STATE OF MICHIGAN

IN THE SUPREME COURT

BRIAN MCLAIN

Plaintiff/Appellant,

v

THE ROMAN CATHOLIC ARCHDIOCESE OF BALTIMORE,

and

THE ROMAN CATHOLIC DIOCESE OF LANSING,

Defendants/Appellees.

Supreme Court Case No: 165741
Court of Appeals No. 360163

Lower Court Case No: 21-31108-NO
Honorable L. Suzanne Geddis

DEFENDANT/APPELLEE DIOCESE OF LANSING'S BRIEF ON APPEAL

****ORAL ARGUMENT REQUESTED****

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STATEMENT OF JURISDICTION

Defendant/Appellee accepts Plaintiff/Appellant's Statement of Jurisdiction as accurate.

STATEMENT OF THE QUESTIONS INVOLVED

Pursuant to this Court's September 27, 2023, Order Granting the Application for Leave to Appeal the questions involved are the following:

1. Whether the three-year period to commence an action set forth in MCL 600.5851b(1)(b) renders the Plaintiff's lawsuit timely due to his alleged recent discovery of the causal relationship between his purported injuries and the alleged criminal sexual conduct?

Defendant/Appellee answers "No."

2. Whether, under an analysis of the factors set forth in *LaFontaine Saline, Inc. v Chrysler Group, LLC,* 496 Mich 26, 38-39 (2014), MCL 600.5851b(1)(b) applies retroactively to the time of the wrong such that the Plaintiff's claims were timely filed?

Defendant/Appellee answers "No."

INTRODUCTION

In 2018, in the wake of, and very specifically to address, the abuses committed by Larry Nassar, the Legislature adopted amendments to MCL 600.5851 that extend the statute of limitations in favor of those minor plaintiffs to whom the amendments apply. The parties agree that unless the provisions of MCL 600.5851b(1)(b), the amended statute that took effect June 12, 2018, apply to Plaintiff/Appellant's ("Plaintiff's") claim, that claim is barred by the statute of limitations. That is because Plaintiff's negligence claim accrued in 1999, and the controlling statute of limitations at that time, even extended by any tolling date in favor of minors, expired decades before Plaintiff filed this lawsuit.

Plaintiff's interpretation of the statute is wrong for several reasons, most notably because there is nothing in the statute evincing the Legislature intended MCL 600.5851b(1)(b) to apply retroactively. To the contrary, the fact that the amendments set forth in MCL 600.5851b(3) expressly *do* apply retroactively is the strongest possible evidence that the Legislature did *not* intend MCL 600.5851b(1) to apply retroactively. Otherwise, they would both share the same language. And because the controlling statute of limitations expired decades ago, and Plaintiff's claim was then completely barred, a retroactive application of the amended statute would impair Defendant's vested rights.

A thorough review of the statue and decisions from this Court shows that the Court of Appeals properly held that MCL 600.5851b(1)(b) does not apply retroactively to Plaintiff's expired negligence claim. Accepting Plaintiffs' statutory gloss would rewrite the Legislature's careful and intentional work by judicial fiat, exposing public and private entities to decades-old claims where the alleged perpetrator and witnesses are deceased, making any defense nearly impossible to make. Accordingly, this Court should affirm the Court of Appeals.

FACTS AND PROCEEDINGS BELOW

Plaintiff brings a claim of negligence against Defendant/Appellee the Roman Catholic Diocese of Lansing ("Defendant") arising out of alleged acts of criminal sexual conduct by Defendant Father Richard Lobert, which Plaintiff claims occurred between March and July 1999.[1] Plaintiff alleges that during that time, Plaintiff resided at the W.J. Maxey Boys Training School ("Maxey") in Livingston County. (Plaintiff's Appx. 002a, Complaint, ¶ 8).[2] Plaintiff alleges that Father Lobert was an agent or employee of Defendant and that Fr. Lobert provided religious services and counseling to residents of Maxey, including Plaintiff. (*Id.*, ¶ 9). Plaintiff further alleges that Fr. Lobert sexually abused Plaintiff. (*Id.*, p 003a, ¶ 10). Plaintiff was a minor at the time of these alleged abusive acts (*Id.*), and although not specifically referenced within the Complaint, Plaintiff has not disputed that he was 16 or 17 years old.

Plaintiff filed his Complaint on April 15, 2021. (Appx. 001a-006a). In it, Plaintiff alleges that in November 2020, "Plaintiff revealed to his therapist for the first time" that he had been abused by Fr. Lobert (*Id.*, ¶ 11), and that subsequent treatment with his therapist "has revealed to Plaintiff" that the abuse allegedly committed by Fr. Lobert caused or aggravated "Plaintiff's history of adjustment disorder, anxiety, bipolar disorder, and the requirement for medication." (*Id.*, ¶ 12). Plaintiff's Complaint sets forth only one cause of action: negligence. Plaintiff alleges duties

[1] Father Lobert is not a party to this Appeal.

[2] Consistent with the standard of review applicable to Appellees' Motions for Summary Disposition under MCR 2.116 (C)(7), all factual allegations – but not conclusions of law – contained in Plaintiff's Complaint are accepted as true.

owed and allegedly breached by Fr. Lobert (*Id.*, ¶ 14), the Diocese of Lansing (*Id.*, ¶ 15), and the Archdiocese of Baltimore (*Id.*, ¶ 16). [3]

I. Proceedings in the Trial Court.

In lieu of filing answers to the Complaint, all Defendants filed motions for summary disposition with supporting briefs and exhibits. Plaintiff filed responsive briefs and Defendants filed replies. At the time of the hearing on December 9, 2021, the trial court advised the parties that it had decided to issue a written opinion, so there was no oral argument. The court's Order resolving the motions entered January 13, 2022 (Plaintiff's Appx., 117a-125a).

II. Proceedings in the Court of Appeals.

Defendant the Roman Catholic Diocese of Lansing filed its Application for Leave requesting interlocutory review of the trial court's Order denying Defendants' Motions for Summary Disposition. The Court of Appeals granted the Application on June 7, 2022, and consolidated this case with the concurrent Application filed by the Archdiocese of Baltimore in Docket No. 360173, *Brian McLain v Richard Lobert*. The parties filed their briefs on appeal and on April 11, 2023, the Court of Appeals heard oral argument.

On April 27, 2023, the Court of Appeals published a unanimous, per curiam opinion reversing the trial court's denial of summary disposition and remanding the case for further proceedings consistent with that opinion. (Plaintiff's Appx., 126a-134a). As the Court of Appeals explained, a "claim accrues at the time the wrong upon which the claim is based was done

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[3] The Roman Catholic Archdiocese of Baltimore filed for bankruptcy after appearing in this Court. As a result, as to the Archdiocese of Baltimore all proceedings were stayed and this Court issued an Order on November 3, 2023 administratively closing without prejudice and without a decision on the merits the case concerning the Archdiocese of Baltimore (Supreme Court No. 165742).

regardless of the time when damage results." *McLain v Roman Catholic Diocese of Lansing*, __ Mich App __; __ NW2d __; 2023 WL 3131974, at *3 (2023) (quoting MCL 600.5827). In cases involving alleged "sexual assault, the claim accrues at the time of the assault, and '[s]ubsequent damages arising after the initial assaults would not give rise to a new cause of action or renew the running of the limitation period.'" *Id.* (quoting *Lemmerman v Fealk*, 449 Mich 56, 64; 534 NW2d 695 (1995)). That means that Plaintiff's claim here had to be filed in the early 2000s, two or three years after he turned 18.

The Court of Appeals emphatically rejected Plaintiff's argument that MCL 600.5851b(1)(b) somehow changed the accrual date. "First, MCL 600.5851b never explicitly states that it changes the general rule for when a claim accrues. Second, MCL 600.5851b clearly indicates that it is an exception to the general statute of limitation in MCL 600.5805 and any tolling of that statute as provided in MCL 600.5851. [N]othing in MCL 600.5851b(1) suggests that it is an exception to the statute governing the general accrual of claims—MCL 600.5827." *Id.* "Rather, MCL 600.5851b(1)(b) simply extends the time that an individual has to bring such a claim, i.e., it extends the statute of limitations" for claims that accrue after the statute's enactment. *Id.* Thus, said the Court, "the only way for plaintiff's claim to survive is if MCL 600.5851b(1)(b)—which was not enacted until [more than two decades] after the acts giving rise to plaintiff's claims took place—applies retroactively." *Id.*

The unanimous Court of Appeals then walked through this Court's so-called "*LaFontaine* factors," see *Lafontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 28-39; 852 NW2d 78 (2014), and determined that MCL 600.5851b(1)(b) cannot be applied retroactively. *Id.* at *4-7. The Court gave many reasons for its conclusion, but principal among them was that "[n]othing n the plain language of MCL 600.5851b(1)(b) suggests that it was intended to apply retroactively."

Id. at *4. In fact, "[t]he lack of any language in MCL 600.5851b(1)(b) suggesting that it is to be given retroactive effect stands in stark contrast to Subsection (3), in which the Legislature made abundantly clear its intent for *that* subsection to apply to claims that accrued before the statute was enacted." *Id.* (emphasis added). Moreover, "MCL 600.5851b was to be given immediate effect without further elaboration, which supports that it was intended to be applied prospectively only unless the text of the statute clearly indicates otherwise (like it does in Subsection (3))." *Id.* (citing *Buhl v City of Oak Park*, 507 Mich 236; 968 NW2d 348 (2021)). And "MCL 600.5851b(1)(b) makes no mention of whether it applies to a cause of action that had already accrued before its effective date." *Id.* (citing *Buhl*, 507 Mich at 245). The Court also rejected Plaintiff's argument that the Legislature's use of the phrase "at any time" supports retroactive application. *Id.* at *5.

On June 8, 2023, Plaintiff timely filed his Application for Leave to Appeal with this Court pursuant to MCR 7.305(C)(2). This Court entered its Order Granting the Application for Leave on September 27, 2023.

LAW AND ARGUMENT

I. STANDARD OF REVIEW

A trial court's grant or denial of summary disposition pursuant to MCR 2.116 (C)(7) is reviewed de novo on appeal. *GMC v Dep't of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002). The court considers all affidavits, pleadings, and other documentary evidence submitted by the parties and the pleadings are construed in the plaintiff's favor. *Id.* at 421. "Whether a cause of action is barred by a statute of limitations is, absent disputed issues of fact, a question of law" reviewed de novo. *Colbert v Conybeare Law Office*, 239 Mich App 608, 613–14; 609 NW2d 208 (2000).

This case also concerns the statutory interpretation and retroactive application of a statute, and both of those are reviewed de novo. *Buhl v City of Oak Park*, 507 Mich 236, 242; 968 NW2d 348 (2021).

II. CANONS OF STATUTORY INTERPRETATION

This case turns on the interpretation of a statute—MCL 600.5851b. "In resolving disputed interpretations of statutory language, it is the function of a reviewing court to effectuate the legislative intent." *Hiltz v Phil's Quality Market*, 417 Mich 335, 343; 337 NW2d 237 (1983). "When determining whether a statute should be applied retroactively or prospectively, 'the primary and overriding rule is that legislative intent governs. All other rules of construction and operation are subservient to this principal.'" *Buhl v City of Oak Park*, 507 Mich 236, 243-244; 968 NW2d 348 (2021) (quoting *Frank W. Lynch & Co. v Flex Technologies, Inc.*, 463 Mich 578, 583; 624 NW2d 180 (2001)).

The first question is thus whether there is specific language in the amended statute that provides for retroactive application. This Court has long acknowledged that "the Legislature … knows how to make clear its intention that a statute apply retroactively." *Buhl*, 507 Mich at 245 (quoting *Lynch*, 463 Mich at 584). Additionally, statutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application." *Johnson v Pastoriza*, 491 Mich 417, 429; 818 NW2d 279 (2012).

Also, important here is this Court's acknowledgment of the importance of legislative history when interpreting statutes. For example, the Court of Appeals in this case wrote:

> Our Supreme Court has recognized that "actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted" can be useful to determining legislative intent because "by comparing alternative legislative drafts, a court may be able to discern the

> intended meaning for the language actually enacted." In re *Certified Question from US Court of Appeals for Sixth Circui*t, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003).

2023 WL 3131974 at *5; accord, *Lynch, supra* 483 Mich at 588-589, (Cavanagh and Kelly concurring) (noting that even "a bill analysis could be a persuasive tool of statutory construction.")

Additional controlling rules of statutory interpretation are set forth below in the context of several arguments.

III. THE STATUTE AT ISSUE: MCL 600.5851b.

This case turns on the interpretation of MCL 600.5851b that reads in full as follows:

> Sec. 5851b. (1) Notwithstanding sections 5805 and 5851, an individual who, while a minor, is the victim of criminal sexual conduct may commence an action to recover damages sustained because of the criminal sexual conduct at any time before whichever of the following is later:
>
> (a) The individual reaches the age of 28 years.
>
> (b) Three years after the date the individual discovers, or through the exercise of reasonable diligence should have discovered, both the individual's injury and the causal relationship between the injury and the criminal sexual conduct.
>
> (2) For purposes of subsection (1), it is not necessary that a criminal prosecution or other proceeding have been brought as a result of the conduct or, if a criminal prosecution or other proceeding was brought, that the prosecution or proceeding resulted in a conviction or adjudication.
>
> (3) *Regardless of any period of limitation under subsection (1) or sections 5805 or 5851*, an individual who, while a minor, was the victim of criminal sexual conduct after December 31, 1996 but before 2 years before the effective date of the amendatory act that added this section may commence an action to recover damages sustained because of the criminal sexual conduct within 90 days after the effective date of the amendatory act that added this section if the person alleged to have committed the criminal sexual conduct was convicted of criminal sexual conduct against any person under section 520b of the Michigan penal code, 1931 PA 328, MCL 750.520b, and the defendant admitted either of the following:

(a) That the defendant was in a position of authority over the victim as the victim's physician and used that authority to coerce the victim to submit.

(b) That the defendant engaged in purported medical treatment or examination of the victim in a manner that is, or for purposes that are, medically recognized as unethical or unacceptable.

(4) This section does not limit an individual's right to bring an action under section 5851.

(5) As used in this section:

(a) "Adjudication" means that term as defined in section 5805.

(b) "Criminal sexual conduct" means that term as defined in section 5805.

P.A. 1962, No. 236, § 5851b, added by P.A. 2018, No. 183, Imd. Eff. June 12, 2018. *(emphasis added)*

The controlling sections of this amended statute are Sections 5851b(1)(b) and 5851b(3). Also of particular significance is the effective date: "Imd. Eff. June 12, 2018."

IV. THIS COURT SHOULD AFFIRM THE COURT OF APPEALS BECAUSE PLAINTIFF'S CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS

A. The Only Claim Alleged in This Case – Negligence – Accrued Decades Before Plaintiff Filed This Lawsuit And Is Barred By The Statute Of Limitations

In *Lemmerman v Fealk*, 449 Mich 56; 534 NW2d 695 (1995), this Court heard consolidated cases of two plaintiffs who sought to sue their relatives for alleged sexual abuse that occurred when plaintiffs were minors some forty to fifty years earlier. The Court noted that "[a]s a general rule, untimely filed tort claims are barred by the statute of limitations. Claims for assault and battery normally must be brought within two years after they accrue and claims for negligence and intentional infliction of emotional distress must be brought within three years after they accrue in order to avoid the limitation bar. A claim accrues 'at the time the wrong upon which the claim is

based was done regardless of the time when damage results.'" *Id.* at 63-64 (internal statutory citations omitted). Sexual assaults "inflict immediate damage on the children so abused." *Id.*, at 64. That law applies to Plaintiff's negligence claim in this case. A negligence claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." *Id.;* see MCL 600.5805(2) (establishing the period of limitations as three years after the time of injury for all actions to recover damages for injury to a person). The "period of limitations runs from the time of Plaintiff's claim accrues." MCL 600.5827. "The applicable statute of limitations is the one in effect when the Plaintiff's cause of action arose." *Rzadkowolski v Pefley*, 237 Mich App 405, 411; 603 NW2d 646 (1999); MCL 600.5869 ("All actions and rights shall be governed and determined according to the law under which the right accrued, in respect to the limitations of such actions or right of entry."). These authorities are controlling here.

Plaintiff is suing because he alleges he was sexually abused in 1999, when he was 16 or 17 years old. Assuming Plaintiff was 16 in 1999, and assuming a maximum limitations period of three years, the law required him to file his claim—at the latest—in 2004, five years later. Plaintiff did not file a lawsuit within that time, and that ends the matter unless the Legislature reopened the time for filing claims, like it did for claims against Dr. Nassar in MCL 600.5851b(3). Because the Legislature did not do that for other claims, no more analysis is necessary.

B. MCL 600.5851b Has No Impact on This Lawsuit.

There is nothing in the text of MCL 600.5851b that changes the reality that Plaintiff's claim accrued at the time of the alleged harm and was barred after 2004 at the latest. To hold otherwise would require imputing to the Legislature the intent to abrogate *Lemmerman*, *Rzadkowolski*, and MCL 600.5827, even though there is zero evidence of such legislative intent.

Plaintiff's argument that his claim did not accrue until he first made the causal connection during therapy is also misplaced. Accepting that argument would compel a determination that the Legislature intended to create a new cause of action based on criminal sexual conduct that includes a new accrual date. There is nothing in the statute that supports that. And Plaintiff has not filed a claim for criminal sexual conduct. Plaintiff has filed a negligence claim. The accrual date for a negligence claim remains the date of the harm. *Lemmerman, supra,* 449 Mich at 63-64. Rewriting the statute in such a way would allow a plaintiff to claim a causal connection 30, 50, even 70 years after the fact. This would put defendants in the impossible position of trying to defend claims where the alleged perpetrator and every alleged potential witness was already deceased, defeating the entire purpose of the statute of limitations.

In response, Plaintiff points to MCL 600.5851b(1)'s first sentence: "Notwithstanding sections 5805 and 5851, an individual who, while a minor, is the victim of criminal sexual conduct may commence an action … *at any time* …" before the person reaches age 28 or within the discovery period. [Emphasis added.] But this very language confirms that the Legislature was expanding the statute of limitations for alleged plaintiffs whose claims arise in the future, not changing the accrual date for claims that arose in the past. The Legislature did not say that the provision applies in favor of those who *were* victims of sexual abuse at any time in the past. Instead, the statute applies in the present, to "an individual who while a minor *is* the victim of criminal sexual conduct." Read in context and as more fully developed in Section IV. C. 1. of this brief (pp 12-18 below), this statutory provision applies in favor of minors victimized since the time the act was adopted, June 12, 2018.

The present tense used in subsection (1) can be compared to the past tense use in subsection (3), which indisputably provides for retroactive application of the statute to very specifically described defendants—certain physicians. MCL 600.5851b(3) relevantly provides:

"Regardless of any period of limitation under subsection (1) or Sections 5805 or 5851, an individual who, while a minor, ***was*** the victim of criminal sexual conduct after December 31, 1996, but before two years before the effective date of the amendatory act that added this section may commence an action …" within the timeframes further specified in subsection (3). So, while sub-provision (3) applies to those who claim they were victimized *before* the effective date of the statute, MCL 600.5851b(1) applies only to those victimized from June 12, 2018, forward, that is, prospectively.

Plaintiff further argues that MCL 600.5827 no longer applies at all, although no language in the statute supports that. MCL 600.5827 begins "Except as otherwise expressly provided, the period of limitation runs from the time the claim accrues." That remains the case. Plaintiff asks the Court to read into the 2018 amendment a provision that says "a criminal sexual conduct claim filed by a minor first accrues at the time" the causal connection is made. And although the statute is clear that, as to Plaintiff's negligence claim, it "accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results," Plaintiff's argument is that the "except as otherwise expressly provided" language indicates flexibility and thus supports a conclusion that the amendatory act changes the accrual date. That analysis is unsupportable, particularly on review of the several statutory provisions that MCL 600.5827 references. Section 5827 indicates that "the claim accrues at the time provided in Sections 5829-5838 …." Each of those statutory provisions expressly states when the claims at issue "accrue." In fact, the title of each statutory provision begins "Accrual of claim." Again, when the Legislature wishes to speak

to a topic, it knows how to do so directly. There is nothing in MCL 600.5851b(1)(b) suggesting that the Legislature intended to create a new cause of action or new accrual date for a negligence cause of action.

For all these reasons, and those stated in the Court of Appeals' well-reasoned decision, the Court's first question must be answered no: The amended statute does not render Plaintiff's lawsuit timely based on his discovery of a causal relationship between injuries suffered in 1999 and the alleged criminal sexual conduct that also occurred in 1999. Instead, the claim could be viewed as timely only if MCL 600.5851b(1)(b) applies retroactively. But, as next established, it does not.

C. Applying the Four Factors Set Forth in *LaFontaine*, MCL 600.5851b(1)(b) Does Not Apply Retroactively to the Time of the Wrong, So Plaintiff's Claims Were Not Timely Filed

This Court in *LaFontaine* Court set forth four factors to analyze when addressing whether a statute is to be applied retroactively. The factors are: "First, whether there is specific language providing for retroactive application; second, whether the statute is to operate retroactively merely because it relates to an antecedent event; third, it must be kept in mind that retroactive laws impair vested rights acquired under existing laws; and fourth, a remedial or procedural act not affecting vested rights may be given retroactive effect." 496 Mich at 38-39. As applied here, those factors show MCL 600.5851b(1)(b) does not apply retroactively.

1. There is No Specific Language in the Statute that Provides for Retroactive Application; to the Contrary, the Legislative Intent as Drawn from the Text and Legislative History was that the Act Apply Only Prospectively

In addressing the first *LaFontaine* factor last year, this Court wrote:

> This first question is thus whether there is specific language in the amended statutes that provides for retroactive application. We have long acknowledged that "the Legislature … knows how to make clear its intention that a statute apply retroactively."

Andary v USSA Casualty, 2023 WL 4873660 at *18 (citing *Buhl* 507 Mich at 245 and *Lynch* 463 Mich at 584); accord *Buhl* ("When determining whether a statute should be applied retroactively or prospectively, the primary and overriding rule is that legislative intent governs. All other rules or construction and operation are subservient to this principle." 507 Mich at 244 (quoting *Lynch* 463 Mich at 583)). In *Lynch*, this Court relied on the United States Supreme Court decision in *Landgraf v USI Film Products*, 511 US 244; 114 S Ct 1483 (1994), in setting forth the importance of fulfilling the Legislature's intent when addressing issues of the retroactive application of statutes. The *Lynch* Court wrote: "We agree with the *Landgraf* Court that a requirement that the Legislature make its intention clear 'helps ensure that the Legislature itself was determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.'" *Lynch*, 463 Mich at 587 (quoting *Landgraf*, 511 US at 268).

Andary, *Buhl* and *Lynch* also confirm that while the Court stated in *Ramey v The Michigan Public Service Commission*, 296 Mich 449, 460; 396 NW 323 (1941), that the presumption in favor of prospective operation can be rebutted only by a clear, express command or necessary implication, "this Court generally has not found a sufficiently clear statement of retrospective intent in the absence of a clear and express statement," *Andary* at * 18 (citing *Buhl* 507 Mich at 245). And in further explaining its analysis of this issue, the *Ramey* Court wrote that retroactive application would not be found without express command or ***"necessary, unequivocal and unavoidable implication*** from the words of the statute taken by themselves and in connection with the subject matter, and the occasion of the enactment, ***admitting of no reasonable doubt*** …" *Ramey*, 296 Mich at 460 (emphasis added). Indeed, legislative silence regarding retroactivity undermines any suggestion that a statutory provision was intended to apply retroactively. *LaFontaine*, 496 Mich at 40.

There is no such unequivocal, unavoidable language of retroactivity in MCL 600.5851b(1)(b). As just noted, the statute speaks in the present tense—"is"—not in the past tense—"was." And the language of sub-provision 5851b(1)(b) "stands in stark contrast to Subsection (3), in which the Legislature made abundantly clear its intent for *that* subsection to apply to claims that accrued before the statute was enacted." *McLain*, 2023 WL 3131974, at *4. Sub-provision 5851b(3) states expressly: "*Regardless of any period of limitation* under subsection (1) or sections 5805 or 5851, an individual who, while a minor . . . may commence an action to recover damages." Sub-provision 5851b(3) affirms that the Legislature knows how to abrogate a limitations period that applies to claims that have already accrued when it wants to do so, and sub-provision 5851b(1)(b) affirms that the Legislature did *not* intend such retroactivity with respect to claims that accrued in the past and were already time-barred in 2018 when the statute was enacted.

This Court has also found important to the first *LaFontaine* factor the fact that a statute itself identifies the statute as immediately effective. In *LaFontaine* the Court wrote: "That the Legislature provided for the law to take immediate effect *upon its filing date*—August 4, 2010—only confirms its textual prospectivity." 496 Mich at 40. Similarly, in *Andary,* the Court wrote:

> In this case, nothing in the plain language of the statute suggests that MCL 691-1402a(5) was intended to apply retroactively. To the contrary, the amendment was given immediate effect without further elaboration. Furthermore, the amendment makes no mention of whether it applies to a cause of action that had already accrued before its effective date.

Andary, at *18 n 23 (citing *Buhl,* 507 Mich at 245); see also *Johnson*, 491 Mich at 430 (same); and *Selk v Detroit Plastic Products,* 418 Mich 32, 35 n 2; 348 NW2d 652 (1984) ("When it wishes to address the question of retroactivity, the Legislature has specifically done so in addition to providing for an effective date.").

Here, the statute took immediate effect on the date of its adoption, June 12, 2018. This, too, "supports that it was intended to be applied prospectively only." *McLain*, 2023 WL 3131974, at *4.

Another indication that the Legislature intended MCL 600.5851b(1)(b) to only apply prospectively is the very specific language the Legislature used to assure that claims against certain defendants (physicians, like Dr. Nassar) could be pursued retroactively in sub-provision (3). Plaintiff's theory of sub-provision (1) has no limits whatsoever. Instead, it provides an extended statutes of limitations for claims against *anyone* filed by individuals who were victims of criminal sexual conduct as minors and includes a discovery-rule tolling provision. MCL 600.5851b(1)(b). In contrast, sub-provision (3) defines in great detail both the potential defendant physicians to whom the sub-provision applies and the timeframe within which those physicians may be sued. It provides that insofar as someone was a minor when the victim of criminal sexual conduct perpetrated by a physician between 1997 and 2016 that victim may commence an action for damages suffered because of such conduct within 90 days of the statute becoming effective. This retroactive application provision was intended to allow Larry Nassar's victims to sue him notwithstanding the fact that their claims were time barred under then-governing law. MCL 600.5851b(3).

The Legislature did not include the same sort of retroactive language in MCL 600.5851b(1)(b). On its face, MCL 600.5851b demonstrates that the Legislature contemplated the issue of retroactivity and decided to revive only a narrow category of stale claims—those claims against some physicians and very specifically, Larry Nassar.

In fact, if MCL 600.5851b(1)(b) applies retroactively to *all* wrongdoers, then the detailed exceptions to prospective application set forth regarding certain physicians in subsection (3) would

be unnecessary and rendered nugatory. Accepting Plaintiff's interpretation renders sub-provision (3) unnecessary surplusage. But "an interpretation that would render any part of the statute surplusage or nugatory must be avoided." *Bauer v Saginaw County*,332 Mich App 174; 955 NW2d (2020) (citing *South Dearborn v DEQ*, 502 Mich 349, 361; 917 NW2d 603 (2018)); see *Scalia and Gardner*, Reading Law: The Interpretation of Legal Texts, p 174 ("Or in the words of Thomas M. Cooley: 'The courts must … lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory.'")

Further comparisons of subsections (b)(1) and (3) support Defendant. Subsection (1) of MCL 600.5851b begins "Notwithstanding sections 5805 and 5851, an individual who, while a minor, ***is*** the victim of criminal sexual conduct may commence an action … at any time before [age 28 or three years after the discovery date]." Subsection (3), on the other hand, applies to a "an individual who, while a minor, ***was*** the victim of criminal sexual conduct after December 31, 1996, but before two years before the effective date of the amendatory act …" Additionally, subsection (3) begins by stating that it is applicable "regardless of any period of limitation under subsection (1) or sections 5805 or 5851." If MCL 600.5851b(b)(1) applied retroactively, this language, too, would be unnecessary.

The statute's legislative history also confirms that the Legislature intended for MCL 600.5851b(1)(b) to apply prospectively. The Legislature revised the proposed bill that became MCL 600.5851b, Senate Bill No. 872, while it was considering it. Among other things, these revisions *narrowed the bill's retroactive application.* As initially proposed in the Senate, the bill provided that *all* its provisions would "apply to actions to recover damages for conduct that constitutes criminal sexual conduct that occurred after December 31, 1992." 2018 SB 872 (February 27, 2018, version). As amended and later passed by the Senate, the bill specified that

Section 5851b would apply "to a claim based on criminal sexual conduct that accrues after December 31, 1996," subject to certain generally applicable limitations. 2018 SB 872 (March 14, 2018, version). But the House then modified the bill by *eliminating* across-the-board retroactivity and adding the physician-targeted provision that ultimately appeared in the statute. 2018 SB 872 (May 24, 2018, version). During the vote in the House, Representative John Chirkun, who disagreed with the proposed change, complained about the narrowing of the bill's retroactivity provision:

> It is a sad day in the Legislature when they don't treat all people the same way in the state of Michigan. I could not vote in favor of this bill because we are not treating all residents of Michigan (Juvenile ,and Adults) [sic] that have been sexually assaulted IE:(By priests coaches ,teachers, social workers etc.) ,equally as the same rights as the ones involved in the MSU Dr. Nassar scandal." [2018 HJ No. 53, p 1074 (errors in original).]

Similar comments were made by members of the Senate when the amended Bill passed the Senate on May 29, 2018. According to these Senators, the House's amendments stripped away the broad retroactivity of the initial bill and narrowly focused the bill's impact on the victims in the Nassar case:

Senator Schuitmaker stated:

"I rise today to express my extreme, sincere disappointment, in the lack of leadership in our neighboring chamber to put the safety of Michigan's children first. . . . I challenge each of us to do more. **Every victim and survivor deserves justice, not just those whose names and predators make national headlines**."

Senator Hertel:

"I rise to express my disappointment and frustration with this bill package."

"**I am extremely disappointed in the severe limits of justice contained in these bills. . . . These bills have been whittled down to provide justice for certain survivors**."

"I am sorry for the survivors that this process failed. I am sorry that the House of Representatives so drastically decided to limit justice."

Senator O'Brien:

"The Nassar survivors, these women, they lent their names and their support because they wanted to change the statistics, especially for our kids. **Now some legislators chose to focus this package on them – the survivors – instead of the kids**."

2018 SJ 54, p 914.

Over the objections from several legislators, the Senate passed the House's narrowed version of the bill. 2018 SB 872 (May 29, 2018, version). That final version ultimately was signed by the Governor and became MCL 600.5851b.

This legislative history shows exactly what the statute's plain language means: that the Legislature considered whether to apply the extended statute of limitations retroactively in all cases and deliberately chose not to do so. Instead, the Legislature narrowed the statute's retroactive application significantly. 2018 SB 872 (March 14, 2018, version). And then, the Legislature narrowed it even more, to apply only to Larry Nassar's victims. 2018 SB 872 (May 24, 2018, version). Accordingly, the non-Nassar portion of the statue does not apply retroactively.

In sum, the first *LaFontaine* factor supports Defendant. There is no specific language in the statute that supports the retroactive application of the statute in this case. To the contrary, the language used and the legislative history of the amendments prove the Legislature intended MCL 600.5851b(1)(b) to apply prospectively.

2. The Second *LaFontaine* Factor is Inapplicable Here.

As to the second *LaFontaine* factor, the parties are in agreement with the Court of Appeals that it does not apply in this case.

3. The Third *LaFontaine* Factor Favors Defendant

This Court has indicated that the third *LaFontaine* factor shows the Court's "general disdain for retrospective laws because they can impair vested rights acquired under existing laws

or create new obligations or duties with respect to transactions or considerations already passed." *Andary,* at *20. In this regard, the *Andary* Court also wrote: "we must first determine whether a right has vested before we can determine whether application of a statute would retroactively impair that right, and … this Court has long employed a presumption against retroactivity. *Id.* at *11 n 11.

In the present case, this Court's precedents establish that Defendant had a vested right in the running of the statute of limitations because it had already completely run, and the action was barred. *People v Russo,* 439 Mich 584, 594; 387 NW2d 698 (1992) (citing *In Re Straight's Estate*, 329 Mich 319, 325; 445 NW2d 300 (1951)). The *In Re Straight's* Court further explained: "There is no vested right in the running of the statute of limitations *unless* it has completely run and barred the action." 329 Mich at 325 (emphasis added); see also *Russo,*493 Mich at 597 (Cavanagh, J, concurring) ("I agree with the majority that the amended statute of limitations was intended by the Legislature to apply to offences not barred when the amendment took effect.")

Courts have often addressed the policy issues that support the finding that an expired statute of limitations creates a vested right in the defendant and cannot be impaired by the retrospective application of an amended statute of limitations. In *Russo,* this Court wrote:

> Judge Learned Hand, while on the United States Court of Appeals for the Second Circuit, aptly summarized in *Falter v United States,* 23 F2d 420, 425-426 (CA 2, 1928), cert. den. 277 US 590, 48 S Ct 528, 72 LEd 1003 (1928), our conclusion when he stated:
>
> "Certainly, it is one thing to revive a prosecution already dead, and another to give it a longer lease on life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the state forgives it."

439 Mich 584, 587 n 18.

In *White v General Motors Corp,* 431 Mich 387, 382 n 2; 429 NW2d 576 (1988) the Court similarly wrote:

> In the civil area, the cases reflect both greater consistency in result and more severe limitations upon retrospective reach. In a sense, this can be explained by the fact that in civil cases, the range of alternatives is narrower than in the criminal arena; concepts such as res judicata and statutes of limitation operate to cut off the backward effect of law-changing doctrines.

And both the United State Supreme Court and this Court have spoken to this same issue in a broader context. For example, in *United States v Kubrick,* 44 US 111, 117; 100 S Ct 352, 357; 62 L Ed 2d 259 (1979), the Court wrote:

> Statutes of limitations, which are found and approved in all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Similarly, in *Lemmerman, supra,* the Court wrote "In summary, the primary purposes behind statutes of limitations are 1) to encourage plaintiffs to pursue claims diligently and 2) to protect defendants from having to defend against stale and fraudulent claims." 449 Mich at 65. Allowing long expired claims to proceed "would be unfavorable to a just examination and decision and would increase the danger of the assertion of fraudulent or speculative claims." *Id.* at 74 (citation omitted). Additionally, a major concern is that "a person would have an unlimited time to bring an action while the facts become increasingly difficult to determine. The potential for spurious claims would be great and the probability of the court's determining the truth would be unreasonably low." *Id.* at 75.

These policy considerations together with the clear statements of law in *Russo* and *In Re Straight's Estate* compel the conclusion that in this case, where the statute of limitations had completely run decades before Plaintiff filed this lawsuit, the third *LaFontaine* factor supports the conclusion that MCL 600.5851b(1)(b) does not apply retroactively.

4. The Fourth *Lafontaine* Factor Also Favors Defendant

The fourth *LaFontaine* factor provides that "a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment to the statute." *LaFontaine,* 496 Mich at 39. Here, as in *LaFontaine,* this factor does not apply given that Defendant's rights in the statute of limitations had vested when the statute of limitations expired in 2004. In addition, this Court has made clear that the procedural/remedial distinction set forth in the fourth *LaFontaine* factor should be "rejected when the parties substantive rights would be effected." *Lynch,* 463 Mich at 584. And this Court has further explained: "Every statute that makes any change in the existing body of law, excluding only those enactments which merely restate or codify prior law, can be said to 'remedy' some flaw in the prior law or some social evil. The mere fact that a statute is characterized as 'remedial' has for this purpose a more discriminate meaning." *White, supra,* 431 Mich at 397 (citation omitted).

In *Johnson v Pastoriza* the Court wrote:

> [W]e have rejected the notion that a statue significantly affecting a party's substantive rights should be applied retroactively merely because it can also be characterized in a sense as "remedial." In that regard, we agree with Chief Justice RILEY'S plurality opinion in *White v General Motors Corp.,* that the term "remedial" in this context should *only be employed to describe legislation that does not affect substantive rights.* Otherwise, the mere fact that a statute is characterized as remedial is of little value in statutory construction. Again, the question is one of legislative intent.

(Citing *Lynch,* 463 Mich at 485 (emphasis by *Johnson* Court)).

The Court of Appeals has twice addressed the procedural/remedial issue in the context of the statute of limitations. In *Gorte v Dept' of Transportation*, 202 Mich App 161, 167; 507 NW2d 793 (1993) the Court wrote: "While a procedural or remedial statute is generally excepted from this rule, and statutes of limitation are generally considered procedural, where a period of limitation has expired, the rights afforded by that statute are vested and the action in question is barred." (Quoting *Russo, supra,* 439 Mich at 594-595). Similarly, in *Davis v State Employees Retirement Board*, 272 Mich App 151, 160-161; 725 NW2d 56 (2006), the Court explained that in the context of the so-called procedural exception to the rule against retroactivity, statutes of limitations, while generally considered procedural necessarily affect substantive rights when the action is already time barred. Moreover, as the Court of Appeals noted in this case, the *Davis* Court further notes that "it must be observed that the presumption against statutory retroactivity is not restricted to actions involving vested rights." 272 Mich App at 158. The *Davis* Court relied in part on the United Supreme Court decision in *Landgraf, supra,* where the Court wrote "We do not restrict the presumption against statutory retroactivity to cases involving 'vested rights.'" 511 US at 275 n 29. Nor does *LaFontaine* restrict the presumption. The fourth factor indicates only that procedural/remedial statutes *may* have retroactive effect. But the statute at issue in this case does not. Instead, the fourth *LaFontaine* factor, applied in this case, favors the conclusion that MCL 600.5851b(1)(b) cannot apply retroactively.

CONCLUSION

In adopting amendments to the statute of limitations in 2018, the Legislature did not create a new cause of action nor indicate that the accrual date for existing causes of action had changed. And the Legislature did not overturn this Court's precedents nor existing statutes that provide that the only cause of action alleged in this case—negligence—accrues at the time that the harm is

caused, regardless of when damage results or is discovered. Instead, the Legislature extended the limitations period for individuals who allege victimization in the future, and it opened a limited, retroactive window so that victims of Dr. Nassar could file suit.

Statutes of limitation ensure the integrity of testimony and evidence. It is not possible for a defendant to defend itself against allegations that are decades old. These principles apply to bar Plaintiff's claim here. Accepting the Complaint allegations as true, Plaintiff's harm was caused in 1999. It was not caused at the time that Plaintiff came to believe through therapy that abuse he suffered in 1999 resulted in additional emotional or mental-health harms.

While the legislative intent to provide remedies for victims of sexual abuse may be presumed, it does not follow that the Legislature intended that MCL 600.5851b(1)(b) was to apply retroactively. As the United States Supreme Court said in *Landgraf*: "It will frequently be true, as petitioner and amici forcefully argue here, that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity." 511 US at 285-286.

Respectfully submitted,

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Attorneys for Defendant/Appellee Diocese of Lansing

Dated: February 13, 2024

By: /s/ Thomas R. Meagher (P32959)
Thomas R. Meagher (P32959)

CERTIFICATE OF COMPLIANCE

I hereby certify that Defendant/Appellee's Brief on Appeal complies with MCR 7.212(B), consisting of 7,385 words (exclusive of cover sheets, tables of contents/authorities, and exhibits), as generated in Microsoft Word.

RESPECTFULLY SUBMITTED,

FOSTER SWIFT COLLINS & SMITH, PC
Attorneys for Defendant/Appellee

Dated: February 13, 2024

By: /s/ Thomas R. Meagher (P32959)
Thomas R. Meagher (P32959)

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument, and related documents if any, was served upon the attorneys of record of all parties by the court's efiling/service system on February 13, 2024. The above statement is true to the best of my knowledge, information and belief.

/s/Thomas R. Meagher
Thomas R. Meagher