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STATE OF MICHIGAN
IN THE SUPREME COURT

BRIAN McLAIN,

Plaintiff-Appellant,

v.

THE ROMAN CATHOLIC DIOCESE OF LANSING,

Defendant-Appellee,

and

THE ROMAN CATHOLIC ARCHDIOCESE OF BALTIMORE, and RICHARD LOBERT,

Defendants.

MSC No. 165741
COA No. 360163
Livingston Circuit Court Case No 21-31108-NO

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Plaintiff-Appellant's Reply to Defendant-Appellee Diocese of Lansing's Brief on Appeal

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Christopher Patrick Desmond (P71493)
Johnson Law, PLC
The Buhl Building
535 Griswold Street, Ste 2600
Detroit, MI 48226
313-324-8300
CDesmond@VenJohnsonLaw.com
Counsel for Plaintiff-Appellant

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ARGUMENT

Defendant's arguments based on legislative history and policy concerns are misplaced

As is well-established regarding the subject of statutory interpretation, the primary objective of this Court is ascertaining the legislative intent underlying the statute in question. This Court has extensively addressed how such intent is to be determined, stating that "[w]hen the statute's language is clear, as it is here, we rely on that plain language as the best evidence of its meaning." *Rouch World, LLC v Dep't of Civil Rights*, 510 Mich 398, 429; 987 NW2d 501 (2022). Similarly, this Court has stated that "[w]here the [statutory] language is unambiguous, 'we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written.'" *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002), quoting *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

In arguing that the legislature did not intend the terms of MCL 600.5851b to apply to Mr. McLain's cause of action, Defendant directs this Court to legislative history in the form of early versions of the bill that would ultimately be passed and signed into law. Defendant, as the Court of Appeals did below, cites to this Court's opinion in *In re Certified Question from US Court of Appeals for Sixth Circuit*, 468 Mich 109; 659 NW2d 597 (2003), for the concept that some types of legislative history are more valuable or insightful than others. Defendant then implies that the history on which it relies is more valuable than the type of legislative history that has so often been rejected by our courts.

Defendant's reliance on *In re Certified Question* is misplaced. In the passage that Defendant and the Court of Appeals relied on, this Court stated as follows:

> Examples of legitimate legislative history include actions of the Legislature intended to repudiate the judicial construction of a statute, see, e.g., *Detroit v Walker*, 445 Mich. 682, 697; 520 N.W.2d 135 (1994), or actions of the

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> Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted. See, e.g., *Miles ex rel Kamferbeek v Fortney*, 223 Mich. 552, 558; 194 NW 605 (1923). From the former, a court may be able to draw reasonable inferences about the Legislature's intent, even when the Legislature has failed to unambiguously express that intent. From the latter, by comparing alternative legislative drafts, a court may be able to discern the intended meaning for the language actually enacted. [*Id*. at 115, n 5.]

Thus, this Court referred to *Miles ex rel Kamferbeek* as an example of where evolving statutory language can be relevant to the question of legislative intent. Turning to that decision, however, makes it clear that this Court was not referring to the type of legislative drafts on which Defendant currently relies but was instead referring to the manner in which the legislature can sometimes amend laws that have been enacted when it sees those laws in effect.

First, before examining the actual discussion in *Miles ex rel Kamferbeek*, it is important to look to the authority on which that Court relied. It appears that Court's sole authority in support of its reliance on legislative history was a legal treatise that is not fully identified in the opinion. The Court, writing in 1923, stated the following:

> "In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time." [*Miles ex rel Kamferbeek,* 223 Mich at 558, quoting 36 Cyc. pp. 1147-1149.]

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After this Court cited to 36 Cyc. pp. 1147-1149, it then engaged in the analysis of legislative history that deemed proper. Here is a sample of that analysis:

> A general election law requiring official ballots to be initialed was passed in 1891 (Act No. 190, § 22 [1 Comp. Laws 1897, § 3632]) and provides they shall be initialed "in ink on the upper left-hand corner of the back."
>
> It was amended in 1901 (Act No. 214, § 22) providing that the initialing should be done in ink "but not upon the perforated corner."
>
> Section 22 as amended in 1905 (Act No. 55) directing that the initials be written in ink and placed on the lower left-hand corner of the back of the ballot.
>
> This section was again amended in 1909 (Act No. 192) directing the inspector "to write his initials in ink or with lead or indelible pencil."
>
> Section 22 was again amended in 1915 (Act No. 141 [1 Comp. Laws 1915, § 3693]) providing that the indorsement should be made "in ink or with lead or indelible pencil (or with a facsimile signature stamp of his initials, using indelible ink)."
>
> In 1917 the legislature passed Act No. 203, known as the "Michigan election law," following closely in section 5 of chapter 10 the requirements of former section 22 as to initialing of ballots, but returned to the former safeguard requiring the indorsement to be made "in ink or with indelible pencil," or with a facsimile signature stamped on the back of the ballot "using indelible ink," by eliminating the three words "or with lead" found in the amendment of 1915. Thus fairly indicating an intent in harmony with the plain language upon the subject found elsewhere to make the use of an indelible pencil or ink in officially indorsing the ballot a prerequisite to its validity. [

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Thus, in *Miles ex rel Kamferbeek,* this Court did *not* endorse analyzing how a bill's language changed during the drafting process, as Defendant now asks this Court to do and as the Court of Appeals erroneously did. Instead, this Court was exclusively analyzing the way that legislation that had already been passed and signed into law was modified over time as a window into the intent of the legislature. While consideration of such information is logical as it shows the legislature directly altering language that had carried the force of law, consideration of language that never was law is an entirely different proposition that this Court has not firmly endorsed.

When previously discussing the manner in which legislative history can be abused during the course of statutory interpretation, Justice Markman observed that

> One of the most common and compelling critiques of the use of legislative history is that a judge can almost always find something in the legislative history to support the interpretation he personally wishes to give to a law. To borrow an analogy invoked by United States Supreme Court Justice Antonin Scalia, using legislative history is like entering a room, looking over the assembled multitudes in the crowd, and picking out your friends. See Scalia, A Matter of Interpretation (Princeton, NJ: Princeton University Press, 1997), at 36. [*McCormick v Carrier*, 487 Mich 180, 246-47; 795 NW2d 517 (2010) (Markman, J., dissenting).]

It is because of the often self-fulfilling nature of reliance on legislative history that this Court has been traditionally skeptical of such approaches to statutory interpretation "We do not resort to legislative history to cloud a statutory text that is clear." *Chmielewski v Xermac, Inc*, 457 Mich. 593, 608; 580 N.W.2d 817 (1998) (cleaned up). The statutory text in this case *is* clear. It provides that

> (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

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> 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. [emphasis added.]

By stating that an action arising out of an act of criminal sexual conduct may be brought "at any time" the legislature was using language that the Court of Appeals recognized as signaling an intent for retroactive application. Similarly, the legislature expressly stated that this provision was "notwithstanding" sections 5805 and 5851. In *LaFontaine*, this Court specifically identified the term "notwithstanding" as one that can be indicative of legislative intent for retroactive application. *LaFontaine*, 496 Mich at 39, n 30. Together then, there are multiple textual demonstrations of legislative intent within the legislative language that was passed and signed into law. By choosing to instead direct this Court to nothing more than historical versions of the bill without any context as to why the alterations were made prior to its passage, Defendant does nothing more than ask this Court to speculate, needlessly, about the intent that is clear from the face of the law.

Just as Defendant asks this Court to ignore unambiguous statutory language in favor of legislative history, so too does Defendant ask this Court to make improper policy considerations in this case. Defendant expresses concerns that Plaintiff's position in this case would result in "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." (Defendant's Brief, p 1). But, those concerns are not properly for this Court when interpreting the statute at issue. As this Court has made clear:

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> The general power of the legislature to pass statutes of limitation is not doubted. The time that these statutes shall allow for bringing suits is to be fixed by the legislative judgment, and where the legislature has fairly exercised its discretion, no court is at liberty to review its action, and to annul the law, because in their opinion the legislative power has been unwisely exercised. [*Trentadue v Gorton*, 479 Mich 378, 403-404 (2007), quoting *Price v Hopkin*, 13 Mich 318, 324 (1865).]

Defendant purports to believe that the legislature was unwise in providing victims of sexual assault greater access to a remedy for their injuries. It is not for the parties or the courts of this state to allow those policy opinions regarding what the law *should be* to shape their interpretation of what the law *is*. Plaintiffs in cases like Mr. McLain's still bear the burden of proof just like in every other tort action, and the verdicts that result from such cases will be subject to the same appellate review as any other case. So long as the legislature was acting within its constitutional authority when it passed this legislation (which Defendant in no way contests), its unambiguous language must control.

Plaintiff's cause of action did not accrue until *after* the passage of MCL 600.5851b

Defendant also erroneously contends that the legislature did not intend to modify when a cause of action arising out of sexual assault, like the present case, accrues. As our legislature has provided, "[a]ll 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." MCL 600.5869. Here, Plaintiff's cause of action, under the plain language of MCL 600.5851b, accrued in November 2020 after he disclosed the acts of sexual assault to his therapist.

In contending that the law of accrual has not changed relative to cases arising out of sexual assault, Defendant asserts that this action is controlled by the terms of MCL 600.5827, which provides

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> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

Defendant argues that this cause of action is merely a cause of action for negligence to which the above-quoted provision applies. That argument, however, cannot be reconciled with the plain language of MCL 600.5851b and the precedent of this Court.

Again, as Defendant acknowledges, MCL 600.5851b(1)(b) states that a victim has "[t]hree 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" in order to bring suit. That language is, unmistakably, a codification of what is known as the discovery rule. As this Court stated in *Trentadue*, "[u]nder a discovery-based analysis, a claim does not accrue until a plaintiff knows, or objectively should know, that he has a cause of action and can allege it in a proper complaint." *Trentadue*, 479 Mich at 389. The *Trentadue* opinion explains that while the discovery rule was previously a product of the common law, it is now purely a statutory creature:

> Since the Legislature has exercised its power to establish tolling based on discovery under particular circumstances, but has not provided for a general discovery rule that tolls or delays the time of accrual if a plaintiff fails to discover the elements of a cause of action during the limitations period, no such tolling is allowed. Therefore, we conclude that courts may not employ an extrastatutory discovery rule to toll accrual in avoidance of the plain language of MCL 600.5827 and we reject this Court's contrary conclusion in *Chase v Sabin,* 445 Mich 190, 191-192; 516 NW2d 60 (1994). [*Id*. at 391-392.]

Trenatadue thus provides that while injury victims could rely on the discovery rule for accrual purposes under the common law, that rule was

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not codified by the legislature when it passed the general accrual provision that Defendant contends applies here- MCL 600.5827. But, *Trentadue* explained that while the discovery rule was not generally available, the legislature was free to deem it applicable through specific statutes. That is precisely what it did when it passed MCL 600.5851b.

There is no way to harmonize Defendant's position that MCL 600.5827 continues to control the accrual of actions arising out of sexual assault while also giving meaning to the language in MCL 600.5851b(1)(b). That is because under the former, a cause of action "accrues at the time the wrong upon which the claim is based was done," whereas under the latter, a Plaintiff can bring suit within "[t]hree 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."

MCL 600.5851b was enacted in July 2018, which was more than two years prior to Mr. McLain "discover[ed], or through the exercise of reasonable diligence should have discovered, both [his] injury and the causal relationship between the injury and the criminal sexual conduct." Consequently, at the time he discovered the causal relationship between the abuse and his damages, the law provided that he had a cause of action without regard to when the underlying act of abuse occurred. And again, while Defendant continues to raise policy arguments against that decision of the legislature, such arguments do not negate the fact that it was a decision for the legislature to make and it was a decision the legislature did make.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above and in his brief on appeal, Plaintiff respectfully requests that this Honorable Court reverse the decision of the Court of Appeals. This Court should reverse where the Court of Appeals failed to recognize that Mr. McLain's cause of action did not accrue until 2020 and was thus timely filed. Alternatively, even if this Court were to determine that the timeliness of Mr. McLain's action was

dependent on a retroactive application of MCL 600.5851b, reversal is still required. Under the plain language of the statute and an application of the *LaFontaine* factors, it is evident that the legislature intended for this provision to apply retroactively, rendering Mr. McLain's action timely.

Respectfully submitted,

JOHNSON LAW, PLC

By: /s/ Christopher P. Desmond
Christopher P. Desmond (P71493)
Ven R. Johnson (P39219)
Attorneys for Plaintiff
535 Griswold, Suite 2600
Detroit, MI 48226
(313) 324-8300

Dated: March 19, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 2,704 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

/s/ Christopher P. Desmond (P71493)
535 Griswold Street, Ste 2600
Detroit, MI 48226
313-324-8300
CDesmond@VenJohnsonLaw.com

Date: March 19, 2024