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S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

BRIAN MCLAIN,

Plaintiff-Appellee,

v

ROMAN CATHOLIC DIOCESE OF LANSING,

Defendant-Appellant,

and

RICHARD LOBERT and ROMAN CATHOLIC ARCHDIOCESE OF BALTIMORE,

Defendants.

FOR PUBLICATION
April 27, 2023
9:15 a.m.

No. 360163
Livingston Circuit Court
LC No. 21-031108-NO

BRIAN MCLAIN,

Plaintiff-Appellee,

v

ROMAN CATHOLIC ARCHDIOCESE OF BALTIMORE,

Defendant-Appellant,

and

RICHARD LOBERT and ROMAN CATHOLIC DIOCESE OF LANSING,

Defendants.

No. 360173
Livingston Circuit Court
LC No. 21-031108-NO

Before: O'BRIEN, P.J., and MURRAY and LETICA, JJ.

PER CURIAM.

In these consolidated appeals, the Diocese of Lansing and the Archdiocese of Baltimore appeal by leave granted[1] the trial court's opinion and order denying their motions for summary disposition under MCR 2.116(C)(7).[2] At issue in this appeal is the retroactivity of MCL 600.5851b(1)(b). For the reasons explained in this opinion, we conclude that, based on the language of MCL 600.5851b(1)(b), the Legislature plainly did not intend for that subsection to apply retroactively to claims that were already time-barred before the statute was enacted in 2018. We reverse the trial court's opinion to the extent it held otherwise, and remand for entry of an order granting defendants' motions for summary disposition.

I. BACKGROUND

The Diocese of Lansing and the Archdiocese of Baltimore filed their dispositive motions in lieu of filing an answer to plaintiff's complaint, and the parties all agree that we must therefore accept the allegations in plaintiff's complaint as true for purposes of this appeal.

In 1999, plaintiff, while a minor, was sexually abused by defendant Richard Lobert, a priest for the Diocese of Lansing and the Archdiocese of Baltimore.[3] Plaintiff filed the complaint giving rise to this action in 2021, in which he alleged claims of negligence against all three defendants based on Lobert's sexual abuse. In 2018, before plaintiff filed his complaint, the Legislature passed MCL 600.5851b. As relevant to plaintiff's claims, MCL 600.5851b(1)(b) extended the statute of limitations for individuals who, while a minor, were "the victim of criminal sexual conduct" to "[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." Since 1999, plaintiff was diagnosed with adjustment disorder, anxiety, bipolar disorder, and required "medication throughout his lifetime." Plaintiff did not discover the connection between his mental health issues and Lobert's sexual abuse until he revealed the abuse to his therapist in November 2020.

In lieu of filing an answer to plaintiff's 2021 complaint, the Diocese of Lansing and the Archdiocese of Baltimore filed motions for summary disposition under MCR 2.116(C)(7) on grounds that plaintiff's complaint was time-barred. According to both defendants, the statute of limitations applicable to plaintiff's claims was the one in effect when plaintiff's claim accrued in

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[1] *McLain v Lobert*, unpublished order of the Court of Appeals, issued June 7, 2022 (Docket No. 360163); *McLain v Lobert*, unpublished order of the Court of Appeals, issued June 7, 2022 (Docket No. 360173).

[2] Defendant Richard Lobert also moved for summary disposition under MCR 2.116(C)(7), but he did not file an application for leave to appeal and is therefore not a party to this appeal.

[3] While not pertinent to the resolution of this appeal, Lobert denies the substantive allegations in the complaint, and the Archdiocese of Baltimore claims that it had no connection to Lobert after he left for Michigan in 1995.

1999, which had long since lapsed. Both defendants recognized that, based on the allegations in the complaint, plaintiff's claims could proceed if MCL 600.5851b(1)(b) applied retroactively, but they argued that the Legislature did not intend for this subsection to apply retroactively.

In response, plaintiff argued that retroactivity was not an issue because MCL 600.5851b(1)(b) changed the accrual date for actions based on criminal sexual conduct that occurred while the plaintiff was a minor from the date on which the criminal sexual conduct occurred to the date on which the plaintiff discovered the causal relationship between the criminal sexual conduct and the plaintiff's injuries. Plaintiff alternatively argued that, even if retroactivity was an issue, the Legislature intended for MCL 600.5851b(1)(b) to apply retroactively.

Following a hearing on the dispositive motions, the trial court issued an opinion denying defendants' motions for summary disposition. The trial court agreed with plaintiff that retroactivity was not an issue because MCL 600.5851b(1)(b) changed the accrual dates for a claim of an individual who, while a minor, was "the victim of criminal sexual conduct" to the date that the individual discovers the causal connection between the individual's injuries and the criminal sexual conduct. Thus, according to the trial court, plaintiff's claims did not accrue until November 2020 when he made this connection, and his complaint was timely. The trial court further reasoned that, even if retroactivity was an issue, it would hold that MCL 600.5851b(1)(b) applied retroactively because the Legislature's purpose in enacting the statute was "to protect the right of minor victims of sexual assaults to bring a claim against those responsible for the abuse even where many years have elapsed."

This appeal followed.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Michigan Ass'n of Home Builders v City of Troy*, 504 Mich 204, 211; 934 NW2d 713 (2019). The Diocese of Lansing and the Archdiocese of Baltimore moved for summary disposition under MCR 2.116(C)(7). As explained in *Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010):

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [Citations omitted.]

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

III. ANALYSIS

At issue is MCL 600.5851b, which in its entirety provides:

> (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.

The parties initially dispute whether retroactivity is even an issue in this case. According to plaintiff, retroactivity is not an issue because MCL 600.5851b(1) changed when claims such as his—

that is, claims to recover damages sustained by an individual who, while a minor, was the victim of criminal sexual conduct—accrued.

Generally speaking, a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. When a claim is based on a sexual assault, the claim accrues at the time of the assault, and "[s]ubsequent damage arising after the initial assaults would not give rise to a new cause of action or renew the running of the limitation period." *Lemmerman v Fealk*, 449 Mich 56, 64; 534 NW2d 695 (1995).

According to plaintiff, MCL 600.5851b(1)(b) changed the accrual date for claims to recover damages sustained by an individual who, while a minor, was the victim of criminal sexual conduct from when the criminal sexual conduct occurred to "when the connection between the injury and sexual assault as a minor was made." We disagree because nothing in MCL 600.5851b supports plaintiff's argument. First, MCL 600.5851b never explicitly states that it changes the general rule for when a claim accrues. Second, while MCL 600.5851b(1) 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, nothing in MCL 600.5851b(1) suggests that it is an exception to the statute governing the general accrual of claims—MCL 600.5827. We therefore conclude that MCL 600.5851b does not change the date of accrual for a claim to recover damages sustained by an individual who, while a minor, was the victim of criminal sexual conduct. 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.

Accordingly, the general rules for accrual apply to plaintiff's claims. Plaintiff's claims are premised on criminal sexual conduct that occurred in 1999, meaning that plaintiff's claims accrued in 1999. See MCL 600.5827; *Lemmerman*, 449 Mich at 64. It is well accepted that " '[t]he pertinent statute of limitations is the one in effect when the plaintiff's cause of action arose.' " *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 163; 725 NW2d 56 (2006), quoting *Chase v Sabin*, 445 Mich 190, 192 n 2; 516 NW2d 60 (1994), overruled on other grounds by *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 392; 738 NW2d 664 (2007). See also 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."); *Rzadkowolski v Pefley*, 237 Mich App 405, 411; 603 NW2d 646 (1999) ("Stated otherwise, the applicable statute of limitations is the one in effect when the plaintiff's cause of action arose."); *Casey v Henry Ford Health Sys*, 235 Mich App 449, 451 n 1; 597 NW2d 840 (1999).[4] Any statute of limitations applicable to plaintiff's claims when they accrued in 1999 had long since expired by the time he filed his complaint in 2021. Thus, the only way for plaintiff's claims to survive is if MCL 600.5851b(1)(b)—which was not enacted until after the acts giving rise to plaintiff's claims took place—applies retroactively. Accord *Buhl*, 507 Mich at 243 ("Because MCL 691.1402a(5) was not enacted until after the incident in this case took place, the outcome here turns on whether this provision applies retroactively.").

[4] Because the pertinent statute of limitations is the one in effect when plaintiff's claims accrued, it is irrelevant that plaintiff did not discover the connection between his injuries and Lobert's sexual assault until after MCL 600.5851b was passed.

"In determining whether a statute should be applied retroactively or prospectively only, the primary and overriding rule is that legislative intent governs." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) (cleaned up). Recently, in *Buhl*, 507 Mich at 244, our Supreme Court reiterated that "this inquiry into the Legislature's intent" is governed by the "*LaFontaine* factors" from *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 38-39; 852 NW2d 78 (2014):

> First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute.

A. FIRST *LAFONTAINE* FACTOR

For the first factor, our Supreme Court recently reiterated that "[s]tatutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application," and that "the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively." *Buhl*, 507 Mich 244-245 (quotation marks and citations omitted). Nothing in the plain language of MCL 600.5851b(1)(b) suggests that it was intended to apply retroactively. The 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. See MCL 600.5851b(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 . . . ."). Moreover, like the statute at issue in *Buhl*, 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)). "Furthermore, [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." *Buhl*, 507 Mich at 245.

The language the Legislature used in MCL 600.5851b(1) also supports that it was intended to be applied prospectively only. MCL 600.5851b(1) applies to "an individual who, while a minor, *is* the victim of criminal sexual conduct," as opposed to an individual who, while a minor, is *or was* a victim of criminal sexual conduct. (Emphasis added.) This, in combination with the fact that the statute was to be given immediate effect without any reference to claims that already accrued, supports that MCL 600.5851b(1) was to be applied prospectively only. Compare *People v Russo*, 439 Mich 584, 596-597; 487 NW2d 698 (1992) (stating that the statute of limitations' use of "was" indicated the Legislature's intent for the statute to apply retroactively); *Evans Prod Co v Fry*, 307 Mich 506, 546; 12 NW2d 448 (1943) (explaining that the Legislature intended for an escheatment act to be given retroactive effect because the act applied to property that "*has been* unclaimed," and "[s]imilar expressions are found in other sections of the act").

We also agree with the Diocese of Lansing and the Archdiocese of Baltimore that changes the Legislature made to MCL 600.5851b while it was being considered confirm that the Legislature did not intend for Subsection (1) to be retroactive. 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 Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). In versions of MCL 600.5851b that were not enacted, the Legislature proposed language that would have made retroactive all claims premised on criminal sexual conduct committed against minors reaching back to a certain date. For instance, one version proposed enacting language that would have made MCL 600.5851b "apply to actions to recover damages for conduct that constitute criminal sexual conduct that occurred after December 31, 1992." In a different version, the Legislature proposed language that would have made MCL 600.5851b(1) apply to all claims that accrued "after December 31, 1996" with limited exceptions. In contrast to these alternative legislative drafts, MCL 600.5851b(1) as enacted was given immediate effective and did not state that it applied to claims that previously accrued.

Plaintiff argues that MCL 600.5851b(1)'s use of the phrase "at any time" shows "an intent to have the statute apply both 'retroactively' to sexual assaults that occurred before the effective date of the statute and prospectively to protect future minor victims of sexual abuse." Plaintiff concedes that this language does not demonstrate the Legislature's express intent to have the statute apply retroactively, but emphasizes that such intent can be implied. See, e.g., *Davis*, 272 Mich App at 156 n 1 ("The Legislature's intent to apply an amended statute retroactively can be express or implied."). Retroactivity by implication will not be lightly presumed, however. Retroactivity can only "be inferred by 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, but precluding all question as to such intention." *Ramey v State*, 296 Mich 449, 460; 296 NW 323 (1941) (quotation marks and citation omitted). See also *Buhl*, 507 Mich at 259-260 (VIVIANO, J, concurring).

While MCL 600.5851b(1)(b)'s use of the phrase "at any time" lends support to plaintiff's contention that the Legislature impliedly intended for the statute to be applied retroactively, it does not lead to a necessary, unequivocal, and unavoidable implication that the statute is to be applied retroactively. "[T]o overcome the presumption against retroactive application, it is not enough that the language could be read in a wooden, literal fashion to encompass earlier events[.]" *Buhl*, 507 Mich at 261 (VIVIANO, J, concurring). Any implication arising from MCL 600.5851b(1)'s use of the phrase "at any time" is not sufficiently clear, and does not create a sufficiently strong implication that the text applies to pre-enactment criminal sexual conduct against minors.

B. SECOND *LAFONTAINE* FACTOR

The second *LaFontaine* factor concerns how, "in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event." *LaFontaine*, 496 Mich at 38-39. In the parties' briefs on appeal, they agreed that the second *LaFontaine* factor was not applicable to this case. At oral argument, however, plaintiff's counsel stated that he was mistaken in his understanding of the second *LaFontaine* factor when he filed his brief, and that he now believes that the second *LaFontaine* factor is applicable to this case. According to plaintiff's

counsel, MCL 600.5851b(1)(b) is not operating retroactively in this case merely because the sexual abuse occurred before the statute was enacted; rather, retroactivity is not an issue because plaintiff did not discover the connection between his injuries and Lobert's sexual abuse until after MCL 600.5851b(1)(b) came into effect in 2018. Plaintiff's argument misunderstands second rule cases. As our Supreme Court explained in *In re Certified Questions from US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 571; 331 NW2d 456 (1982):

> Second rule cases relate to measuring the amount of entitlement provided by a subsequent statute in part by services rendered pursuant to a prior statute . . . . Examples of second rule cases are measuring the amount of a judicial pension not only by years served subsequent to enactment but also by years served under a previous act, and measuring the amount of highway entitlement not only by expenditures subsequent to enactment but also by expenditures under a previous act. [Citations omitted.]

Plainly, the issue in this case does not "relate to measuring the amount of entitlement provided by a subsequent statute in part by services rendered pursuant to a prior statute," *id.*, and so the second *LaFontaine* factor is inapplicable.

C. THIRD *LAFONTAINE* FACTOR

The third *LaFontaine* factor as relevant to this case is whether retroactive application of the statute would take away or impair a vested right acquired under existing laws. See *LaFontaine*, 496 Mich at 39. The Diocese of Lansing and the Archdiocese of Baltimore argue that retroactive application of MCL 600.5851b to plaintiff's claims against them would impair a vested right because the statute of limitations in effect when plaintiff's claims accrued had expired by the time MCL 600.5851b was enacted, and, according to defendants, the expiration of the statute of limitations created a vested right. Plaintiff, on the other hand, contends that there is no vested right to assert the statute of limitations to defeat a claim.

There are two binding, published cases from this Court that contain contradictory statements on this point. Plaintiff directs this Court's attention to this Court's statement in *Bessmertnaja v Schwager*, 191 Mich App 151, 154; 477 NW2d 126 (1991), that "the right to defeat a claim by interposing a statute of limitations is not a vested right." But in *Gorte v Dep't of Transp*, 202 Mich App 161, 167; 507 NW2d 797 (1993), this Court stated that "where a period of limitation has expired, the rights afforded by that statute are vested and the action in question is barred."

We decline to resolve these contradictory statements at this time because it would not affect the outcome of this case. Under the third *LaFontaine* factor, if a statute does not impair a vested right, it *may* be retroactive. See *Buhl*, 507 Mich at 246. Thus, assuming that "the right to defeat a claim by interposing a statute of limitations is not a vested right," it means only that MCL 600.5851(1)(b) *could* apply retroactively. In light of the facts that (1) there is no specific language in MCL 600.5851b(1)(b) providing for its retroactive application as explained in Part III.A, and (2) the fourth *LaFontaine* factor does not support retroactive application as will be explained in Part III.C, we conclude that MCL 600.5851b(1)(b) should apply prospectively only, even if applying it retroactively would not impair a vested right.

D. FOURTH *LAFONTAINE* FACTOR

The fourth and final *LaFontaine* factor states 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 of the statute." *LaFontaine*, 496 Mich at 39. In *Davis*, 272 Mich App at 160-161, this Court explained, "In the context of the 'procedural' exception, statutes of limitations, while generally coined as procedural, necessarily affect substantive rights where causes of action can be lost entirely because the action is time-barred." *Davis* went on to hold that "the general remedial-procedural exception to prospective application" does not apply to statutes of limitations that had completely run. *Id*. at 162. Accordingly, the fourth factor does not support retroactive application of MCL 600.5851b(1)(b) in this case.

For the foregoing reasons, we conclude that the trial court erred by holding that retroactivity was not at issue in this case, and by further reasoning that, even if it was at issue, the statute applies retroactively. Plaintiff's claims can only proceed if MCL 600.5851b(1)(b) applies retroactively. Yet MCL 600.5851(1)(b) contains no clear and unequivocal manifestation suggesting that the Legislature intended for it to apply retroactively. Further, statutes of limitations in this context do not fall into the "remedial-procedural exception to prospective application," *Davis*, 272 Mich App at 162, which lends further support for the conclusion that MCL 600.5851b(1)(b) should apply prospectively only. Thus, regardless of whether applying the subsection retroactively to these defendants would impair a vested right, we find that MCL 600.5851b(1)(b) may not be applied retroactively in this case, and therefore plaintiff's claim is time-barred.[5]

IV. CONCLUSION

We hold that MCL 600.5851b(1)(b) does not apply retroactively to claims that were already time-barred when the statute was enacted. For the reasons outlined in this opinion, we reverse the trial court and remand for the court to enter an order granting defendants' motions for summary disposition.

Reversed and remanded. We do not retain jurisdiction.

/s/ Colleen A. O'Brien
/s/ Christopher M. Murray
/s/ Anica Letica

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[5] In light of our conclusion, we decline to address the Archdiocese of Baltimore's alternative argument related to personal jurisdiction.