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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 Nos. 165741, 165742

COA Nos. 360163, 360173

Livingston Circuit Court
Case No. 21-31108-NO

MICHIGAN ASSOCIATION FOR JUSTICE BRIEF *AMICUS CURIAE*

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (MAJ)'s mission is

> *to promote a fair and effective justice system. We aim to support the work of attorneys in their efforts to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in Michigan's courtrooms, even when taking on the most powerful interests.*

In the courtrooms across Michigan, MAJ is the voice of those who often have no other public voice. Our clients are those members of the public whose rights are most likely to be jeopardized by barriers to recovery such as a restriction on the ability to file suit against those who have harmed them.

As members of Michigan's bar, and as officers of the court, we recognize our responsibility to help the Court develop the State's jurisprudence. It is our mission to assist the Court in reaching decisions where all voices are heard and represented, in areas of law in which our members devote their professional lives.

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ARGUMENT

I. Plaintiff's Lawsuit is Timely Under the Plain Language of MCL 600.5851b.

The question of whether Plaintiff's lawsuit is timely is a question of statutory interpretation. The primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). This can be done by according the words in the statute their plain and ordinary meaning. *People v Vanderpool*, 404 Mich 391, 398; 952 NW2d 414 (2020). In interpreting a statute, "[i]t is not the role of the judiciary to second-guess the wisdom of a legislative policy choice" because the obligation of the judiciary is to interpret the law rather than to rewrite it. *State Farm Fire and Cas Co v Old Republic ins Co*, 466 Mich 142, 149; 644 NW2d 715 (2002).

Here, the relevant statutory language, enacted in 2018, 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.

MCL 600.5851b.

On its face, the statute at issue was meant to provide an "exception" for "minor victim[s] of criminal sexual conduct" to the typical statute of limitations governing such civil actions and allows a minor victim to bring suit before the age of 28 *or* within 3 years of discovering injury caused by criminal sexual conduct. MCL 600.5851b. The record reflects that the plaintiff brought his lawsuit in 2021 – after the enactment of MCL 600.5851b in 2018 – and within six months of his discovery that his injuries were caused by the criminal sexual conduct he suffered as a minor.

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Again, this is what the statute provided for, on its face, at the time the plaintiff filed suit. Accordingly, plaintiff's suit is unquestionably timely.

Moreover, while it is not the province of the judiciary to question the legislature's policy decisions, *State Farm Fire and Cas Co, supra,* prospective policy considerations do not weigh against straight-forward application of the statute:

A. The Statute's Exception for Minor Victims of Criminal Sexual Conduct Demonstrates the Legislature's Rejection of Concerns About Fraudulent Claims, Which, In Any Event, Are Not Supported by Recent Studies.

Given that the statute specifically allows an exception to the statute of limitations for minor victims of criminal sexual conduct in pursuing a cause of action, it cannot be true that principles underlying traditional statutes of limitation guide its application. For example, in 1995, the Michigan Supreme Court cited "the danger of the assertion of fraudulent or speculative claims" in rejecting a delayed-discovery rule in sexual abuse claims. *Lemmerman v Fealk*, 449 Mich 56, 74, 534 NW2d 695 (1995). First, it is worth noting that, even in reaching this conclusion, the *Lemmerman* Court cautioned that its decision "should not be read as an expression of opinion that assault-based tort actions that plaintiffs have allegedly been unable to commence because of memory repression should never be recognized." *Id.* at 77. But more importantly, by creating a law that allows a survivor of assault to bring claims by age 28 *or after*, the Legislature has squarely rejected the concerns raised in *Lemmerman*. Further, more recent data shows the concerns to be outdated.

"Fraudulent claims," or "false" reporting have been shown to be rare. Studies estimate a false reporting rate of 2% to 10%.[1] The real number is probably even lower. Law enforcement

[1] Lisak, D., Gardinier, L., Nicksa, S. C., & Cote, A. M., False allegations of sexual assault: An analysis of ten years of reported cases, VIOLENCE AGAINST WOMEN, 16 (12), 1318–1334 (2010), https://journals.sagepub.com/doi/10.1177/1077801210387747;

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designations for "false" reports can also be misleading. Law enforcement may mark a report as "false" if a victim provides no physical evidence, if they delay reporting, or if the story contradicts common myths about sexual assault. The FBI and the National Association of District Attorneys have explained that insufficient evidence, delayed reporting, inconsistencies in a victim's statement, or a victim's choice not to cooperate with investigators are common consequences of trauma, but they are not indicators of a false report.[2] This makes sexual assault different from many other types of crime. Prosecutors and the court system are equipped to screen and dismiss false reports of sexual assault, as they do for all crimes.

Further, existing Michigan law already addresses false reporting by criminalizing it. A person who deliberately makes a false accusation of sexual assault is guilty of a misdemeanor offense. MCL 750.411a(1)(a). The penalty is up to four years in prison or a fine of up to $2000, or both. MCL 750.411a(1)(c). Thus, a deterrent to the rare instance of false reporting already exists. The Legislature obviously realized that there is no practical or policy value in attempting to create a further deterrent by limiting legal remedies through the statute of limitations. See *Alticor, Inc. v. Dep't of Treasury*, 324 Mich. App. 403, 414–15, 921 N.W.2d 748, 754 (2018) ("The Legislature is presumed to be familiar with the rules of statutory construction and, when promulgating new laws, to be aware of the consequences of its use or omission of statutory language, and to have considered the effect of new laws on all existing laws[.]").

NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, False Reporting Overview (2012), https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf, at p. 1.

[2] Lisak, et al. (2010) at 1320; NATIONAL DISTRICT ATTORNEYS ASSOCIATION, Prosecuting Sexual Assault and Related Violent Crimes, (Training Event, Aug. 13-17, 2018) https://ndaa.org/training/prosecuting-sexual-assault-and-related-violent-crimes/.

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B. Other States Have Recognized that Sexual Assaults are Unique and Therefore Favor Recovery Under Delayed Discovery Theories.

Plaintiff's appeal affords the Michigan Supreme Court an opportunity to update its reasoning to reflect the progress of the last thirty years, as at least 21 other states have done. Decisions from other states show that, in addition to outdated reasons for rejecting a delayed discovery theory, there are reasons to favor the adoption of such a theory.

For example, Florida permits recovery for survivors of sexual assault under its "delayed discovery doctrine," which "generally provides that a cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious act giving rise to the cause of action." *Hearndon v Graham*, 767 So2d 1179, 1184 (Fla. 2000). Florida's language refers to discovery of "the tortious act," while Michigan's discovery language provides that accrual occurs when the plaintiff discovers "both the individual's injury and the causal relationship between the injury and the criminal sexual conduct." MCL 600.5851b.

In justifying the application of it doctrine, the *Hearndon* court noted that application of a delayed discovery doctrine in cases involving childhood sexual abuse "constitutes both the majority rule and the modern trend in American jurisprudence." *Hearndon* at 1186. It reasoned that "it is widely recognized that the shock and confusion resultant from childhood molestation, often coupled with authoritative adult demands and threats for secrecy, may lead a child to deny or suppress such abuse from his or her consciousness." *Id*. It then concluded that it would seem "patently unfair" to deny the delayed discovery doctrine "to victims of a uniquely sinister form of abuse." *Id*. The statute at issue here recognizes and embodies this very rationale.

Other jurisdictions have reached the same result. In Illinois, a plaintiff who, as a child, was sexually abused by a priest, and who had repressed his memories of the abuse such that he did not remember it until 17 years after it ended, was permitted to proceed on his claims. *Horn v Goodman*,

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2016 IL App (3d) 150339, 60 NE3d 922 (Ill App Ct 3d Dist 2016). In New Jersey, a plausible claim for tolling existed where a plaintiff testified that he had no memory of sexual abuse that occurred at the age of seven until some 40 years later. *Bryson v Diocese of Camden, NJ*, 909 F Supp 2d 364 (D NJ 2012). And in Mississippi, a plaintiff adequately alleged latent injuries more than three decades after he was abused by a priest at the age of twelve or thirteen. *McGowen v Roman Catholic Diocese of Biloxi*, 319 So 3d 1086 (Miss 2021).

Similarly, in Michigan, "when the situation requires it, this Court will apply the discovery rule to determine the date of accrual." *Larson v Johns-Manville Sales Corp.*, 427 Mich 301, 310, 399 NW2d 1(1986). The primary purposes behind statutes of limitation are: 1) to encourage plaintiffs to pursue claims diligently, and 2) to protect defendants from having to defend against stale or fraudulent claims. *Id*. at 311. These principles do not apply to claims where damages have not yet been discovered because "there is obviously no interest in encouraging plaintiffs who are unable to determine they have been injured to diligently pursue their claims," and therefore the adoption of a discovery rule to determine an accrual date would not interfere with the policies underlying statutes of limitation. *Id*. at 311-312

While *Larson* addressed the discovery rule in asbestos claims, the same principles apply here. Plaintiff did not learn that his trauma had caused numerous lifelong conditions such as anxiety, adjustment order, and bipolar disorder until 2020, which is after the amendments. The statute, on its face, allows for him to recover damages against his abuser and the institutions that allowed it to be perpetuated.

C. Defendants' interpretation requires an absurd result.

Defendants argue that "[t]he 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

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present, to 'an individual who while a minor *is* the victim of criminal sexual conduct.' " (Defendants' Answer to Application for Leave to Appeal, p.10). Under this interpretation, a person cannot benefit from application of the statute unless they were a minor at the time it was enacted in 2018. This would mean that no survivor of childhood sexual assault who was born before the year 2000 would benefit from this statute. Such a result is nonsensical. Further, the Legislature recognized that childhood sexual assault survivors may repress memories or they may not realize that they had suffered damages until much later in life. Thus, it allowed for second timeframe to bring a lawsuit—three years from the discovery of a causal connection between the assault and the injury—and allowed plaintiffs to recover at whichever is *later* of the two timeframes. MCL 600.5851b(1)(b).

Because Defendants' interpretation forecloses relief for survivors of childhood sexual assault who were born before the year 2000, it would allow someone who is 24 years of age today to file suit for at least the next four years and, potentially for decades if the discovery of the causal connection was delayed, while firmly denying relief for someone who is 25 years of age if they did not file within three years of the assault. A statute should be construed to avoid absurd results that are manifestly inconsistent with legislative intent. *Detroit Intern Bridge Co v Commodities Export Co*, 279 Mich App 662, 674, 760 NW 2d 565 (2008). Here, there is no policy benefit to drawing such an arbitrary line, and it runs contrary to the intent of the Legislature, which meant to provide an avenue for relief to adults who had been assaulted as children.

II. Even if the Court finds that the request is for the statute to be applied retroactively, the *LaFontaine* factors are in favor of doing so.

Legislative intent is best expressed by the unambiguous language of the statute, but if the Court finds that some construction is necessary, remedial statutes are to be liberally construed to suppress the evil and advance the remedy. *Eide v Kelsey-Hayes Co*, 431 Mich 26, 34; 427 NW2d

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488 (1988). If the Court finds that the statute must be applied retroactively to allow Plaintiff to recover, the applicable factors support such a finding. Michigan courts consider the following factors to determine whether a statute should be applied retroactively:

> 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.

LaFontaine Saline Inc v Chrysler Group LLC, 496 Mich 26, 38; 852 NW2d 78 (2014).

With regard to the first factor, there is specific language in the statute that provides for retroactive application. The statute provides that a person who is a minor when they were sexually assaulted can file suit "*at any time* before whichever of the following is later." It then goes on to allow recovery "*three years after* the date the individual discovers" their injury and a causal relationship between the injury and the assault. MCL 600.5851b (emphasis added). Further, the statute begins by stating that the person can file suit "[n]otwithstanding sections 5805 and 5851." The *LaFontaine* Court noted that the Legislature may use the word "notwithstanding" to indicate that it intended retroactivity. *LaFontaine*, 496 Mich at 39, n 30.

Additionally, "[t]he Legislature's intent to apply an amended statute retroactively can be express or implied." *Davis v State Employees' ret Bd*, 272 Mich App 151, 155; 725 NW2d 56, 60 (2006). The Legislature intended for the statute to allow plaintiffs who were assaulted as children to have a claim long after the statute of limitations would run if they had been assaulted as adults. This implies that the Legislature was not concerned about temporal limitations, retroactive or otherwise.

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With regard to the second *LaFontaine* factor, amici agrees with the parties that it has no application under this analysis.

The third *LaFontaine* factor is whether applying the statute retroactively would "impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past." Defendants have no vested rights under the prior statutes of limitation, and therefore there are no rights that are impaired by retroactive application of this statute. A defendant did not have a right to sexually assault a minor before the statute was enacted. This has not changed. Further, there is no vested right to be free from the consequences of assaulting a minor simply because of the statute limitations. "The right to defeat a claim by interposing a statute of limitations is not a vested right." *Bessmertnaja v Schwager*, 191 Mich App 151, 154 (1991). The third factor weighs in favor of Plaintiff.

The final *LaFontaine* factor, which is 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," also weighs in favor of Plaintiff. Only Plaintiff's assaults were antecedent to the enactment of the statute. The discovery of the connection between his injuries and the assault came after the statute was enacted, and as explained above, this means that the statute is not being applied retroactively if he is permitted to recover. But even if the date of the injury had been the accrual date (making the claim antecedent to the enactment), that would not change the question of whether Defendants had vested rights in the prior statute of limitations—they did not.

Contrary to Defendants' assertions, *People v Russo*, 439 Mich 584, 487 NW2d 698 (1992) does not change this result. While the *Russo* Court held that there is a vested right in the running of a statute of limitation that has completely run and the action is barred, that was in the context of a *criminal* case. There is no shortage of discussion in the jurisprudence of this state that

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distinguishes between civil remedies and criminal penalties. "A prosecution is generally understood to be a criminal action; a proceeding instituted and carried on by due course of law before a competent tribunal for the purpose of determining the guilt or innocence of the person charged with some crime or offense." *People v Ellis*, 204 Mich 157, 161, 169 NW 930 (1918). Because of this, constitutional protections attach to criminal prosecutions that do not apply in a civil context. *People v Antkoviak*, 242 Mich App 424, 481, 619 NW2d 18 (2000). And those constitutional provisions "are not violated when the civil penalty serves a purpose distinct from any punitive purpose." *Dawson v Secretary of State*, 274 Mich App 723, 732, 739 NW2d 339 (2007). This Court has advised exercising caution in applying "cross-over estoppel" because of "the fundamental procedural differences in the civil versus criminal contexts." *People v Zitka*, 325 Mich App 38, 45, 922 NW2d 696 (2018). "A trial court may abuse its discretion by blurring the distinction between a civil remedy for damages and the criminal penalty of restitution." *People v Orweller*, 197 Mich App 136, 140, 494 NW2d 753 (1992). "[A] civil action is completely separate and independent from a criminal action." *People v Williams*, 244 Mich App 249, 254, 625 NW2d 132 (2001). "Criminal and civil liability are not synonymous." *Aetna Cas. & Surety Co. v. Collins*, 143 Mich App 661, 663, 373 NW2d 177 (1985).

Pryber v Marriott Corp, 98 Mich App 50, 296 NW2d 697 (1980), aff'd by 411 Mich 887, 307 NW2d 333 (1981) provides a more closely-related interpretation than *Russo*. In that case, a Michigan resident was injured at an amusement park owned by the defendant. *Id*. at 52. At the time of her injury, Michigan had a statute "borrowing" the limitations period from the state where the injury occurred if applying that period would serve to bar the claim. *Id*. at 53. Applying that statute, the plaintiff's claims were barred in the lower courts. But the statute had been amended *after* the plaintiff's injury, such that Michigan's statute of limitations would apply if it favored the

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Michigan resident. *Id.* at 54. Like Defendants here, the defendants in *Pryber* argued that they had a vested interest in the prior statute of limitations. In holding that they did not, the Court of Appeals noted that "[t]he right to defeat a claim by interposing a statute of limitations is not a vested right. The right to defeat a claim by interposing a statute of limitations is a right which may be removed by the Legislature." *Id*. at 57. The Court further held that the conclusion was reinforced because when the Legislature acts, it is presumed to have knowledge of existing statutes. *Id*. at 57.

Such is the case here. The statute at issue addresses civil remedies, not criminal penalties. It aims to make plaintiffs whole for injuries arising from sexual assaults, not punish the perpetrator of the assault. Thus, *Pryber* and *Bessmertnaja* control and Defendants do not have a vested right in the prior statute of limitations.

CONCLUSION

For the foregoing reasons, the Court should hold that the Plaintiff's Complaint is timely, under the plain language of the statute, and, furthermore, that MCL 600.5851b is retroactive.

Respectfully submitted,

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