, Executrix of the Estate of John William Queen

v.

Catholic Medical Center

Docket No. 216-2024-CV-00463

&

Debra Dimond, Administratrix of the Estate of Myron Louis Bishop, Jr.

v.

Catholic Medical Center

Docket No. 216-2024-CV-00464

Order on Defendant's Motion to Dismiss

Plaintiffs Holly Connell and Debra Dimond, in their capacity as administrators of the estates of John Queen and Myron Bishop, Jr., respectively, separately filed suit[1] against Defendant Catholic Medical Center ("CMC") alleging one count each of Medical Negligence (Count I) and Negligent Credentialing, Retention, and Supervision (Count II). CMC moves to dismiss both complaints in their entirety. (Docs. 4.) Plaintiffs object. (Docs. 7.) The Court held a hearing on the matter on January 2, 2025. For the reasons that follow, CMC's motions are DENIED.

[1] Although Plaintiffs separately filed their lawsuits, they both present nearly identical claims for relief. Likewise, CMC's motions to dismiss their respective complaints are nearly identical. Thus, for the sake of judicial economy and lack of repetition, the Court will address both motions in a single order.

Factual Background

The following facts, which the Court assumes are true for the purpose of the present motion, are taken from Plaintiffs' complaints.

Facts Common to both Plaintiffs

Up until August 2019, CMC employed Yvon Baribeau, M.D. as a cardiovascular and cardiothoracic surgeon. (Doc. 1 ¶ 12.) In the early 2000s, CMC first became aware that Dr. Baribeau's "cardiovascular operating room morbidity and mortality rate was exponentially higher than that of his two partners, [Doctors] Benjamin Westbrook and David Charlesworth." (*Id*. ¶ 13.) As a result, CMC brought in an outside surgeon to observe and provide feedback to Dr. Baribeau, which contributed to a drop in his morbidity and mortality rates. (*Id*. ¶ 14.) Around 2010, Dr. Charlesworth retired, leaving only two surgeons to operate on a large number of patients. (*Id*. ¶ 15.) CMC did not reduce the number of surgeries that it scheduled despite now only having two cardiothoracic surgeons. (*Id*. ¶ 16.) Dr. Baribeau's mortality rates began to climb again. (*Id*.)

In 2012, CMC's administration changed, with Dr. Joseph Pepe and Attorney Alex Walker being appointed as CEO and COO, respectively. (*Id*. ¶ 17.) Plaintiffs allege that around this time, CMC's pay structure, known as relative value units ("RVUs") and patient care philosophy changed, focusing more on "productivity and profit rather than patient safety and quality clinical care." (*Id*.) Under the new structure, each surgery—regardless of how long it took or how complicated it was—generated the same RVUs, incentivizing surgeons to do as many surgeries in a day as possible. (*Id*. ¶ 18.) CMC did not inform its patients about the changes in surgeon compensation. (*Id*. ¶ 19.)

CMC also decided not to staff the intensive care unit on nights and weekends, expecting emergency room physicians to cover any post-operative complications. (*Id*. ¶ 20.)

On July 16, 2022, Dr. Baribeau caused the death of a 55-year-old woman by leaving the hospital as the patient bled to death on the operating table. (*Id*. ¶ 24.) Plaintiffs assert that CMC knew about this conduct but failed to address it. (*Id*. ¶ 23.) Approximately five months later, CMC's peer review system determined that the patient's death was likely the result of Dr. Baribeau's reckless behavior. (*Id*. ¶ 27.) CMC never informed the patient's family or the state medical board of this finding. (*Id*.) Next, on November 12, 2022, Plaintiffs allege that Dr. Baribeau caused Bishop's death. (*Id*. ¶ 29.) Dr. Baribeau's conduct led to another patient's death on January 20, 2013. (00463 Doc. 1 ¶ 30.) CMC's peer review system found potential reckless conduct but, once again, did not inform the patient's family of this finding. (*Id*. ¶ 32.)

In response, CMC suspended Dr. Baribeau for 28 days. (*Id*. ¶ 33.) Because the suspension was for less than 30 days, CMC did not have to report the suspension to the National Practitioner Data Bank, precluding a formal inquiry into Dr. Baribeau's conduct. (*Id*.) CMC told medical staff and patients that Dr. Baribeau was out on medical leave to address back problems. (*Id*. ¶ 34.) During this time, Dr. Baribeau underwent surgery to correct a hand condition that prevented him "from grasping and manipulating fine instruments." (*Id*. ¶ 35.) CMC never informed patients about Dr. Baribeau's hand condition or that he had been suspended for reckless conduct during surgery. (*Id*. ¶ 36.) Dr. Baribeau's conduct next caused the death of Decedent Queen on August 14, 2013. (*Id*. ¶ 38.)

In September 2022, the Boston Globe Spotlight team started publishing a series of articles that exposed Dr. Baribeau's extensive history of dangerous and reckless conduct while performing surgery and CMC's complicity in allowing it to happen. (*Id*. ¶ 1.) The articles alleged that CMC covered up Dr. Baribeau's actions and allowed him to continue operating on patients after CMC was aware that he caused the death of a patient in July 2012. (*Id*. ¶ 2.) The articles also charged CMC with putting profits over patient safety by cutting costs and not adequately staffing its operating rooms. (*Id*. ¶ 3.) According to the articles, CMC allowed Dr. Baribeau to perform too many unnecessary surgeries while he was disabled and/or sleep deprived. (*Id*. ¶ 4.) CMC denied the allegations to the press initially. (*Id*. ¶ 5.) On May 26, 2023, an external law firm, Horty Springer, conducted its own investigation of the *Boston Globe's* allegations and determined that they were true. (*Id*. ¶ 6.) Horty Springer's report also revealed the deficiencies in CMC's peer review and quality management processes. (*Id*.) Both Plaintiffs subsequently filed suit against CMC on June 24, 2024.

Facts Specific to Decedent Queen

Queen was 65 years old at the time of his death and was a former police officer and Air Force veteran. (*Id*. ¶ 39.) On August 3, 2013, Queen experienced chest pain after playing 18 holes of golf and subsequently drove himself to CMC's emergency room. (*Id*. ¶ 41.) Testing revealed that he had a "large ascending aortic aneurysm and an enlarged descending aorta." (*Id*.) Prior to this, Queen had no significant medical history. (*Id*. ¶ 40.) Queen consulted with Dr. Baribeau, who recommended that Queen would need "ascending aortic arch replacement with an elephant trunk," a relatively new procedure at the time. (*Id*. ¶ 43.)

After being briefly discharged, Queen was re-admitted to CMC on August 14, 2013, for the aortic aneurysm procedure with Dr. Baribeau. (*Id*. ¶ 45.) The surgery lasted for 13 hours, after which Queen was pronounced dead. (*Id*. ¶ 46.) Queen bled profusely throughout the procedure, requiring Dr. Baribeau to put him on by-pass on two separate occasions. (*Id*. ¶ 48.) Dr. Baribeau's surgical notes are unclear as to what caused the extensive bleeding. (*Id.* ¶ 51.) He never investigated the source of bleeding, and he did not ask for help during the procedure. (*Id*.) Queen died because of the massive blood loss. (*Id*. ¶ 52.) In the days following the surgery, Queen's son attempted to ask Dr. Westbrook about what happened, but Westbrook responded that he did not assist Dr. Baribeau, despite Dr. Baribeau's claiming that he did. (*Id*. ¶ 57.) Queen's sons attempted to talk to Dr. Baribeau after the surgery but were unsuccessful. (*Id*. ¶ 58.)

Facts Specific to Decedent Bishop

Bishop began having cardiac issues in early 2012, at which time his cardiologist at Elliot Hospital advised him against surgery. (00464 Doc. 1 ¶ 30.) Bishop went to CMC for a second opinion in May 2012 and the cardiothoracic surgery group recommended surgery. (*Id*. ¶ 31.) Bishop's aortic valve replacement surgery was scheduled with Dr. Baribeau for October 2012. (*Id*. ¶ 32.) At that point, Bishop had a complex medical history including numerous cardiovascular and pulmonary conditions. (*Id*.) Dr. Baribeau performed a reportedly uncomplicated surgery on October 3, 2012, after which Bishop was admitted to the intensive care unit for post-surgery complications. (*Id*. ¶ 34.) While there, he developed significant pulmonary

complications, requiring an extended hospitalization and rehabilitation stay. (*Id*.) He was ultimately discharged on October 31, 2012. (*Id*.)

On November 2, 2012, Bishop went to CMC's emergency room because of labored breathing and lower leg swelling. (*Id*. ¶ 35.) After a chest x-ray revealed fluid on his lungs, Dr. Westbrook removed the fluid from his chest and subsequently discharged Bishop after his symptoms improved. (*Id*.) He returned to CMC's emergency room on November 7, 2012, because of shortness of breath. (*Id*. ¶ 36.) A November 8 x-ray showed that Bishop had a significant amount of blood in his chest, requiring multiple blood transfusions. (*Id*. ¶ 37.) Despite attempts to alleviate the bleeding, Bishop continued to bleed into the night. (*Id*.) No one attempted to determine the bleeding's source. (*Id*.) On the morning of November 9, Dr. Baribeau reported that Bishop was stable even though his medical records showed Dr. Baribeau that Bishop was in shock because of the blood loss. (*Id*. ¶ 38.) Dr. Baribeau replaced one of Bishop's chest tubes and continued giving him blood transfusions without determining the source of the bleed. (*Id*. ¶ 39.)

Bishop went into acute respiratory distress later that night. (*Id*. ¶ 40.) Dr. Baribeau did not take Bishop back into surgery until 1:30 pm the next day. (*Id*. ¶ 41.) During surgery, Dr. Baribeau never found the source of the bleeding. (*Id*. ¶ 42.) By November 11, Bishop experienced organ failure and was placed on dialysis. (*Id* ¶ 43.) Bishop died on the morning of November 12. (*Id*.) No one ever informed Bishop's daughter about what caused his death. (*Id*.)

Analysis

In ruling on a motion to dismiss, the court determines "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." *Pesaturo v. Kinne*, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the Complaint to determine whether a cause of action has been asserted. *In re Guardianship of Madelyn B.*, 166 N.H. 453, 457 (2014). The Court "assume[s] the truth of the facts alleged by the plaintiff and construe[s] all reasonable inferences in the light most favorable to the plaintiff." *Lamb v. Shaker Reg. Sch. Dist.*, 168 N.H. 47, 49 (2015). The Court "need not, however, assume the truth of statements in the pleadings that are merely conclusions of law." *Id*. The Court may also consider documents attached to Plaintiff's pleadings, "documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the writ." *Ojo v. Lorenzo*, 164 N.H. 717, 721 (2013). "If the facts do not constitute a basis for legal relief, [the Court will grant] the motion to dismiss." *Graves v. Estabrook*, 149 N.H. 202, 203 (2003).

CMC moves to dismiss both counts of both complaints for being untimely filed under RSA 556:11. Additionally, CMC also moves to dismiss Count II of both complaints because negligent credentialing is not a cognizable cause of action under New Hampshire law. The Court will address each argument in turn.

I. Statute of Limitations Analysis

CMC first argues that both complaints should be dismissed because each complaint was filed more than three years after the decedent's date of death. Additionally, CMC contends that RSA 556:11 sets an outer limit of six years for wrongful

death claims filed after the decedent's death, meaning that the discovery rule is not available to Plaintiffs because the cases were filed more than six years after the decedents' deaths. (Doc. 4 at 8.) Even if the discovery rule is available to Plaintiffs, CMC maintains that it would not toll the statute of limitations because Plaintiffs should have known of CMC's causal connection to the decedents' death. (*Id*. at 14.) Plaintiffs instead argue that RSA 556:11 plainly provides that it is subservient to RSA 508, which contains the discovery rule. (Doc. 7 ¶ 42.) According to Plaintiffs, if RSA 556:11 does not include a discovery rule, that would violate their equal protection rights under the New Hampshire constitution. (*Id*. ¶ 47.) Lastly, Plaintiffs contend that they did not know and could not have known of CMC's role in the decedents' deaths until the *Boston Globe* articles and subsequent Horty Springer report. (*Id*. ¶ 62.)

"The statute of limitations constitutes an affirmative defense, and . . . the defendant bears the burden of proving that it applies in a given case." *Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 712 (2010). Because Plaintiffs are Decedents' estates, RSA 556:11 provides the applicable statute of limitations. RSA 556:11 provides: "[i]f an action is not then pending[2], one may be brought for such cause at any time within 6 years after the death of the deceased party, subject to the provisions of RSA 508." The New Hampshire Supreme Court has held that when tort actions are brought under RSA 556:11, the applicable statute of limitations period is three years for wrongful death claims rather than six years. *Cheever v. S. N.H. Reg'l Med. Ctr*., 141 N.H. 589, 591 (1997). The three-year statute of limitations period starts on the date of

[2] This phrase requires that a tort action cannot be pending at the time of death. *See generally Anderson*, 171 N.H. at 530. This is not an issue in this case because it is undisputed that there was no tort claim pending at the time of either Bishop or Queen's deaths.

death. *Anderson v. Estate of Wood*, 171 N.H. 524, 530–31 (2018). "Ultimately, a suit is timely under RSA 556:11 if the lawsuit was not barred by RSA 508:4 at the time of death and the lawsuit is otherwise brought within three years of the decedent's death. *Id*.

Here, Queen died on August 12, 2013, and Bishop died on November 12, 2012. To be timely filed under RSA 556:11, Queen's estate would have needed to file on or before August 12, 2016, and Bishop's estate likewise on or before November 15, 2015. Both cases were filed on June 24, 2024, well outside of the period prescribed by RSA 556:11. Thus, CMC has met its burden to show that the complaints were not timely filed. *Beane*, 160 N.H. at 712. The burden now shifts to Plaintiffs to demonstrate that the discovery rule or some other tolling doctrine applies. *Id*. at 713. Plaintiffs claim that the discovery rule tolls their statute of limitations period until the publication of the *Boston Globe* articles and the Horty Springer report.

First, however, the Court must address whether the discovery rule tolls the limitations period for cases brought under RSA 556:11. RSA 508:4, I codifies the discovery rule, which allows for the tolling of the three year statute of limitations for personal actions when:

> [T]he 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

RSA 508:4, I. Resolving the parties' arguments requires the Court to interpret RSA 556:11. In *Cheever*, the supreme court was tasked with determining whether the applicable statute of limitations period under RSA 556:11 was six years or three years.

141 N.H. at 590–91. The supreme court held that a plain reading of RSA 556:11 demonstrates that the applicable limitations period is three years. Id. In so holding, the supreme court explained that the "plain meaning of the phrase 'subject to' indicates that the six-year period set forth in the statute is *subservient to or governed by* the provisions of RSA chapter 508." *Id*. at 591 (emphasis added). In *Anderson* the supreme court re-affirmed its holding in *Cheever* as to this point. *Anderson*, 171 N.H. at 530 ("In light of *Cheever*, we cannot agree with the plaintiff's assertion that the applicable limitations period is six years: *Cheever* clearly holds that it is three years.").

The Court finds that the logic of *Cheever* and *Anderson* supports Plaintiffs' arguments that RSA 556:11's plain language clearly contemplates the application of the discovery rule thereunder. RSA 556:11 plainly states that it is "subject to the provisions of RSA 508." Because RSA 508:4, I includes the discovery rule, it then follows that RSA 556:11 is also subject to the provisions of 508:4, I, therefore rendering the discovery rule applicable to wrongful death claims brought under RSA 556:11. *Cheever* and *Anderson* can be fairly read to treat the limitations period in RSA 556:11 as being consistent with RSA 508's terms because of RSA 556:11's plain language subjecting RSA 556:11 to RSA 508. Such an interpretation is also consistent with the supreme court's interpretation of RSA 556:11 prior to *Cheever* and *Anderson*. For example, in *Coffey v. Bresnahan*, 127 N.H. 687, 691 (1986), the supreme court found that although a prior version of RSA 556:11 was unconstitutional because it provided only two years for survival actions, the unconstitutional two-year period could be replaced with a six-year period, which at that point, was the statute of limitations period for personal actions. Thus, the supreme court has repeatedly determined that RSA 556:11's terms

should be consistent with RSA 508's terms. *See Anderson*, 171 N.H. at 530; *Cheever*, 141 N.H. at 590–91; *Coffey*, 127 N.H. at 691.

CMC invites the Court to interpret RSA 556:11 as containing both a three-year statute of limitations and a six-year statute of repose which sets six years as the outer limit for wrongful death actions. The Court declines CMC's invitation. The Court cannot reach CMC's interpretation without adding words that the legislature did not see fit to include. *See Appeal of FairPoint Logistics, Inc.*, 171 N.H. 361, 367 (2018) (providing that "under familiar principles of construction, [the court] will not add language to a statute that the legislature did not see fit to include."). As the Court explained above, the supreme court has consistently interpreted RSA 556:11 as a whole, finding that RSA 508's terms directly govern the limitations period as set forth in RSA 556:11. Consequently, finding that RSA 556:11 contained a separate statute of limitations period and a statute of repose is contrary to RSA 556:11's plain language. *See Cheever*, 141 N.H. at 590–91. Simply put, the Court cannot accept CMC's interpretation without adding words signaling that the six-year period was the outer limit to file wrongful death actions to RSA 556:11 that the legislature did not see fit to include. *See Appeal of FairPoint Logistics, Inc.*, 171 N.H. at 367.

Contrary to CMC's arguments, interpreting RSA 556:11 to contain the discovery rule gives effect to the entirety of RSA 556:11. *See State v. Parr*, 175 N.H. 52, 56 (2022) (observing that the court "must give effect to all words in a statute, and presume that the legislature did not enact superfluous or redundant words."). The Court finds first that RSA 556:11's plain language does not contain a six-year statute of repose. The Court, therefore, does not need to consider RSA 556:11's legislative history. The

Court notes, however, that even if RSA 556:11 contained any ambiguity as to whether a statute of repose exists, the history of RSA 556:11's amendments makes clear that the legislature always meant to tie this to the statute of limitations period in RSA 508.

Indeed, the six-year time period contained therein does not independently establish an outer limit of six-years to file wrongful death suits. Instead, it is merely a reflection of the fact that when RSA 556:11 was amended in 1983, RSA 508:4 provided a six-year statute of limitations period for personal actions. RSA 556:11's language "at any time within 6 years after the death of the deceased party" does not plainly establish six years as the outer limit to file wrongful death suits. Additionally, as Plaintiffs point out, when the legislature amended RSA 556:11 in 1983, it removed language setting an outer boundary for when claims needed to be filed thereunder. *See Perutsakos v. Tarmey*, 107 N.H. 51, 52 (1966) (quoting previous version of RSA 556:11, which contained the phrase "and not afterwards."). This further supports that the legislature did not intend to set six years as the outer limit for the filing of wrongful death claims. Lastly, considering that the supreme court decided *Cheever* nearly thirty years ago, presumably if the legislature disagreed with the court's interpretation, it would have amended RSA 556:11 to accurately reflect its intentions. *See Anderson*, 171 N.H. at 529 (broadly explaining that the legislature "is presumed to [be] cognizant of the interpretation put upon the statute by the court.").

Finally, CMC's reliance on out-of-state case law demonstrating that wrongful death statutes do not include a discovery rule is misplaced. CMC cites four out-of-state cases for the proposition that a discovery rule cannot extend the statute of limitations outside what is provided for in the statute. (Doc. 4 at 12.) Of these cases, two of the

statutes at issue include the phrase "and not thereafter," which plainly places an outer limit on when wrongful death claims can be filed. *See Aberkalns v. Blake*, 633 F. Supp. 2d 1231, 1235 (D. Colo. 2009) (finding that Colorado's wrongful death act which provides in relevant part, "[t]he following civil actions . . .shall be commenced within two years after the cause of action accrues, and not thereafter."); *Anthony v. Koppers Co., Inc.*, 436 A.2d 181, 122–23 (Pa. 1981) (similar as to Pennsylvania's wrongful death statute). As noted, RSA 556:11 contains no such limiting language. Additionally, the other two statutes, unlike RSA 556:11, do not contain language expressly subjecting the wrongful death statute to a statute which contains the discovery rule.. *See Pobieglo v. Monsanto Co.*, 521 N.E.2d 728, 730 (Mass. 1988); *Krueger v. St. Joseph's Hospital*, 305 N.W.2d 18, 21–22 (N.D. 1981).

Ultimately, the Court concludes that because RSA 556:11—by virtue of its plain language—is subjected to the terms of RSA 508, the discovery rule as codified in RSA 508:4, I is applicable to wrongful death actions brought under RSA 556:11. *See Cheever*, 141 N.H. at 590–91. Because this is a reasonable construction of RSA 556:11, the Court resolves this issue on statutory grounds rather than constitutional grounds. *See Coffey*, 127 N.H. at 691 ("A statute will not be construed unconstitutional, where it is susceptible to a construction rendering it constitutional."). The Court briefly notes, however, that it is skeptical of whether RSA 556:11 would pass constitutional muster without a discovery rule because of the supreme court's previous rejection of CMC's argument that the need for prompt administration of estates justifies the treatment of wrongful death plaintiffs differently than other tort plaintiffs. *See Gould v. Concord Hosp*. 126 N.H. 405, 409 (1985) (finding that the "State's interest in the prompt

administration of estates is not sufficiently important to justify discrimination against plaintiffs in survival actions, relative to plaintiffs in other tort actions.").

Accordingly, the Court now turns to the parties' substantive arguments about the application of the discovery rule to Plaintiffs' claims. CMC contends that the discovery rule does not toll the limitations period here because the fact that both Queen and Bishop died during heart surgery should have put Plaintiffs on notice of CMC's causal connection to their deaths. (Doc. 4 at 16.) Plaintiffs argue that they were entitled to rely on their doctor's representations surrounding Queen and Bishop's death and that none of CMC's actions reasonably put Plaintiffs on notice that CMC might have been responsible or contributed towards Queen and Bishop's death. (Doc. 7 ¶ 62.)

"The discovery rule is a two-pronged rule requiring both prongs to be satisfied before the statute of limitations begins to run." *Beane*, 160 N.H. at 713. "First, a plaintiff must know or reasonably should have known that it has been injured; and second, a plaintiff must know or reasonably should have known that its injury was proximately caused by conduct of the defendant." *Id*. "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." *Id*. The discovery rule "is not intended to toll the statute of limitations until the full extent of the plaintiff's injury has manifested itself." *Balzotti Global Group, LLC v. Shepherds Hill Proponents, LLC*, 173 N.H. 314, 321 (2020). "Rather, that the plaintiff could reasonably discern that he suffered some harm caused by the defendant's conduct is sufficient to render the discovery rule inapplicable." *Id*. "Further, 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." *Id*. (explaining that the issue of "whether to apply the discovery rule is . . . equitable in nature").

The New Hampshire Supreme Court has recognized that in both the medical and the legal malpractice context, application of the discovery rule "finds its justification in the necessary reliance of the layman on the professional in his field and the mystery to the layman of the professional's work." *McKee v. Riordan*, 116 N.H. 729, 730–31 (1976) (explaining a layperson "may not recognize negligent professional acts when they occur and should not be expected to"). In such cases, application of the discovery rule often turns on "when the plaintiff[] discovered or through reasonable care and diligence should have discovered" the causal connection between the injury and the defendant's alleged negligence. *See id*. at 731. Indeed, patients are entitled to rely on physicians' representations about their care and treatment because it "would be both harsh and incongruous to hold that the plaintiff was put on notice" of a defendant's potential causal connection to an adverse medical treatment due to such representations. *Brown v. Mary Hitchcock Mem'l Hosp.*, 117 N.H. 739, 744 (1977).

Here, the supreme court's recent discussion of the discovery rule's second prong in *Troy v. Bishop Guertin High Sch.*, 176 N.H. 131 (2023) is instructive. In *Troy*, the supreme court found that a plaintiff's knowledge that a school employed the plaintiff's alleged abuser was not sufficient itself to reasonably put the plaintiff on notice that the school proximately caused the plaintiff's alleged injury. *Id*. at 137. Critically, the plaintiff did not become aware of the fact that the school knew about her abuser's prior sexual assault convictions before hiring him until more than twenty years after the alleged abuse. *Id*. at 134. The supreme court concluded "[s]imply put, the plaintiff's knowledge

that she had been injured and that her assailant was employed by the defendants differs from her knowing of the causal connection between the injury and the defendants' alleged acts or omissions in hiring, retaining, and supervising [her assailant]." *Id*. at 137.

Similar to the plaintiff in *Troy*, Plaintiffs allege that they did not know, and reasonably could not have known, of CMC's causal role in Queen and Bishop's death until the publication of the *Boston Globe* articles. Just like in *Troy*, Plaintiffs had no reason to know of CMC's alleged causal role in the decedents' deaths beyond Dr. Baribeau's employment relationship with CMC at the time of their deaths. Plaintiffs allege that CMC did not inform patients or their families of any information—such as changes in surgeons' compensation structure or allowing Dr. Baribeau to continue performing surgeries after he was found to have acted recklessly in causing a death—that would have put them reasonably on notice that CMC had a causal role in the decedents' deaths. (Doc. 1 ¶¶ 18, 27.) Crucially, Plaintiffs did not allege observing or learning of any information while the decedents were in CMC's care that would trigger their duty of reasonable inquiry. *See Balzotti Global Group, LLC*, 173 N.H. at 321.

CMC's arguments to the contrary are very similar to the arguments that the supreme court rejected in *Troy*. CMC maintains that Plaintiffs must have been on notice of CMC's potential causal role because they were aware of the fact that CMC granted Dr. Baribeau privileges at CMC. This argument essentially reasons that because Plaintiffs should have known CMC permitted Dr. Baribeau to practice at its hospital, they necessarily should have known of the possibility that CMC contributed to Decedents' deaths. This argument, however, does not rely on information Plaintiffs had outside of

CMC's employment relationship with Dr. Baribeau. In the absence of any such facts, the Court finds that the mere fact that CMC granted Dr. Baribeau privileges is insufficient to put Plaintiffs on notice of CMC's potential causal connection to the decedents' death. *See Troy*, 176 N.H. at 137.

The Court is likewise not persuaded by CMC's argument that the decedents' deaths themselves triggered Plaintiffs' duty of reasonable inquiry. Queen's surgery was relatively new at the time it was performed and was a lengthy and complicated procedure. (00763 Doc. 1 ¶ 43.) Similarly, Bishop had a complicated cardiovascular medical history and had previously been informed that he was a poor surgery candidate. (00764 Doc. 1 ¶ 30.) In both of these circumstances, death was not an unreasonable surgical outcome.[3] This is a situation where it would be "both harsh and incongruous" for the Court to require Plaintiffs to immediately question and investigate a reasonable—although undoubtedly tragic—outcome from a doctor who Plaintiffs at that point had no reason to believe was not competent and acting in the patient's best interest. *See Brown*, 117 N.H. at 744. Indeed, where "the plausible explanation [for death] is one of purely natural causes . . . there is initially no reasonable basis" to support the inference of misconduct because it is "not the purpose of the discovery rule to encourage or reward simple paranoia." *Cascone v. United States*, 370 F.3d 95, 105 (1st Cir. 2004). Considering the disadvantage Plaintiffs, as laymen, faced in understanding the scientific and technical causes of the decedents' deaths, *see McKee,*

[3] In its reply, CMC points the Court to surgical risk indicators for both Decedents to show that the risk of death from their respective surgeries was quite low. Even if the Court were to find that such indicators undermined the inherent dangerousness of these surgeries—which it does not—such documentation goes outside the scope of what the Court can consider on a motion to dismiss because it is not a document sufficiently referenced in the complaint the authenticity of which is not in question. *Ojo*, 164 N.H. at 721.

116 N.H. at 730–31, the reasonable nature of the decedents' deaths during complicated heart surgeries is insufficient to put Plaintiffs on notice that CMC could have been responsible for their deaths, *see Cascone*, 370 F.2d at 105–06 (explaining that news reports that a nurse at the VA may have murdered some of her patients was insufficient to put plaintiff on notice that the decedent was murdered where the decedent—who had a history of heart problems—died of a heart attack while in the VA's care).

In sum, Plaintiffs do not allege any facts prior to the publication of the *Boston Globe* articles that should have put them on notice of CMC's potential institutional negligence. Similar to *Troy*, the only information that could have put Plaintiffs on notice was the employment relationship between CMC and Dr. Baribeau, which on its own, is insufficient to trigger a reasonable duty of inquiry. *See Troy*, 176 N.H. at 137. Thus, at this stage, Plaintiffs have satisfied their burden of showing that the discovery rule tolled Plaintiffs' limitations period to at least September 2022, which is when the *Boston Globe* first started publishing articles on CMC's reported actions in covering up Dr. Baribeau's recklessness. Since both cases were filed on June 24, 2024, the cases are timely pursuant to the discovery rule. *See* RSA 508:4, I. Accordingly, CMC's motion to dismiss on timeliness grounds is DENIED.[4] *See Troy*, 176 N.H. at 137.

II. Negligent Credentialing (Count II)

CMC also seeks to dismiss Count II because negligent credentialing is not a cognizable claim under New Hampshire law. (Doc. 4 at 20.) Even if it is, CMC

[4] This applies equally both to Plaintiffs' direct and vicarious claims. CMC claims that *Troy* is inapplicable to Count I because it is based on vicarious liability through Dr. Baribeau's actions, further arguing that the *Boston Globe* reports did not reveal any additional information about Dr. Baribeau that Plaintiffs could not have reasonably discovered themselves. The Court disagrees. As explained above, the mere fact that Decedents died under Dr. Baribeau's care did not trigger their duty to investigate Dr. Baribeau at the time of their deaths. Thus, the information Plaintiffs learned from the *Boston Globe* articles provided them information about Dr. Baribeau's actions that they could not have reasonably discovered beforehand.

maintains that Plaintiffs failed to state a claim for negligent credentialing. (*Id*. at 21–22.) Plaintiffs argue that negligent credentialing is akin to a negligent hiring claim and therefore, is recognizable under New Hampshire law. (Doc. 7 ¶ 91.) Plaintiffs also contend that it has sufficiently pled negligent credentialing by alleging that CMC did not revoke Dr. Baribeau's privileges even after the peer review process determined that he acted recklessly during a surgery which resulted in a patient's death. (*Id*. ¶ 93.)

Credentialing is the process by which hospitals hire physicians and surgeons to work out of and be affiliated with the hospital. *See generally Bricker v. Sceva Speare Mem'l Hosp.*, 111 N.H. 276, 278–79 (1971) (explaining the hospital credentialing process). Hospital by-laws typically govern this process. *Id*. Essentially, although most hospitals and physicians do not have a typical employer-employee relationship, credentialing is the process by which hospitals should ensure that the physicians they allow to practice at their institution are competent and capable to do so. *See id*.; *see also Larson v. Wasemiller*, 738 N.W.2d 300, 306 (Minn. 2007) (explaining that the tort of negligent credentialing is rooted in the "recognition of a hospital's duty of care to protect its patients from harm by third persons . . .").

The New Hampshire Supreme Court has not considered whether an action for negligent credentialing is actionable under New Hampshire law. "Whether to recognize a new cause of action presents a question of policy — would it be wise to provide the relief that the plaintiff seeks?" *Richards v. Union Leader Corp.*, 176 N.H. 789, 801 (2024). "Reaching an answer to this question requires two separate steps, for [the court] must determine whether the interest that the plaintiff asserts should receive any legal recognition and, if so, whether the relief that the plaintiff requests would be an

appropriate way to recognize it." *Id*. In considering the above, the Court will look to whether other jurisdictions have recognized a cause of action for negligent credentialing.

There is a split of authority about whether negligent credentialing is a cognizable claim. CMC points the Court to cases finding under Delaware, Kansas, and Maine law that negligent credentialing is not a valid cause of action. *See Svindland v. A.I. DuPont Hosp. for Child. of Nemours Found.*, No. 05-0417, 2006 WL 3209953, at 3–4 (E.D. Pa. Nov. 3, 2006) (holding that Delaware's peer review statute statutorily barred plaintiff's negligent credentialing claim because the statute fully protects all of defendant's records from disclosure); *Gafner v. Down East Cmty. Hosp.*, 735 A.2d 969, 979 (Me. 1999) (reasoning that because the legislature has extensively regulated the hospital industry, recognizing expanded tort liability for corporate negligence for hospitals is contrary to Maine law); *McVay v. Rich*, 874 P.2d 641, 645 (Kan. 1994) (ruling that Kansas's immunity statute for medical care facilities precluded the tort of negligent credentialing).

On the other hand, a majority of other jurisdictions—nearly thirty—have recognized the tort of negligent credentialing. *See, e.g.*, *Miller v. Polk*, 872 S.E.2d 754, 778 (Ga. Ct. App. 2022) (recognizing the tort of negligent credentialing and explaining its elements); *Brookins v. Mote*, 292 P.3d 347, 361 (Mont. 2012) (same); *Larson*, 738 N.W.2d at 313 (same); *Rodrigues v. Miriam Hosp.*, 623 A.2d 456, 462–63 (R.I. 1993) (similar rationale in recognizing the doctrine of corporate negligence as a way to hold hospitals liable for negligent credentialing); *see also Tort Claim for Negligent Credentialing of Physician*, 98 A.L.R. 5th (2002) ("The evolution of hospitals toward multifaceted, integrated healthcare facilities has eroded the traditional immunities

healthcare institutions once enjoyed, which were based on the view that they were mere venues where independent contractor physicians carried out their practice of medicine."); *Cause of Action for Negligent Credentialing*, 18 Causes of Action 2d 329 (Feb. 2025 Update) ("Hospitals have an independent duty to patients to monitor and supervise the hospital medical staff and select and retain only competent physicians.").

In reviewing the above split in authority, the Court is more persuaded by the courts that recognize the negligent credentialing tort. The Court finds the analysis in *Larson* most instructive. There, the Minnesota Supreme Court analyzed in depth whether it should recognize a new tort for negligent credentialing. First and foremost, the *Larson* court was very cognizant of the fact that such a tort is a natural extension of a hospital's duty to protect its patients. 738 N.W.2d at 305. Further, *Larson* explained that some jurisdictions "that recognize the tort of negligent credentialing do so as a natural extension of the tort of negligent hiring." *Id*. The Court finds this point particularly persuasive.

It is common for hospitals to use the credentialing process to have physicians work at a hospital without directly employing the physician. *See Adamski v. Tacoma Gen. Hosp.*, 579 P.2d 970, 974–75 (Wash. Ct. App. 1978) (explaining the evolution of the way hospitals contract with and employ their physicians). The core protections of a negligent hiring claim—protecting plaintiffs against harm caused by an employer's "failure to exercise reasonable care to employ a competent and careful contractor", *Richmond v. White Mountain Recreation Ass'n Inc.*, 140 N.H. 755, 758 (1996)—apply equally to a hospital's decision of which doctors to extend privileges, *see Negligent Credentialing*, 18 Causes of Action 2d 329 § 5 (explaining that the theory of negligent

hiring is "the theory most closely related to negligent credentialing, and many of the same principles apply."). In fact, this reasoning is what persuaded the Rhode Island Supreme Court in *Rodrigues* to adopt corporate negligence for hospital liability because it deemed doing so "a natural progression to extend the negligent-hiring doctrine to the hospital setting." 623 A.2d at 463. Similarly, *Larson* examined the nearly thirty other jurisdictions that have recognized the tort of negligent credentialing. 738 N.W.2d at 307–09. In so examining, the *Larson* court ultimately concluded that "the tort of negligent credentialing is recognized as a common law tort by a substantial majority of the other common law states." *Id*. at 309. Thus, this Court likewise concludes that the majority of other courts recognize the tort of negligent credentialing, further persuading this Court to recognize it as a cause of action.

CMC maintains that RSA 151:13-a, the statute which recognizes and protects the confidentiality of hospital committee proceedings, bars the tort of negligent credentialing. In relevant part, RSA 151:13-a, II provides that records of a hospital committee "organized to evaluate matters relating to the care and treatment of patients or to reduce morbidity and mortality . . . shall be confidential and privileged and shall be protected from direct or indirect means of discovery, subpoena, or admission into evidence in any judicial or administrative proceeding." CMC contends that the foregoing provision directly bars a negligent credentialing claim because Plaintiffs would be unable to admit the very evidence that it would need to prove its claim.

The Court disagrees. Other provisions of RSA 151:13-a suggest other ways in which Plaintiffs could prove its claim without running afoul of RSA 151:13-a, II. For example, "information, documents, or records otherwise available from original sources

are not to be construed as immune from discovery or use in any such civil or administrative action merely because they were presented to a quality assurance program." RSA 151:13-a, II. Additionally, the statutory privilege is not absolute because hospital board members or trustees may waive their privilege under RSA 151:13-a, II.

At the pleading stage, it would be premature for the Court to determine that RSA 151:13-a categorically bars a negligent credentialing claim. *Larson* also addressed a similar augment. Relying on Minnesota's Peer Review Statute's original source exception—which is similar in substance to New Hampshire's—the court concluded that although "the confidentiality provision of Minnesota's peer review statute may make the proof of a common law negligent-credentialing claim more complicated . . . it does not preclude such a claim." *Larson*, 738 N.W. 2d at 310. Therefore, the possibility that Plaintiffs will have access to sources to prove their negligent credentialing claim that are not barred by RSA 151:13-a, II demonstrates that there is no fundamental incompatibility between it and a negligent credentialing claim. *See id*; *see also Greenwood v. Wierdsma*, 741 P.2d 1079, 1088 (Wyo. 1987) (explaining that because the legislature did not expressly "prohibit[] actions against hospitals for breaching their duties to properly supervise the qualifications and privileges of their medical staffs," the court would not "construe the privilege statute to impliedly prohibit this category of negligence actions.").

Ultimately, the Court accords itself with the weight of authority and recognizes negligent credentialing as a cause of action analogous to negligent hiring and

supervision.[5] There is no dispute that negligent hiring is a recognized tort under New Hampshire law. *See Richmond*, 140 N.H. at 758. As explained above, the substantial majority of courts find that patients deserve legal protection from a hospital's negligent selection of which physicians it allows to treat patients at hospitals. Relatedly, the tort of negligent credentialing expands necessary protections to plaintiffs. As discussed above, many hospital providers are independent contractors which precludes plaintiffs from pursuing negligent hiring claims in many circumstances. Allowing plaintiffs to have a cause of action against hospitals directly alleviates the risk of some patients being denied a chance to recover because of the "application of hornbook rules of agency to the hospital-physician relationship." *Adamski*, 579 P.2d at 974. Thus, the Court finds that public policy supports the recognition of negligent credentialing as a new cause of action. *See Richards*, 176 N.H. at 801; *Walls v. Oxford Mgmt. Co., Inc.*, 137 N.H. 653, 657 (1993) ("The decision to impose liability ultimately rests on a judicial determination that the social importance of protecting the plaintiff's interest outweighs the importance of immunizing the defendant from extended liability.").

Now the Court considers whether Plaintiffs have stated a claim for negligent credentialing. To establish a prima facie negligent credentialing claim, Plaintiffs must establish: (1) CMC owed the decedents a duty to hire a competent medical staff; (2) CMC breached that duty by granting privileges to an incompetent or unqualified

[5] The Court often looks to and places weight on Massachusetts' case law where there is no guidance from the New Hampshire Supreme Court. Here, however, Massachusetts' courts have similarly not considered the tort of negligent credentialing. One Massachusetts trial court, because of the similarity between negligent credentialing and negligent hiring, has signaled that it is likely that the Massachusetts Supreme Judicial Court would recognize negligent credentialing as a cause of action. *See Rabelo v. Nasif*, No. WOCV201102329C, 2012 WL 6970543, at * 2 (Mass. Supp. Dec. 27, 2012). This further supports the Court's rationale in recognizing negligent credentialing as a cause of action.

physician; and (3) Dr. Baribeau harmed the decedents. *Negligent Credentialing*, 18 Causes of Action 2d 329 §§ 8–10. CMC challenges the second and third prongs.

At the pleading stage, the Court finds that Plaintiffs have sufficiently stated a claim for relief. CMC does not appear to dispute that it owed the decedents a duty of care. Plaintiffs have pled the following: (1) CMC knew that Dr. Baribeau's actions resulted in multiple patients deaths; (2) CMC's peer review process determined that Dr. Baribeau acted recklessly; (3) CMC did not revoke or prevent Dr. Baribeau from performing surgery on Queen or Bishop; (4) CMC's governance and surgeon compensation structure changed shortly before Queen and Bishop's death; (5) CMC never informed Plaintiffs or any other patients or families about Baribeau's actions, the finding of recklessness, or CMC's policy changes; and (6) Dr. Baribeau never explored the causes of Bishop and Queen's bleeding during surgery, resulting in their deaths.

These allegations are more than sufficient to meet the elements of negligent credentialing. Indeed, accepting Plaintiffs' allegations as true, CMC used its peer review process negligently by allowing Dr. Baribeau to keep his hospital privileges after his recklessness resulted in another patient's death.[6] Thus, contrary to CMC's arguments, this plausibly demonstrates that Dr. Baribeau's actions were the result of CMC's negligence rather than staffing shortages. *Cf. Tharp v. St. Luke's Surgicenter-Lee's Summit, LLC*, 587 S.W.3d 647, 658 (Mo. 2019) (explaining that plaintiff had insufficient evidence to support that plaintiff's surgeon was unqualified and therefore likely to injure patients). Therefore, because Plaintiffs' allegations are reasonably

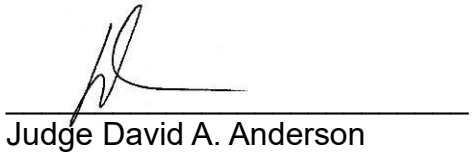
[6] The Court recognizes that this determination was made after Bishop's death. This does not change the Court's analysis as to Bishop because the complaint still alleges that CMC knew of the other patient's death well-before Bishop's death and allowed him to keep performing surgeries on patients.

susceptible of an interpretation that would permit recovery for negligent credentialing, CMC's motions to dismiss Count II is DENIED. *See Pesaturo*, 161 N.H. at 552.

Conclusion

Accordingly, CMC's motions to dismiss both complaints are DENIED.

SO ORDERED.



February 25, 2025 Judge David A. Anderson

Clerk's Notice of Decision
Document Sent to Parties
on 02/26/2025