

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

Filed under AO 2019-6

**Plaintiff-Appellant's
Appendix to
Brief on Appeal in
Docket No. 165741**

BRIAN McLAIN,

Plaintiff-Appellant

v.

THE ROMAN CATHOLIC
ARCHDIOCESE OF BALTIMORE,

Defendant-Appellee,

and

THE ROMAN CATHOLIC
DIOCESE OF LANSING,
and RICHARD LOBERT,

Defendants.

MSC No. 165742

COA No.: 360173

Livingston Circuit Court Case No
21-31108-NO

Filed under AO 2019-6

**Plaintiff-Appellant's Appendix to
Brief on Appeal in Docket No. 165741**

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Date: November 22, 2023

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

BRIAN McLAIN,
Plaintiff,

Case No. 21-31108 -NO
Judge:

v

FR. RICHARD LOBERT, THE ROMAN CATHOLIC
DIOCESE OF LANSING and THE ROMAN CATHOLIC
ARCHDIOCESE OF BALTIMORE, individually and
jointly and severally.

TRUE COPY
44th Circuit Court
County Clerk's Office

Defendants.

SAMUEL H. PIETSCH (P30173)
VEN R. JOHNSON (P39219)
ANTHONY P. SINISHTAJ (P82128)
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JUDGE GEDDIS
P-35307

There is no other pending or resolved civil action arising out of the
transaction or occurrence alleged in the Complaint.

COMPLAINT AND JURY DEMAND

NOW COMES Plaintiff, by and through his attorneys, JOHNSON LAW, PLC, and
complaining of the above-captioned Defendants respectfully represents unto this
Honorable Court as follows:

1. At all times herein, Plaintiff was a resident of the County of Livingston and
State of Michigan.

2. At all times herein Defendant FR. RICHARD LOBERT was a priest practicing in the County of Livingston and State of Michigan.

3. At all times herein Defendant FR. RICHARD LOBERT was an agent, servant or employee of Defendants THE ROMAN CATHOLIC DIOCESE OF LANSING and THE ROMAN CATHOLIC ARCHDIOCESE OF BALTIMORE.

4. At all times herein, Defendant THE CATHOLIC DIOCESE OF LANSING had its principal place of business in the County of Ingham and State of Michigan.

5. At all times herein, Defendant THE ROMAN CATHOLIC ARCHDIOCESE OF BALTIMORE had its principal place of business at 320 Cathedral St., Baltimore, MD 21201.

6. That the amount alleged to be in controversy herein exceeds the sum of \$25,000.00, exclusive of interest, costs and attorney fees.

7. That jurisdiction and venue are therefore properly vested within this Court for the reasons stated above.

8. In or approximately the month of March 1999, Plaintiff BRIAN McLAIN was a resident of the W. J. Maxey Boys Training School, located in Livingston County, Michigan.

9. At that time, Defendant FR. RICHARD LOBERT, as part of his duties serving as the agent or employee of Co-Defendants THE ROMAN CATHOLIC DIOCESE OF LANSING and THE ROMAN CATHOLIC ARCHDIOCESE OF BALTIMORE, would regularly and periodically visit the W. J. Maxey Boys Training School to provide religious services and counseling to residents of the facility, such as Plaintiff.

10. Throughout the year 1999, Defendant FR. RICHARD LOBERT induced Plaintiff, then a minor, to perform masturbatory acts upon him, a series of requests that Plaintiff felt powerless to refuse to perform. These activities occurred when Defendant FR. RICHARD LOBERT would devise situations when Plaintiff would be alone with him.

11. In the month of November 2020 while in the course of psychological treatment for anxiety disorder, Plaintiff revealed to his therapist for the first time that he had undergone the abuse by Defendant FR. RICHARD LOBERT described above.

12. Subsequent treatment with his therapist in November 2020 to the present has revealed to Plaintiff that the sexual abuse committed by Defendant FR. RICHARD LOBERT was a cause, or at least an aggravating factor, in Plaintiff's history of adjustment disorder, anxiety, bipolar disorder, and the requirement for medication throughout his lifetime.

13. Until receiving the insights provided through counseling in November 2020 to the present, Plaintiff did not discover, nor through the exercise of reasonable diligence should he have discovered, both the psychological injuries he suffered and the causal relationship between his psychological injuries and the criminal sexual conduct of Defendant FR. RICHARD LOBERT.

14. Defendant FR. RICHARD LOBERT violated duties of care owed toward Plaintiff including, but not necessarily limited to, the following:

- a. exploited a vulnerable minor for the purposes of gratifying his own desire for power, sexual gratification, or both;
- b. abused his role as a counselor and trusted confidant for the purposes of exploiting Plaintiff in the manner stated in the preceding sub-paragraph;

- c. **traumatized Plaintiff to such an extent that Plaintiff suppressed or repressed memory of this abuse, which nonetheless resulted in significant impairment of Plaintiff's mental health and social development in future years, although Plaintiff remained unaware of the connection between these activities and his damaged emotional status until receiving counseling in November 2020; and**
- d. **failed in the performance of other duties that will become known during the course of discovery in this matter.**

15. Defendant THE ROMAN CATHOLIC DIOCESE OF LANSING violated duties of care owed toward Plaintiff including, but not necessarily limited to, the following:

- a. **failed to properly hire, train and supervise FR. RICHARD LOBERT;**
- b. **is responsible for the negligence of its agent/servant or employee under the Doctrine of *Respondeat Superior*;**
- c. **failed to adopt, implement and enforce policies and procedures that would assure that no one-on-one meetings between clergy and minors would take place in an unsupervised setting;**
- d. **failed to disseminate to the staff of W. J. Maxey Boys Training Home, and to the residents therein such as Plaintiff, a clearly-stated policy that priests such as FR. RICHARD LOBERT are never to be permitted to have unsupervised one-on-one meetings with any of the residents of the facility; and**
- e. **failed in the performance of other duties that will become known during the course of discovery in this matter.**

16. Defendant THE ROMAN CATHOLIC ARCHDIOCESE OF BALTIMORE violated duties of care owed toward Plaintiff including, but not necessarily limited to, the following:

- a. **failed to properly hire, train and supervise FR. RICHARD LOBERT;**
- b. **is responsible for the negligence of its agent/servant or employee under the Doctrine of *Respondeat Superior*;**

- c. failed to adopt, implement and enforce policies and procedures that would assure that no one-on-one meetings between clergy and minors would take place in an unsupervised setting;
- d. failed to disseminate to the staff of W. J. Maxey Boys Training Home, to Co-Defendant The Roman Catholic Archdiocese of Lansing, or both, and to the residents therein such as Plaintiff, a clearly-stated policy that priests such as FR. RICHARD LOBERT are never to be permitted to have unsupervised one-on-one meetings with any of the residents of the facility; and
- e. failed in the performance of other duties that will become known during the course of discovery in this matter.

17. As a direct and proximate result of these breaches of duties by Defendants, Plaintiff BRIAN McLAIN suffered damages and injuries including, but not necessarily limited to, the following:

- a. great physical and emotional pain and suffering;
- b. mental anguish and post-traumatic anxiety;
- c. development of anti-social behavior from that time to the present;
- d. aggravation of pre-existing mental health infirmities, and anti-social tendencies;
- e. interference with educational and vocational pursuits due to the impairments listed in the preceding sub-paragraph; and
- f. other damages that may become known during the course of discovery in this matter.

WHEREFORE, Plaintiff demands judgment against Defendants for whatever amount above the sum of \$25,000.00 to which he is found to be entitled, exclusive of costs, interest and attorney fees.

Respectfully submitted,

JOHNSON LAW PLC

BY: 

SAMUEL H. PIETSCH (P30173)

VEN R. JOHNSON (P36579)

ANTHONY P. SINISHTAJ (P82128)

Attorneys for Plaintiff

Dated: April 6, 2021

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

BRIAN McLAIN,
Plaintiff,

Case No. 21-
Judge:

-NO

v

FR. RICHARD LOBERT, THE ROMAN CATHOLIC
DIOCESE OF LANSING and THE ROMAN CATHOLIC
ARCHDIOCESE OF BALTIMORE, individually and
jointly and severally.

Defendants.

SAMUEL H. PIETSCH (P30173)
VEN R. JOHNSON (P39219)
ANTHONY P. SINISHTAJ (P82128)
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DEMAND FOR JURY TRIAL

NOW COMES Plaintiff, by and through her Attorneys, JOHNSON LAW, PLC and
hereby demands a trial by jury.

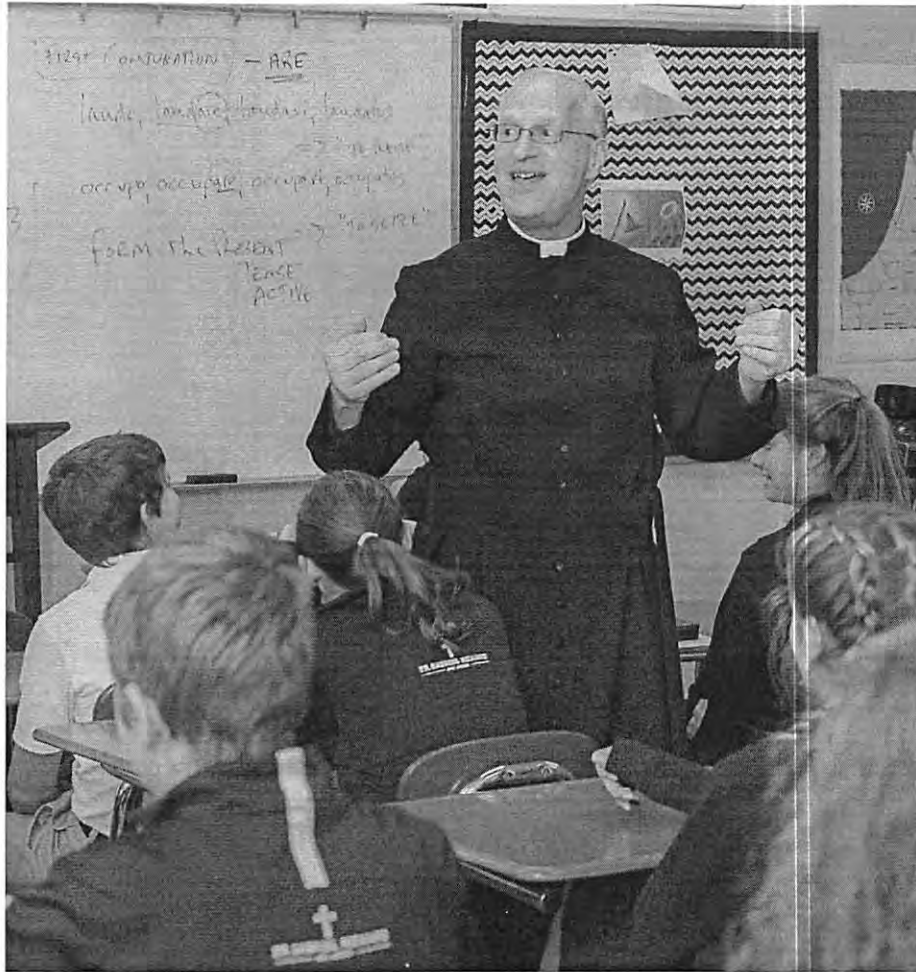
Respectfully submitted,

JOHNSON LAW, PLC

BY: 

SAMUEL H. PIETSCH (P30173)
VEN R. JOHNSON (P36579)
ANTHONY P. SINISHTAJ (P82128)
Attorneys for Plaintiff

Dated: April 6, 2021



Father Gabriel Richard High School - Ann Arbor

May 10, 2018 ·

Today marks the 43rd anniversary of Fr. Lobert's ordination to the priesthood. Thank you, Fr. Lobert, for your tireless service to our school, the students and those in need. We are grateful for your priestly ministry, your example of discipleship and for the constant reminders that our "Heavenly Father loves us beyond words."

113

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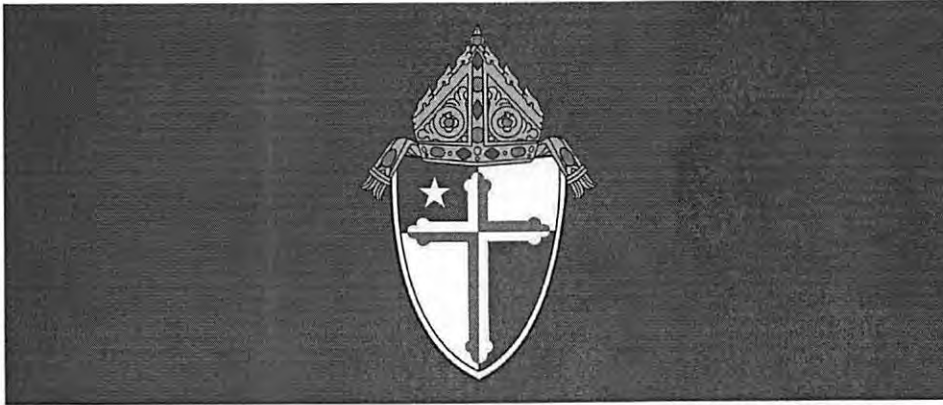
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Statement on the Removal of the Priestly Faculties of Father Richard Lobert



ARCHDIOCESE OF BALTIMORE



JANUARY 5, 2021



PRESS RELEASE

For Immediate Release

Tuesday, Jan. 5, 2021

The Archdiocese of Baltimore has been informed by the Diocese of Lansing that it has recently issued the following statement:





this matter swiftly and fairly.

The statement was issued to the community of Fr. Gabriel Richard Catholic High School (located in Ann Arbor, Michigan), where Fr. Lobert has served since 1995. Father Lobert is a priest of the Archdiocese of Baltimore, and in light of this information, the Archdiocese of Baltimore has removed the archdiocesan priestly faculties of Father Lobert. Father Lobert is not permitted to minister in the Archdiocese of Baltimore while the Diocese of Lansing is conducting its investigation. Father Lobert served at Resurrection (Ellicott City) 1975-1979; St. Mary (Cumberland) 1979-1986; St. Mark (Catonsville) 1988-1993; St. Louis (Clarksville) 1993-1994; and Prince of Peace (Edgewood) 1994.

Anyone with information about inappropriate conduct by a representative of the Church is encouraged to contact the Archdiocese of Baltimore by calling Chancellor Diane Barr at 410-547-5446, by calling the Ethics Hotline at 1-888-572-8026, or by visiting www.archbalt.org and clicking on "Report Misconduct" at the top of the page. Anyone with information about criminal conduct is encouraged to also contact law enforcement.

###

About the Archdiocese of Baltimore

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Archdiocese of Baltimore

2021

Mary Ellen Russell

410.547.3158 (office)

443.994.0879 (cell)

> Archbishop
Lori's Homily:
24th Sunday in
Ordinary Time
September 12,
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> Archbishop
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DIOCESE OF LANSING

M I C H I G A N

NEWS

MENU

Statement regarding the Reverend Richard Lobert, April 16, 2021

April 16, 2021
Diocese of Lansing



DIOCESE OF LANSING

M I C H I G A N

The Most Reverend Earl Boyea, Bishop of Lansing, has accepted the resignation of the Reverend Richard Lobert as Chaplain to Father Gabriel Richard High School in Ann Arbor.

012a

In December 2020, the Diocese of Lansing placed Father Lobert on ministerial leave pending an investigation by The Office of the Attorney General of the State of Michigan; Father Lobert's home diocese, the Archdiocese of Baltimore, also removed Father Lobert's priestly faculties.

Rooted in a commitment to the highest standards of conduct on the part of all clergy, staff and volunteers, the Diocese of Lansing is fully cooperating with the Attorney General's investigation which is still ongoing. Neither the existence of such an investigation nor Father Lobert's resignation carries a presumption of guilt. In order not to prejudice this ongoing investigation, no more information can be shared publicly until the matter has been concluded.

A priest of the Archdiocese of Baltimore, Father Lobert has served the school community at Father Gabriel Richard since 1995; while Father Lobert has not had any other assignments within the Diocese of Lansing, he has from time to time assisted at other parishes within the diocese, including regularly at Holy Spirit in Hamburg.

Bishop Boyea has named the Reverend Ryan Riley, currently Parochial Vicar at St. John the Evangelist in Fenton, as the new chaplain of Father Gabriel Richard High School. Father Riley will take up his new post on July 1, 2021.

ENDS

The Diocese of Lansing expects that all diocesan employees, clergy, and volunteers will exemplify the moral teachings of Jesus Christ and His Holy Catholic Church in their personal and professional life. See Diocesan Code of Conduct. Anyone wishing to report misconduct may do so here.

If anyone has reason to suspect physical, sexual or emotional abuse of any person of any age, please contact Protective Services or the police, as appropriate. If abuse by anyone connected to the Church is suspected, please also contact our Victim Assistance Coordinator at (888) 308-6252 or email: vac@dioceseoflansing.org. Anyone reporting clergy abuse can do so directly to the Michigan Attorney General here or by calling the investigation hotline at 844-324-3374.

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STATE OF MICHIGAN

IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

BRIAN MCLAIN,

Plaintiff,

v

FR. RICHARD LOBERT, THE ROMAN
CATHOLIC DIOCESE OF LANSING and
THE ROMAN CATHOLIC ARCHDIOCESE
OF BALTIMORE, individually and jointly and
severally,

Defendants.

CASE No: 21-031108-NO

JUDGE L. SUZANNE GEDDIS

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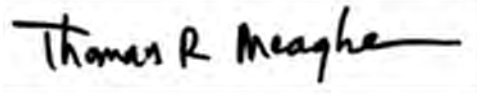
**DEFENDANT THE DIOCESE OF LANSING'S
MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7)**

Defendant, Diocese of Lansing, seeks entry of an order granting summary disposition in its favor because Plaintiff's claims are barred by the statute of limitations.

This motion is supported by a brief.

Respectfully submitted,

FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for Defendant Diocese of Lansing

A rectangular box containing a handwritten signature in black ink that reads "Thomas R. Meagher".

Dated: July 15, 2021

By: _____
Thomas R. Meagher (P32959)

18278:00055:5612872-1

STATE OF MICHIGAN

IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

BRIAN MCLAIN,

Plaintiff,

v

FR. RICHARD LOBERT, THE ROMAN
CATHOLIC DIOCESE OF LANSING and
THE ROMAN CATHOLIC ARCHDIOCESE
OF BALTIMORE, individually and jointly and
severally,

Defendants.

CASE No: 21-031108-NO

JUDGE L. SUZANNE GEDDIS

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**BRIEF IN SUPPORT OF DEFENDANT THE DIOCESE OF LANSING'S
MOTION FOR SUMMARY DISPOSITION**

**BRIEF IN SUPPORT OF DEFENDANT THE DIOCESE OF LANSING'S
MOTION FOR SUMMARY DISPOSITION**

INTRODUCTION

Plaintiff's claims are barred by the statute of limitations. He alleges misconduct in 1999 that caused him harm. He hopes to rely on an amended statute that entitles some minor victims of criminal sexual conduct to an extended limitations period, but that statute does not protect Plaintiff in this case. Accepting Plaintiff's factual allegations as true and applying the controlling law, this motion should be granted and Plaintiff's case dismissed.

FACTS

For purposes of this motion, and consistent with the Standard of Review set forth at pages 2 and 3 below, the Complaint allegations of fact—but not conclusions of law—are accepted as true. Plaintiff's Complaint relevantly alleges the following facts.

Plaintiff resided at the W.J. Maxey Boys Training School ("Maxey") in Livingston County in March, 1999 (Complaint ¶ 8). Defendant, Father Richard Lobert ("Fr. Lobert"), as an agent or employee of Defendants Diocese of Lansing and Archdiocese of Baltimore, provided religious services and counseling to residents of Maxey, including Plaintiff, at that time (¶ 9). During 1999, Fr. Lobert sexually abused Plaintiff (¶ 10).

In November 2020, "Plaintiff revealed to his therapist for the first time" that he had been abused by Fr. Lobert (¶ 11). Subsequent treatment with his therapist "has revealed to Plaintiff" that abuse allegedly committed by Fr. Lobert caused or aggravated "Plaintiff's history of adjustment disorder, anxiety, bipolar disorder, and the requirement for medication" (¶ 12). Paragraph 13 of the Complaint echoes the statutory language on which—as established below—Plaintiff must rely to overcome this motion. Paragraph 13 provides in full:

13. Until receiving the insights provided through counseling in November 2020 to the present, Plaintiff did not discover, nor through the exercise of reasonable

diligence should he have discovered, both the psychological injuries he suffered and the causal relationship between his psychological injuries and the criminal sexual conduct of Defendant Father Richard Lobert.

The Complaint then sets forth the only cause of action Plaintiff alleges separately as to each Defendant: negligence. Plaintiff alleges duties owed and allegedly breached by Fr. Lobert (§ 14), the Diocese of Lansing (§ 15), and the Archdiocese of Baltimore (§ 16). The final paragraph of the Complaint alleges proximate cause and damages (§ 17).

The last fact of significance is not set forth in Plaintiff's Complaint, but presumably will not be challenged: Plaintiff was born in 1982; making him age 16 or 17 when he was allegedly abused while at Maxey in 1999, and age 38 or 39 when he filed this lawsuit in April 2021.

LAW AND ARGUMENT

The dispositive issue is straightforward: indisputably, Plaintiff's negligence claim accrued at the time of the abuse in 1999. At that time, he had three years to file his negligence action. He failed to do that, so his claim is barred.

In response, Plaintiff must find an exception to the three-year statute of limitations governing his negligence claim. There is no applicable exception. Michigan courts have unequivocally rejected "repressed memory" claims, and a 2018 amendment to the statute of limitations entitling minor victims of criminal sexual conduct to an extended statute of limitations in specific circumstances, does not apply here because the amendment only applies prospectively, to claims accruing after its enactment and effective date.

I. Standard of Review

A motion seeking summary disposition based on the statute of limitations is properly brought pursuant to MCR 2.116(C)(7). *Bronson Methodist Hospital v Allstate Insurance Group*, 286 Mich App 219, 222; 779 NW2d 304 (2009). In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true Plaintiff's well pleaded factual allegations, affidavits, or other documentary evidence and construe them in Plaintiff's favor. *Id.*

II. Plaintiff's Claims are Barred by the Statute of Limitations

A. The statute of limitations protects Defendants from the prolonged fear of litigation and circumstances that would be unfavorable to a just examination of the claims alleged.

In *Lothian v City of Detroit*, 414 Mich 160, 164-167; 324 NW2d (1982), the court summarized some of the policies supporting the strict application of the statute of limitations as follows:

A statutory limitations period represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action. A statute of limitations is a statute of presumption. The fact of “ ‘delay extending to the limit prescribed’ ”, without further proof, “ ‘is itself a conclusive bar’ ” to suit . . .

Limitations periods created by statute are grounded in a number of worthy policy considerations. They encourage the prompt recovery of damages . . . ; they penalize plaintiffs who have not been industrious in pursuing their claims . . . ; they “afford security against stale demand when the circumstances would be unfavorable to a just examination and decision” . . . ; they relieve defendants of the prolonged fear of litigation . . . ; they prevent fraudulent claims from being asserted . . . ; and they “ ‘remedy *** the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert’ “ (citations omitted).

Those policies support application of the statute of limitations to bar Plaintiff's claims in this case.

B. Plaintiff's negligence claim is controlled by a three-year statute of limitations that accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results."

In *Lemmerman v Fealk*, 449 Mich 56, 63-64; 534 NW2d 695 (1995), the court wrote that "as a general rule, untimely filed tort claims are barred by the statute of limitations." The court further ruled that claims for negligence must be brought within three years after they accrue or they will be barred by the statute of limitations, and the court held that 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.*; citations omitted; 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). In his Complaint, Plaintiff concedes that the wrong upon which his negligence claim is based was done in 1999. Consequently, the negligence statute of limitations expired in 2002, unless some exception to the general rule applies.

C. The Michigan Supreme Court has rejected "repressed memory" arguments as exceptions to the statute of limitations.

To the extent, if any, that Plaintiff might rely on an argument that some courts (in other jurisdictions) have allowed tolling of statutes of limitations where Plaintiff alleges that his memory of Defendant's abuse was repressed by the gravity of the harm, that argument would fail. The Michigan Supreme Court has unequivocally rejected it. *Lemmerman, supra*, 449 Mich at 79-80. In this regard, the *Lemmerman* court wrote:

Neither the discovery rule, nor the grace period extended to plaintiff's suffering from the disability of insanity comprehends extension of the limitations period as a result of repression of memory of the alleged sexual assaults. We defer to the legislature to consider the appropriateness of extending the limitation period for commencement of suit in such situations.

Lemmerman remains the controlling law. Plaintiff cannot rely on a repressed memory theory to overcome this motion.

D. Recent amendments to the statute of limitations do not save Plaintiff's case.

1. MCL 600.5851b, which was enacted and made effective June 12, 2018, does not save Plaintiff's case.

In 2018, the Legislature amended the statute of limitations. Relevant here, the Legislature enacted MCL 600.5851b that reads in full as follows (emphasis supplied):

**600.5851b. Minor victims of criminal sexual conduct
Effective: June 12, 2018**

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.

Credits

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

By way of summary, four important points are made by the emphasized portions of the statute. First, notwithstanding the three year statute of limitations for negligence claims in MCL 600.5805, minor victims of criminal sexual conduct may file a lawsuit at any time before they reach the age of 28. This provision does not apply here because Plaintiff filed this lawsuit at age 37 or 38. Second, minor victims of criminal sexual conduct also might have the option to file suit within three years after they discover, or should have discovered, both the injury and causal connection between defendant's conduct and the injury. This is the provision that Plaintiff plainly relies on in this case. (See Complaint ¶ 13). Third, this act took immediate effect on June 12, 2018.

Fourth, the act expressly provides for a specifically defined cause of action against medical professionals that applies retroactively to conduct occurring between December 31, 1996 and June 12, 2016 (two years before the effective date).

2. MCL 600.5851b applies prospectively only and cannot revive claims already barred by an expired statute of limitations.

As noted above, the statute on which Plaintiff relies took effect in 2018. For Plaintiff to benefit from its provisions, the statute must be applied retroactively to Defendant's alleged negligence in 1999. The statute applies only prospectively and does not save Plaintiff's case.

a. Absent clear intent by the Legislature, a newly enacted or amended statute of limitations must apply prospectively.

In *LaFontaine Saline Inc. v Chrysler Group LLC*, 496 Mich 26, 38; 852 NW2d 78 (2014), the Michigan Supreme Court wrote:

Retroactive application of legislation “presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions . . . we have therefore required that the Legislature make its intentions clear when it seeks to pass a law with retroactive effect.

(Footnotes and citations omitted)

The Michigan Supreme Court has many times before and since applied this rule of law. Thus, statutes and statutory amendments are to be applied prospectively unless the Legislature manifests intent to have a statute apply retroactively. *Davis v State Employees' Ret Bd*, 272 Mich App 151, 155; 725 NW2d 56, 60 (2006). The Legislature's expression of intent must appear clearly, directly, and unequivocally from the context of the statute. *Id.* Courts examine whether the language of the amended statute suggests it is to be applied retroactively. *Id.* at 61. Cases extending over 100 years of jurisprudence provide that statutes of limitations are to be applied prospectively absent a clear and unequivocal manifestation of a legislative preference for retroactive application. *Id.* at 63.

The primary and overriding rule in determining whether a statute should be applied retroactively or prospectively is that legislative intent governs and all other rules of construction or operation are subservient. *Frank W Lynch & Co v Flex Technologies, Inc.*, 463 Mich 578, 583; 624 NW2d 180, 182 (2001). The *Lynch* court further explained:

Most instructive is the fact that the Legislature included no express language regarding retroactivity. See, e.g., *Chesapeake & Ohio R Co v Public Service Comm*, 382 Mich 8, 22–23, 167 NW2d 438 (1969) (Adams, J). We note that the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively. See, e.g., MCL § 141.1157; MSA 5.3188(257) (“This act shall be applied retroactively ...”); MCL 324.21301a; MSA 13A.21301a (“The changes in liability that are provided for in the

amendatory act that added this subsection shall be given retroactive application”).
Id. at 183.

As was the case in *Lynch*, the amended act here—MCL 600.5851b—contains no express language indicating the Legislature’s intent for it to apply retroactively to claims like Plaintiff’s. And the *Lynch* court’s notation that the Legislature is capable of adding such language where it intends for the statute to apply retroactively is of particular relevance here, because the Legislature did exactly that in subsection (3) of the statute, expressly limiting retroactive application of the statute to claims against medical providers. MCL 600.5851b(3).

This clear expression of the very limited circumstances in which the dispositive statute might apply retroactively, is further supported by the provision that the act took “immediate effect” on June 12, 2018. Michigan courts have often cited that very provision as proving a legislative intent that the statute apply only prospectively and not retroactively. *LaFontaine, supra*, 496 Mich at 40 (“That the Legislature provided for the law to take immediate effect *upon its filing date*—August 4, 2010—only confirms its textual prospectivity” (emphasis in original; citation omitted)), *Buhl v City of Oak Park*, ___ NW2d ___; 2021Westlaw 2350031, *10 (2021) (“The statute bears an effective date of January 4, 2017, which is after the accident occurred. The statute’s silence on retroactivity along with the effective date offers textual support for the conclusion that the statute is not retroactive.” Viviano, concurring) (Attached as Exhibit A to this brief).

The above authorities are clear and controlling. Here, as above, there is nothing in MCL 600.5851b that suggests its relevant provisions should apply retroactively, the statute took immediate effect on June 12, 2018, and the Legislature specifically chose to identify very limited circumstances, not at issue here, where retroactive application of the statute does attend. In these

circumstances, the controlling statutory provisions must be applied prospectively and Plaintiff's claim fails as a matter of law.

b. The limited exceptions to the rule of prospectivity do not apply here.

In the very recent (June 9, 2021) *Buhl* case (Exhibit A here), the Michigan Supreme Court again emphasized the controlling feature of the legislative intent. *Buhl* at *4 (quoting *Lynch, supra*, 463 Mich at 583); see also *Buhl* at *10 and 11, Viviano concurring). The *Buhl* court went on to discuss four principles that had been offered by the *LaFontaine* court¹: First, the court considers whether there is specific language for providing retroactive application. Second, at times the statute is not regarded as operating retroactively if it relates to an antecedent event. Third, a law may not be applied retroactively if it impairs vested rights acquired under existing laws or creates new obligations or duties with respect to transactions or considerations already passed. And, fourth, a corollary to the third factor, a remedial or procedural act that does not affect vested rights may be given retroactive effect. 496 Mich at 38-39, quoted in *Buhl* at *4.

The first principle has been addressed above and does not support retroactive application of the statute. The Legislature's intent was that the provision at issue apply prospectively.

The second *LaFontaine* principle also supports Defendant in that it does not apply: excepting only abuse by medical professionals, the act concerns criminal sexual conduct occurring after the effective date of 2018.

The third factor heavily favors Defendants in this case and highlights the necessity of applying the relevant provisions of the amended act only prospectively. Accepting Plaintiff's

¹ The *LaFontaine* court referred to these as "four principles [to] keep in mind." 496 Mich at 38.

allegations as true, the alleged sexual abuse occurred in 1999. Prior to the adoption of the amended act in 2018, Plaintiff's negligence claim was controlled by a three year statute of limitations that expired in 2002. As of that date, each Defendant had the vested right to believe no negligence claim could be sustained regarding 1999 acts or omissions. In these circumstances—where the statute of limitations had run before the effective date of an amended act extending the limitations period—Defendants' vested rights cannot retroactively be impaired. *Straight's Estate v Straight*, 329 Mich 319, 325; 45 NW2d 300 (1951) (explaining that a vested right in the running of the statute of limitations exists when the statute of limitations “has completely run and barred the action”), see also *People v Chesebro*, 185 Mich App 412, 419; 463 NW2d 134, 137 (1990) (court applied amended statute of limitations because pre-amended version had not yet expired when amended version became effective, defendant had not acquired a right to the statute of limitations defense; “had the charge against defendant already been barred at the time the amendment became effective, we would indeed have a different situation before us.”)

In *LaBar v Cooper*, 376 Mich 401; 137 NW2d 136 (1965), the court addressed this issue in the analogous context of the question of whether an amended pleading can relate back to an original filing. The *LaBar* court pointed out that in that context restrictions are necessary so that “claims clearly barred” could not be “resurrected.” *Id.* 376 Mich at 405. The *LaBar* court further explained that the law must satisfy

the basic policy of the statute of limitations, because the transactional basis of the claim must still be pleaded before the statute runs, thereby giving defendant notice within the statutory period that he must be prepared to defend against all claims for relief arising out of that transaction.

Id. at 406 (citation omitted).

In summary, the third LaFontaine principle strongly supports Defendants in this case.

As does the fourth principle. That principle indicates that remedial or procedural acts “not affecting vested rights” may be given retroactive effect. 496 Mich at 38-39. That principle clearly favors Defendants because, as established above, retroactive application of the statute at issue here *would* affect vested rights. Additionally, any argument that the statute of limitations is merely remedial or procedural has already been rejected by our courts. While statute of limitations are generally regarded as procedural, such statutes necessarily affect substantive rights where causes of action can be lost entirely because the action is time barred. *Davis, supra*, 272 Mich App at 160-161. In general, the remedial-procedural exception does not apply to statute of limitations, “despite the categorizing or characterization of such statutes as procedural in nature.” *Id.* Instead, “the principle that statutes of limitations are to be applied prospectively parallels an accompanying, well-accepted principle that the pertinent statute of limitations is the one in effect when the plaintiff’s cause of action arose.” *Id.* at 162-163.

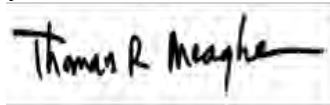
Consequently, an analysis of the four guiding principles from *LaFontaine* reinforces the conclusion necessarily drawn from an analysis of the Legislature’s intent: the statutory provision on which Plaintiff must rely applies prospectively and thus does not save his case.

CONCLUSION

Plaintiff’s claims are barred by the statute of limitations. This motion should be granted and the Complaint dismissed with prejudice.

Respectfully submitted,

FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for Defendant Diocese of Lansing



Dated: July 15, 2021

By: _____
Thomas R. Meagher (P32959)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

BRIAN McLAIN,

Plaintiff,

v

Case No. 21-31108-NO

Hon. L. Suzanne Geddis

FR. RICHARD LOBERT, THE ROMAN CATHOLIC
DIOCESE OF LANSING and THE ROMAN CATHOLIC
ARCHDIOCESE OF BALTIMORE, individually and
jointly and severally.

Defendants.

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**PLAINTIFF'S RESPONSE TO DEFENDANT DIOCESE OF LANSING'S MOTION FOR
SUMMARY DISPOSITION**

Now Comes Plaintiff, by and through his attorneys, JOHNSON LAW, PLC, and for his
Response to Defendant Diocese of Lansing's Motion for Summary Disposition, states as follows:

For the reasons set forth in the accompanying brief below, Brian McLain's claims are valid
and timely under MCL 600.5851b.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny Defendant's Motion for Summary Disposition.

BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT DIOCESE OF LANSING'S MOTION FOR SUMMARY DISPOSITION

Now Comes Plaintiff, by and through his attorneys, JOHNSON LAW, PLC, and for his Brief in Support of his Response to Defendant Diocese of Lansing's Motion for Summary Disposition, states as follows:

Facts

Brian McLain was a troubled youth, who was entered into the Maxey Boys School in July 1998. He attended that school until July 1999. In approximately March 1999, when Brian was 16 years old, Richard Lobert, a priest ordained by the Archdiocese of Baltimore, and working as a priest at the Maxey Boys School for the Archdiocese of Detroit and Diocese of Lansing, sexually assaulted Brian McLain by forcing Brian to perform masturbatory acts upon him. Brian was a minor at the time this sexual assault occurred. (**Exhibit A**, Complaint)

Brian McLain eventually became dependent upon alcohol and opiates, and suffered from bipolar disorder and ADHD. He takes anti-psychotics such as Seroquel and Artane, amphetamines such as Adderall, and Suboxone to treat his mental illnesses and drug dependency. In November 2020, through psychotherapy, he first connected his significant mental health challenges with the trauma that Richard Lobert exacted upon him.

Standard of Review

Defendant Diocese of Lansing brings a Motion for Summary Disposition pursuant to MCR 2.116(C)(7). A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence; if such material is submitted and the substance or

content of the supporting proofs are admissible in evidence, then it must be considered. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817, 823 (1999). However, unlike a motion under subsection (C)(10), neither movant nor the responding party is required to file supportive material, and the opposing party need not reply with supportive material. Rather, the contents of the Complaint are accepted as true unless contradicted by documentation submitted by the movant. *Id*, citing *Patterson v Kleiman*, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994). As such, "All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party." *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997).

In this motion, Defendant Diocese of Lansing has provided no documentation refuting Plaintiff's claims. As such, the contents of the Complaint are accepted as true.

Law

Defendant Diocese of Lansing brings a motion for summary disposition, arguing that Brian McLain's claim is barred by the statute of limitations, and therefore that the claim against Diocese of Lansing should be dismissed for Father Lobert's sexual assault of Brian McLain when he was a minor. However, defendant is mistaken, as Michigan law supports Brian's ability to bring a claim against his assaulter.

Ia. Brian McLain's claim under MCL 600.5851b is brought timely and does not frustrate any "policy" considerations for statutes of limitations

As Defendant Diocese of Lansing states in its Motion for Summary Disposition, in *Lothian v City of Detroit*, 414 Mich 160, 164-167; 324 NW2d (1982), the court summarized some of the policies supporting the application of the statute of limitations as follows:

A statutory limitations period represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action. A statute of limitations is a statute of presumption. The fact of 'delay extending to the limit prescribed', without further proof, 'is itself a conclusive bar' to suit . . .

Limitations periods created by statute are grounded in a number of worthy policy considerations. They encourage the prompt recovery of damages . . . ; they penalize plaintiffs who have not been industrious in pursuing their claims . . . ; they “afford security against stale demand when the circumstances would be unfavorable to a just examination and decision” . . . ; they relieve defendants of the prolonged fear of litigation . . . ; they prevent fraudulent claims from being asserted . . . ; and they “ ‘remedy *** the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert’ “ (citations omitted).

As stated in *Lothian*, the policy consideration for statute of limitations represents a “reasonable period of time that a claimant will be given in which to file an action.” It also encourages “prompt recovery of damages . . . security against stale demand . . . [and] remedy the general inconvenience resulting from delay in the assertion of a legal right.”

In this context, Brian McLain first connected the causal relationship between his sexual assault and his mental health maladies in November 2020. He has brought suit within three years of making this connection as is required under accrual option of the statute, which became effective on June 12, 2018. The mental health professional who counselled Brian McLain as Brian made this causal connection noted these temporally recent findings regarding Brian’s injuries, and his past assaults, and thus the claim is “fresh” and not “stale.” There would also be no prejudice to Richard Lobert, the Diocese of Lansing, or the Archdiocese of Baltimore, as sexual assault has never been allowed under Michigan law, and the recovery of damages for injuries caused by sexual assault has always been permitted under Michigan law. The fact that the Michigan Legislature enacted MCL 600.5851b to generally expand the time that a victim of sexual assault as a minor has to file a lawsuit claiming civil damages for such shows the general intent of the Legislature in this situation: to protect victims of sexual assault, not to protect their abusers. Brian McLain’s case violates none of the reasonable policy decisions behind application of statutes of limitation, as suit was filed within the time prescribed under MCL 600.5158b, namely “at any time before . . . 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.”

Ib. Diocese of Lansing erroneously defines “accrual” as when the sexual assault occurred, whereas the statute provides for accrual of such claims explicitly to the contrary

Despite defendants’ assertion, this is not a case of “retroactivity.” Defendants attempt to bind the “accrual” of this case to the date the sexual assault took place. Under Defendants’ analysis of the law, since the sexual assault took place before June 12, 2018, the controlling statute cannot be applied “retroactively.” However, Defendants’ claims misconstrue the plain language of the statute. MCL 600.5851b states that:

“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.” [emphasis added]

Reading of the statute shows that the only temporal considerations relevant to when the claim accrues are 1) that, “while a minor,” an individual was the victim of sexual assault and 2) that the case is filed before the individual reaches 28 years of age, or within three years of connecting the causal relationship between the criminal sexual conduct and the injury.

Brian McLain first realized the causal connection between his mental illnesses and drug dependency and being sexually assaulted by Richard Lobert through counseling with a therapist in November 2020, at which time he disclosed that he was sexually assaulted while a minor at Maxey Boys School. Thus, his claim under MCL 600.5158b did not accrue until November 2020. That accrual date is **after** the effective date of MCL 600.5851b.

Because Brian McLain only realized the causal connection between his past sexual assault and his mental illnesses and drug dependency through counseling that began on November 2020, Brian's claim "accrued" with this discovery, which was after the passage of MCL 600.5851b. There is no need to consider Defendants' urging to consider whether Plaintiff's claims should be evaluated by an analysis of the retroactive application of the statute, because his claim accrued after the effective date of that statute.

Defendant Diocese of Lansing's reliance on *Lemmerman v Fealk*, 449 Mich 56, 63-64; 534 NW2d 695 (1995) is misplaced. *Lemmerman* interpreted the definition of accrual under MCL 600.5805. It was decided in 1995, before the effective date of MCL 600.5851b, to interpret MCL 600.5805. Plaintiff's claims do not rely upon MCL 600.5805, but rather MCL 600.5851b. The definition of "accrual" in MCL 600.5805 has no bearing on when a case accrues under MCL 600.5851b, a statute specifically designed to be an "exception to period of limitations" (see the Prefatory-Materials Canon) that would normally control sexual assaults, to protect individuals who suffered sexual assault while a minor. MCL 600.5805, admittedly, is the general statutory provision that would bar Plaintiff's claims. However, Plaintiff brings his claims under MCL 600.5851b, a statute specifically passed into law as an exception to the general period of limitations that allows him to bring claims for sexual assault he suffered as a minor.

Ic. Plaintiff's claim do not rely upon "repressed memory," but rather the fact that he had a reasonable delay in his ability to connect his injuries with the sexual assault at the hands of Father Lobert

Defendant Diocese of Lansing claims that "repressed memories" are not supported by Michigan law. This is another "red herring" argument. Plaintiff's claims do not rely upon "repressed memory." Rather, they rely upon Brian McLain's recent connection between his mental

illnesses and drug dependency with the sexual assault he suffered as a minor perpetrated by Father Lobert.

Brian McLain first made the connection between his problems and Father Lobert's sexual assault in November 2020. This was because Brian McLain was already a troubled youth prior to the incident, and he did not realize the extent that Father Lobert's sexual assault further drove him down the path toward mental illness and drug dependency that would lead to the problems that Brian McLain continues to suffer from daily.

Plaintiff expects that, through the course of discovery and through continued expert examination and review of his case, he will be able to support the claim and explain the rationale for why he could not previously understand the connection between the sexual assault and his mental illness and drug dependency. Therefore, Plaintiff's claims cannot be dismissed, as Plaintiff expects that he will be able to establish the foundation for his being unaware of the connection between his injuries and the sexual assault suffered at the hands of Father Lobert.

Id. MCL 600.5851b was passed into law specifically to protect all individuals who suffered sexual assault as a minor, not just those who were minors at the time the statute was passed

1. MCL 600.5851b makes Plaintiff's claims timely, as they are based upon when the injury and sexual assault were causally connected, rather than when the sexual assault occurred

Although irrelevant in this particular context, since Brian McLain's claim did not "accrue" prior to the passage of MCL 600.5851b, Plaintiff nonetheless will address defendant's assertions that the Legislature only meant to apply it prospectively, and therefore protect only individuals sexually assaulted as children after the passage of the statute.

The major canons that defendant Diocese of Lansing ignores are 1) the Ordinary-Meaning Canon, under which words are to be understood in their ordinary, everyday meanings—unless the

context indicates that they bear a technical sense; 2) the Surplusage Canon, under which every word and every provision is to be given effect (*verba cum effectu sunt accipienda*) and that none should be ignored or needlessly be given an interpretation that causes it to duplicate of another provision or to have no consequence, and 3) the Prefatory-Materials Canon, under which a preamble, purpose clause, or recital is a permissible indicator of meaning.

Under the ordinary meaning doctrine, the Court must interpret what the meaning of “at any time before . . . 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.” Defendant Lobert asserts that the Court must examine when the sexual assault occurred and to decide the question of whether the Legislature intended this provision to be retroactive. The Legislature’s intent is made clear by 1) the practical effect of in passing this statute to extend the statute of limitations and 2) by the plain meaning of the words “at any time before . . . three years after the date the individual discovers . . . both the individual's injury and the causal relationship between the injury and the criminal sexual conduct.” The words “at any time” being modified by the following words in the statute, “before . . . three years after the date the individual discovers . . . both the individual's injury and the causal relationship between the injury and the criminal sexual conduct” shows that the Legislature meant to have claims accrue based upon when the “causal relationship between the injury and the criminal sexual conduct” occurred. If the Legislature meant to establish a temporal component based upon the year the sexual assault occurred or the passing of the statute, they could have easily done so, as the Michigan Legislature precisely did under the more specific provisions of MCL 600.5158b(3), which pertain to physician assaults not germane to the present case.

Defendant Diocese of Lansing argues that MCL 600.5158b(3) shows a specific “retroactive” intent. However, defendant’s reading of MCL 600.5158b(3) is faulty. MCL 600.5158b(3) merely states that:

“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 . . .”

Defendant argues that, because the Legislature added specific dates of “December 31, 1996” and “before 2 years before the effective date of the amendatory act,” Legislature intended this statute to have a “retroactive” effect. However, this is based on a faulty reading of MCL 600.5851b(1) and (3). MCL 600.5851b(1)’s only temporal requirements depend on the age of the claimant when he wishes to bring suit (before 28 years old) *or* within three years of when he makes the causal connection between the criminal sexual misconduct suffered as a minor and his injury. Under no explicit or implicit reading of the statute is the date upon which the assault occurred a factor (so long as the victim was a minor when the assault took place).

MCL 600.5851b(3) provides relief to individuals who can bring suit “regardless of any period of limitation under subsection (1)” In this regard, the Legislature did not intend to make MCL 600.5851b(3) retroactive while making MCL 600.5851b(1) prospective only; it meant to allow individuals to bring suit “**regardless of any period of limitation under subsection (1)**” and thus bring suit *even if* the individual is (a) over the age of 28, and (b) more than three years have elapsed since the individual connected his/her injuries with the sexual assault suffered as a minor, so long as the victim can prove the other elements contained within MCL 600.5851b(3).

MCL 600.5851b is a specific physician-based exception intended to allow individuals over the age of 28 who had long since connected their injuries with sexual assaults suffered as minors

(many at the hands of a physician whose tenure as a gymnastics medical director and Michigan State University occurred from 1997 to 2015). Defendants in this case are not physicians.

Only two organizations opposed the signing of MCL 600.5851b: 1) the American Tort Reform Association, an organization diametrically opposed to personal injury lawsuits and plaintiffs, and 2) the Michigan State Medical Society, the organization involved in the tenure of a physician who happened to be particularly affected by the passage of MCL 600.5851b(3). The Michigan Legislature passed MCL 600.5851b in the exact form opposed by these organizations.

Richard Lobert and the other Defendants in this lawsuit were protected by the former statute of limitations. MCL 600.5851b was specifically passed to be an “exception to period of limitations” (see the Prefatory-Materials Canon) that would normally control sexual assaults, to protect individuals who suffered sexual assault while a minor.

The Legislature meant to protect all victims of sexual assaults as minors, not just those who happened to be sexually assaulted after the passage of the statute. This can be determined by reading the plain language of the statute, in which the only temporal considerations are whether the claimant was sexually assaulted as a minor, and whether the claimant has turned 28 or more than three years have passed since the victim reasonably connected the abuse to claimed damages. This intent can be further determined through the language of subsection (3), which would allow suit specifically for individuals who happened to be sexually assaulted by a physician between 1997 and 2016, regardless whether that individual is over the age of 28 or whether they had connected their injuries with the sexual assault more than three years prior.

2. Even assuming that the claim “accrued” at the time of the sexual assault, the Legislature intended MCL 600.5851b to apply “retroactively” to sexual assaults that occurred before the effective date of the statute

For the reasons stated above, the Legislature manifested its intent to have MCL 600.5851b apply, and thus claims “accrue,” when the connection between the injury and sexual assault as a minor was made. It is not dependent on whether the sexual assault occurred before or after the passage of the statute.

Despite that clear manifestation, Defendant relies on the holdings of a number of cases in purported support of its position that the statute should not be applied “retroactively.” Such cases include *LaFontaine Saline Inc. v Chrysler Group LLC*, 496 Mich 26, 38; 852 NW2d 78 (2014); *Davis v State Employees' Ret Bd*, 272 Mich App 151, 155; 725 NW2d 56, 60 (2006); *Frank W Lynch & Co v Flex Technologies, Inc.*, 463 Mich 578, 583; 624 NW2d 180, 182 (2001); and the recent Supreme Court opinion of *Buhl v City of Oak Park*, ___ NW2d ___; 2021 (attached as **Exhibit B**). Defendant, however, misanalyses and misapplies the holdings of these cases to the present claims regarding Brian McLain.

In *LaFontaine*, the Court decided that whether a statute should be applied “retroactively” depends on applying four factors (known hereby in Michigan jurisprudence as the *LaFontaine* factors):

“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.”

The application of these factors was further reinforced by the *Buhl* decision. Thus, the *LaFontaine* factors must be analyzed to determine whether MCL 600.5851b is to be applied “retroactively.”

The first *LaFontaine* factor to be considered is “whether there is specific language providing for retroactive application.” In this regard, there is indeed specific language that shows that MCL 600.5851b was meant to apply “retroactively” and prospectively. Namely, the statute states that:

“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.” [emphasis added]

The words “at any time before whichever of the following is later” mean that the statute applies “**at any time**” either (a) or (b) is true, whichever is later. This is specific language showing 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.

Defendant relies on *Davis* to make the assertion that “the rules of construction or operation are subservient” to the assumption against retroactivity, and thus that, because the statute does not explicitly state that it is to be applied retroactively, it is meant to only be applied prospectively. However, Defendant fails to acknowledge that “our Supreme Court in *Lynch, id.* at 583-584, stated: The Legislature's intent to apply an amended statute retroactively can be express ***or implied.***” *Davis* at 156 (citing *Thompson v Merritt*, 192 Mich App 412, 417 (1991)). Again, MCL 600.5851b's only temporal considerations for bringing suit are whether the person does so before he/she becomes 28 years old, or within three years of when he/she made the causal connection between his/her injury and the sexual assault. Had the Legislature intended the application of MCL 600.5851b to depend on when the sexual assault occurred, it would have expressed that.

The second *LaFontaine* factor, much like in *Buhl*, is not applicable to the current case because it does not pertain to a specific antecedent event.

Regarding the third *LaFontaine* factor, whether the retroactivity would “impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past,” Plaintiff respectfully submits that no vested right of Defendant is involved in this case. In *Buhl, supra* at P. 8, the Court found that MCL 691.1402a(5) should not be read retroactively to apply to plaintiff's case because:

“the subsequent application of the open and obvious danger doctrine would result in the dismissal of plaintiff's lawsuit because retroactive application would relieve defendant of the legal duty it owed to plaintiff at the time the injury occurred. In other words, because plaintiff's claim had already accrued on the day she was injured, the retroactive application of MCL 691.1402a(5) would effectively rewrite history as to the duty defendant owed plaintiff by absolving defendant of its duty”

In Brian McLain's case, Defendants have no “vested right” that would be impaired by “retroactive” effect of MCL 600.5851b. Prior to MCL 600.5851b being enacted, it was still illegal to sexually assault a minor in Michigan. Thus, a defendant still had the duty to refrain from sexually assaulting a minor, and corporate/organizational defendants would still have the duty to supervise and monitor their employees/agents/representatives to prevent them from sexually assaulting minors. MCL 600.5851b does not change this duty. It merely prescribes an alternate time in which a claimant can make a claim due to the breach of duty, causation, and resulting damages committed or caused by offending defendants. Furthermore, there is no “duty with respect to transactions or considerations,” as there was no contractual agreement between Lobert and McLain allowing for this sexual assault to occur. Defendants argue that “each Defendant had the vested right to believe no negligence claim could be sustained regarding 1999 acts or omissions,” Michigan law has expressly rejected that notion. “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). [emphasis added]. Defendant’s claim that it had a right to rely upon the previous statute of limitations in this case is clearly erroneous.

The fourth *LaFontaine* factor also favors Plaintiff: “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.” Defendants’ assertions fail in two regards. Applying the plain language of MCL 600.5851b, the claim accrued when Brian McLain connected the causal relationship between his mental health illnesses and the sexual assault suffered by Father Lobert. This was **after** the enactment of MCL 600.5851b, and thus the claim “is [not] antecedent to the enactment of the statute.” Therefore, the analysis of whether MCL 600.5851b should be applied retroactively is moot. However, even if one bases the accrual upon the date of the injury, the fourth *LaFontaine* factor nonetheless supports Brian McLain’s claim, as the act does not affect the vested rights of the parties. The core duties that defendants owed Brian McLain are completely unchanged by MCL 600.5851b. Moreover, “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).

There is a “well-established rule that 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 488 (1988). “Generally, remedial statutes are those which provide a remedy . . . for the enforcement of rights and the redress of injuries. They also include statutes intended for the correction of defects, mistakes and omissions in the civil institutions and the administration of the state.” *White v Gen Motors Corp*, 431 Mich 387, 396-397; 429 NW2d 576 (1988), quoting 3 Sands, Sutherland Statutory Construction (4th ed), § 60.02, p 60. In this case, it is clear that the Legislature intended to suppress the evil of predators sexually abusing children by allowing those who suffered sexual

abuse as children redress against their assaulters for the horrible injuries they suffered as children, without the predators being able to hide behind the general three-year statute of limitations that would apply if the individual were assaulted as an adult.

Conclusion

This is not a case involving questions of the “retroactivity” of a statute. MCL 600.5851b became effective on June 12, 2018. It provides for an accrual date of up to three years from the time a victim makes a causal connection between abuse suffered as a minor, and resultant damage. Plaintiff made this causal connection through psychotherapy in November 2020. His claim accrued **after** the statute became effective, not before, as Defendants argue.

Brian McLain connected his mental illnesses and the sexual assault he suffered as a minor at the hands of Richard Lobert in November 2020, when he met with his therapist and discussed his past traumas. Thus, he connected the two after the passage of MCL 600.5851b, and this case does not seek to apply retroactive effect to the statute.

Furthermore, it is clear from the language of the statute that it was meant to act both “retroactively” and prospectively to protect individuals who were victimized by pedophiles as minors. The statute allows one to bring a claim “at any time” before the claimant is 28 years old or within three years after connecting his injuries and the sexual assault suffered, whichever is later. Nothing in this statute requires a consideration as to when the sexual assault occurred, other than regarding minority of the victim at the time of the assault. According to defendant, MCL 600.5851b(3) (the irrelevant “physician” clause) provides specific dates, and therefore was the only section to be “retroactive;” rather, that subsection was added to provide relief to individuals over the age of 28 who had **long since** connected their injuries with sexual assaults suffered as minors at the hands of a physician. MCL 600.5851b generally protects all individuals sexually

assaulted as minors so long as they bring the claim within the time period set in the statute. MCL 600.5851b(3) allows older individuals to bring claims for injuries that they have long since recognized, but does not diminish the protections stated in the general provision of MCL 600.5851b(1). Subsection (3) is not meant to modify that general provision. MCL 600.5851b(3) merely allowed certain individuals to bring claims against physicians “regardless of any period of limitation under subsection (1).”


When applying the *LaFontaine* factors to this case, it is clear that the statute should be applied retroactively to sexual assaults that occurred before enactment of the statute. MCL 600.5852b states that suit may be brought “at any time before whichever of the following is later,” which means that the statute applies “at any time” either (a) or (b) is true, whichever is later. This is specific language (factor one) showing 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. Had the Legislature intended the application of MCL 600.5851b to depend on when the sexual assault occurred, it would have expressed that. Factor two is not germane to this case, as the statute does not make a mention of any specific antecedent event. Furthermore, factors three and four also support Brian McLain’s claims as there is no impairment of vested rights. The duty to refrain from sexually assaulting minors was the same in 1999 as it is today. A defendant still had, and has, the duty to refrain from sexually assaulting a minor, and corporate/organizational defendants had, and still have, the duty to supervise and monitor their employees/agents/representatives to prevent them from sexually assaulting minors. Although defendants argue that “each Defendant had the vested right to believe no negligence claim could be sustained regarding 1999 acts or omissions,” Michigan law has expressly rejected

that notion. "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). [emphasis added]

For these reasons, Plaintiff respectfully requests that this Honorable Court deny Defendant's Motion for Summary Disposition.

Respectfully submitted,

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Dated: September 23, 2021

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause at their respective addresses disclosed on the pleadings on the 23rd day of September, 2021 by:

- US Mail Delivery Hand Delivery
- Overnight Courier Facsimile
- E-Correspondence E-File & Serve



SACHÉ JUNCAJ

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

BRIAN McLAIN,

Plaintiff,

v

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

FR. RICHARD LOBERT, THE ROMAN
CATHOLIC DIOCESE OF LANSING and
THE ROMAN CATHOLIC ARCHDIOCESE
OF BALTIMORE, individually and jointly
and severally,

Defendants.

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**DEFENDANT THE ROMAN CATHOLIC ARCHDIOCESE OF BALTIMORE'S
MOTION FOR SUMMARY DISPOSITION**

Pursuant to Rules 2.116(C)(1) and (7) of the Michigan Court Rules, Defendant The Roman Catholic Archdiocese of Baltimore (“Archdiocese of Baltimore”), hereby moves for summary disposition and the dismissal of Plaintiff’s Complaint. For the reasons set forth in the accompanying Brief in Support, the court lacks personal jurisdiction over the Archdiocese of Baltimore. Further, and in the alternative, Plaintiff’s claim should be dismissed because it is barred by the applicable statute of limitations.

Dated: July 16, 2021

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v

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

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BRIEF IN SUPPORT OF
DEFENDANT THE ROMAN CATHOLIC ARCHDIOCESE OF BALTIMORE'S
MOTION FOR SUMMARY DISPOSITION

PRELIMINARY STATEMENT

Defendant the Roman Catholic Archdiocese of Baltimore (“Archdiocese of Baltimore”), by and through its undersigned attorneys, submits this brief in support of its Motion for Summary Disposition pursuant to Rules 2.116(C)(1) and (7) of the Michigan Court Rules.

The Archdiocese of Baltimore, a religious corporation incorporated and headquartered in Maryland, has no contacts with Michigan relating to this action. As set forth more fully herein, Plaintiff has completely failed to allege any contact whatsoever between the Archdiocese of Baltimore and Michigan, because the Archdiocese of Baltimore has never done anything to purposefully avail itself of the laws of Michigan. See Ex. A, Affidavit of Diane L. Barr, J.D., J.C.D., Ph.D. Accordingly, Plaintiff has failed to carry his burden to establish this Court’s personal jurisdiction over the Archdiocese of Baltimore, and his claim against the Archdiocese of Baltimore should be dismissed.

In the alternative, Plaintiff’s Complaint should be dismissed because it was filed long past the applicable three-year statute of limitations. Plaintiff’s claim arises from alleged sexual abuse in 1999, about 22 years ago. There is no exception to the statute of limitations that applies in this matter and thus the Complaint should be dismissed with prejudice.

STATEMENT OF FACTS

In his Complaint, Plaintiff Brian McLain alleges that he was the victim of sexual abuse perpetrated by Richard Lobert, a Roman Catholic priest serving in the Diocese of Lansing. Ex. B, Compl. ¶¶ 2, 3, 8, 9, 10. According to the Complaint, the abuse began in 1999, when Mr. McLain was a resident of W.J. Maxey Boys Training School in Livingston County, Michigan. *Id.* ¶¶ 8, 9, 10. During this time, Lobert visited W.J. Maxey Boys Training School “to provide religious services and counseling to residents of the facility,” including to Plaintiff. *Id.* ¶ 9. The abuse allegedly occurred at the W.J. Maxey Boys Training School in Livingston County, Michigan.

The formal corporate name of the Archdiocese of Baltimore is Roman Catholic Archbishop of Baltimore, a corporation sole. Ex. A, Barr Aff. 5. It is a nonprofit, nonstock, religious corporation organized and incorporated under the laws of the State of Maryland. *Id.* Its headquarters is in Baltimore, Maryland. *Id.*; Ex. B, Compl. ¶ 5.

The entire global Catholic Church is divided into jurisdictions called dioceses with defined geographic borders. Ex. A, Barr Aff. 6. Some dioceses are designated as Archdioceses. *Id.* The geographic territory of the Archdiocese of Baltimore is entirely in the State of Maryland, and consists of Baltimore City and nine nearby counties in central Maryland. *Id.* The Diocese of Lansing is currently comprised of 10 counties covering 6,218 square miles: Clinton, Eaton, Genesee, Hillsdale, Ingham, Jackson, Lenawee, Livingston, Shiawassee and Washtenaw counties.

Each diocese is led by a bishop or archbishop. *Id.*, at 7. Under the law of the Roman Catholic Church, called canon law, the (arch)bishop of the (arch)diocese has power to govern the Church within the territory of his (arch)diocese. *Id.* The head of the Archdiocese of Baltimore is the Archbishop of Baltimore, who since 2011 has been Most Rev. William E. Lori. *Id.* The Archbishop of Baltimore has no power to exercise Church governance in the State of Michigan. *Id.* To serve as a priest, a priest requires authority of the bishop of the diocese where he wishes to serve. *Id.* at 8. For example, to serve in the geographical territory of the Diocese of Lansing, Michigan, including Livingston County, a priest would need to seek authority from the Bishop of Lansing. *Id.*

Father Richard Lobert has not been an employee of the Archdiocese of Baltimore since at least 1996. *Id.* at 9. Since at least 1996, and during the time relevant to this lawsuit (1999), Fr. Lobert has not received a salary, not received employee benefits, and has not had any assignment from the Archdiocese of Baltimore. *Id.* In 1995, Father Lobert sought employment in Michigan.

Id. at 10. Since about 1995, Father Lobert has been employed and engaged in ministry in Michigan, outside the territory of the Archdiocese of Baltimore. *Id.* When acting in the state of Michigan, Fr. Lobert was not acting under the supervision or control of the Archdiocese of Baltimore. *Id.*

Since at least 1996 to the present, the Archdiocese of Baltimore has no operations, physical location, officers, or employees in Michigan. *Id.* at 12. Since at least 1996 to the present, the Archdiocese of Baltimore has not owned or leased any property in Michigan. *Id.* Since at least 1996 to the present, the Archdiocese of Baltimore has never registered to do business in Michigan. *Id.* Since at least 1996 to the present, the Archdiocese of Baltimore has never directed involvement in the provision of goods or services in Michigan. *Id.* Since at least 1996 to the present, the Archdiocese of Baltimore has not had any bank account in Michigan. *Id.*

Notably, the Complaint does not allege that the Archdiocese of Baltimore ever engaged in any activity in Michigan or directed conduct toward the state of Michigan. The Plaintiff merely makes erroneous and unsupported legal conclusions asserting that Lobert was an employee or agent of the Archdiocese of Baltimore at the time the alleged abuse occurred. However, Plaintiff fails to support these legal conclusions with facts, as no facts exist supporting these conclusions.

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF PERSONAL JURISDICTION.

A. Standard of Review

The plaintiff “bears the burden of establishing personal jurisdiction over the defendant” and must make a prima facie showing to succeed. *Glenn v TPI Petroleum, Inc*, 305 Mich App 698, 705 (2014) (quoting *Yoost v Caspari*, 295 Mich App 209, 221 (2012)). In reviewing a motion under MCR 2.116(c)(1), the factual allegations in the complaint must be taken as true, unless defendant’s documentary evidence (including affidavits) contradicts the allegations in Plaintiff’s

pleading. Then, “the plaintiff may not rest on mere allegations but must produce evidence of his or her prima facie case establishing jurisdiction.” *Glenn*, 305 Mich App at 702 (quoting *Yoost*, 295 Mich App at 221).

Plaintiff's Complaint should be dismissed for lack of personal jurisdiction because he has failed to allege facts, and no facts exist, that support the exercise of either general or limited personal jurisdiction over the Archdiocese of Baltimore in Michigan. Further, the Archdiocese of Baltimore has submitted an affidavit establishing that the Archdiocese of Baltimore does not have the requisite “minimum contacts” with Michigan and that personal jurisdiction would not be proper under Michigan's long-arm statutes. As such, this court should dismiss this action for lack of personal jurisdiction.

B. The Framework to Determine Whether Plaintiff Has Met His Burden To Establish Personal Jurisdiction Over The Archdiocese of Baltimore Is A Two-Step Analysis.

Michigan courts “must have in personam jurisdiction over the party” before the “court may obligate a party to comply with its orders.” *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 427; 633 NW2d 408, 412 (2001) (affirming dismissal of complaint against out-of-state ski resort for lack of personal jurisdiction despite advertising directed to Michigan). Personal jurisdiction generally requires a two-step inquiry in which the court asks “(1) do the defendant's acts fall within the applicable long-arm statute, and (2) does the exercise of jurisdiction over the defendant comport with due process.” *Green v Wilson*, 455 Mich 342, 347; 565 NW2d 813, 815 (1997) (citing *Starbrite Distributing v Excelda Mfg Co*, 454 Mich 302 (1997)). Importantly, personal jurisdiction under Michigan's long-arm statutes “may be established by way of general personal jurisdiction or specific (limited) personal jurisdiction.” *Oberlies*, 246 Mich App at 427. Michigan's long arm statutes are “coextensive with due process,” such that “if a defendant's actions or status

fit within a provision of a long-arm statute, jurisdiction may be extended as far as due process permits.” *Green*, 455 Mich at 350.

If a long-arm statute applies, Michigan courts must then confirm that exercising personal jurisdiction over the nonresident defendant comports with Due Process of law. The Due Process Clause requires that the nonresident defendant purposefully availed itself of the laws of Michigan through “minimum contacts” with Michigan such that the exercise of jurisdiction does not offend “traditional notions of fair play and substantial justice.” *Witbeck v Bill Cody's Ranch Inn*, 428 Mich 659, 666; 411 NW2d 439, 443 (1987) (quoting *Int'l Shoe Co v Washington*, 326 US 310, 316 (1945)).

C. The Court Lacks General Jurisdiction as to the Archdiocese of Baltimore, as the Archdiocese of Baltimore Is Not “At Home” in Michigan.

Under Michigan’s general jurisdiction long-arm statute, MCL 600.711, demonstration of the existence of any of the following relationships between a corporation and the state of Michigan is a sufficient basis for a court to exercise general personal jurisdiction over the corporation:

- (1) Incorporation under the laws of this state;
- (2) Consent, to the extent authorized by the consent and subject to the limitations provided in [MCL 600.]745;
- (3) The carrying on of a continuous and systematic part of its general business within the state.

See also *Glenn*, 305 Mich App at 706–07.

First, the Archdiocese of Baltimore is incorporated under the laws of the State of Maryland, not Michigan. Ex. A, Barr Aff. 5. Second, the Archdiocese of Baltimore does not consent, and has not consented, to general personal jurisdiction by the courts of Michigan. *Id.* at 13. Third, the Complaint makes no factual allegation that the Archdiocese of Baltimore carries on continuous or systematic business within Michigan. In determining what is meant by “continuous and systematic,” Michigan courts “have looked at whether the particular corporate entity has a physical

location, officers, employees or bank account in Michigan.” *Glenn*, 305 Mich App at 707. “The United States Supreme Court has found it appropriate to exercise general jurisdiction over foreign corporations when it has been determined that ‘their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.’” *Id.* at 708 (quoting *Goodyear Dunlop Tires Operations, SA v Brown*, 564 US 915, 919 (2011)). As evidence by the Affidavit of Dr. Diane Barr, the Archdiocese of Baltimore does not own or lease real property in Michigan, does not have any employees or officers in Michigan, has no physical location in Michigan, has no bank accounts in Michigan, and has no involvement in the provision of goods or services in Michigan. Ex. A, Barr Aff. 12. No facts are alleged or can be proven to show that the Archdiocese of Baltimore carries on a continuous and systematic part of its general business within Michigan—indeed it does not carry on any business in Michigan.

In *Glenn v TPI Petroleum, Inc*, the Court of Appeals of Michigan declined to exercise general jurisdiction over an out-of-state defendant when the defendant was a “Delaware corporation with its principal place of business in San Antonio, Texas,” was not registered to do business in Michigan, did not own or lease real property in Michigan, and did not have employees or “direct involvement in the provision of goods or services— in Michigan or elsewhere.” 305 Mich App at 709. There is simply no basis for the Court to exercise general personal jurisdiction over the Archdiocese of Baltimore.

D. The Court Lacks Limited Personal Jurisdiction over the Archdiocese of Baltimore since the Long-arm Statute Is Not Satisfied and the Archdiocese of Baltimore Lacks even Minimal Contacts with Michigan.

1. Plaintiff does not satisfy Michigan’s limited personal jurisdiction long-arm statute.

A Michigan court may exercise limited personal jurisdiction over a nonresident defendant only if the limited jurisdiction long-arm statute applies and the exercise of limited personal

jurisdiction comports with Due Process. Plaintiff fails to meet his burden to establish both 1) that limited jurisdiction is appropriate under the long-arm statute and also 2) that the Archdiocese of Baltimore possesses the necessary minimum contacts to satisfy Due Process.

Under MCL 600.715, the long-arm statute for limited personal jurisdiction is met if any of the following relationships between a nonresident corporation or its agent and the state exist:

- (1) The transaction of any business within the state;
- (2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort;
- (3) The ownership, use, or possession of any real or tangible property situated within the state;
- (4) Contracting to insure any person, property, or risk located within this state at the time of contracting;
- (5) Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant.

Plaintiff does not allege how any of the specified bases for limited jurisdiction can be satisfied. The Archdiocese is not alleged to have taken any action in the State of Michigan, and the fact that other Defendants acted in Michigan or Plaintiff allegedly felt harm in Michigan cannot be attributed to Defendant Archdiocese of Baltimore. *See Storie v Beech Aircraft Corp*, 417 F Supp 141, 144 (ED Mich 1976) (rejecting argument that plaintiff feeling harm in Michigan because he resides there is sufficient to support limited long-arm jurisdiction under 600.715(2)); *Vargas v Hong Jin Crown Corp*, 247 Mich App 278, 286; 636 NW2d 291, 297 (2001) (“The defendant’s contacts with the forum state must be analyzed in terms of the defendant’s own actions rather than the unilateral activity of another party or a third person.” (citing *Witbeck*, 428 Mich at 667-68)).

2. Plaintiff does not establish “minimum contacts” between the Archdiocese of Baltimore and Michigan to satisfy Due Process.

However, even assuming the long-arm statute is met, under the second step of the jurisdiction analysis the court must confirm that the defendant’s actions in Michigan are sufficient to comport with Due Process. Put another way, it must be shown that the defendant acted

intentionally in Michigan such that it could expect to be haled into court in Michigan. Here, the Due Process Clause requires the court to employ a three-pronged test to determine if the requisite minimum contacts exist:

First, the defendant must have purposefully availed himself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise from the defendant's activities in the state. Third, the defendant's activities must be substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable.

Vargas, 247 Mich App at 284 (quoting *Jeffrey v Rapid Am Corp*, 448 Mich 178, 186 (1995)).

- a. The Archdiocese of Baltimore did not purposefully avail itself of the privilege of conducting activities in Michigan—it conducts no activities in Michigan.

The Archdiocese has shown that it has not purposefully availed itself of conducting activities in Michigan. Purposeful availment is “something akin either to a deliberate undertaking to do or cause an act or thing to be done in Michigan or conduct which can be properly regarded as a prime generating cause of the effects resulting in Michigan, something more than a passive availment of Michigan opportunities.” *Vargas*, 247 Mich App at 285 (quoting *Jeffrey*, 448 Mich at 187-88). Often, courts look at whether some business activity occurring in the State of Michigan is sufficient for persona jurisdiction, for example, a limited amount of advertising or selling of products in the state. Critically, “the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.” *Witbeck*, 428 Mich at 667 (quoting *Hanson v Denckla*, 357 US 235, 253 (1958)). Instead, “it is the relationship of the defendant, the forum, and the litigation that is significant.” *Jeffrey v Rapid American Corp*, 448 Mich 178, 187; 529 NW2d 644, 649 (1995) (citing *Shaffer v Heitner*, 433 US 186, 204 (1977)).

Here, the Archdiocese is not alleged to have engaged in any activity whatsoever in Michigan. This is completely contrary to the well-established requirement that: “The defendant must deliberately engage in significant activities within a state, or create “continuing obligations’ between himself and residents of the forum’ to the extent that ‘it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.” *Vargas*, 247 Mich App at 285 (quoting *Burger King Corp v Rudzewicz*, 471 US 462, 476 (1985)) (emphasis added).

This Due Process requirement “ensures that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts....” *Comm’r of Ins v Albino*, 225 Mich App 547, 561; 572 NW2d 21, 27 (1997)(quoting *Starbrite Distrib, Inc v Excelda Mfg Co*, 454 Mich 302, 310 (1997)).

As confirmed by the affidavit submitted by Dr. Diane Barr, Chancellor of the Archdiocese of Baltimore, the Archdiocese of Baltimore does not have any operations, physical location, or employees in Michigan. The Plaintiff does not, and could not plausibly, allege that the Archdiocese of Baltimore “deliberately engaged in significant activities” in the state of Michigan. It is simply improper to subject the Archdiocese of Baltimore to suit in Michigan because it has never purposely availed itself of Michigan’s laws.

In a factually similar case, the Court of Appeals of New Mexico granted a motion to dismiss for lack of personal jurisdiction from an out-of-state defendant, the Roman Catholic Diocese of Boise. *Doe v Roman Cath Diocese of Boise, Inc*, 121 NM 738; 918 P2d 17 (1996). In that case, a priest previously ordained and incardinated in the Boise Diocese left the Diocese of Boise with permission of the bishop to seek assignment as a priest in another diocese. *Roman Cath Diocese of Boise, Inc*, 121 NM at 740. The priest moved to New Mexico where he served as a priest with the approval of the local Archbishop in New Mexico and allegedly abused the plaintiff. *Id.* The

court concluded that the Diocese of Boise granting the priest permission to work in another state did not “constitute activity whereby the Boise Diocese could reasonably anticipate being haled into court in New Mexico for any and all tortious acts alleged to have subsequently been committed” by the priest. *Id.* at 744. The court also concluded that the Diocese of Boise’s conduct did not “constitute a purposeful act...to avail itself of the benefits and protections of New Mexico law” and therefore New Mexico lacked personal jurisdiction over the Diocese of Boise. *Id.*

Similarly, in *Catholic Diocese of Green Bay v John Doe 119*, 131 Nev 246; 349 P3d 518 (2015), the Supreme Court of Nevada reversed a jury verdict in favor of an abuse plaintiff, ruling that the trial court should have dismissed the out-of-state diocese defendant for lack of personal jurisdiction. There, the priest’s original diocese of Green Bay had sent a letter of good standing and spoke to the local bishop of Reno-Las Vegas about the priest, but even this was not sufficient to show that the Diocese of Green Bay “purposefully availed itself of [Nevada’s] laws and protections.” *Cath Diocese, Green Bay*, 131 Nev at 248; 254. The court concluded the Nevada courts did not have personal jurisdiction over the Diocese of Green Bay. *Id.* at 254.

Just as the courts in New Mexico did not have jurisdiction over a Catholic diocese in Idaho, and the courts in Nevada did not have jurisdiction over a Catholic diocese in Wisconsin, the courts here in Michigan do not have jurisdiction over a Catholic diocese in Maryland. Plaintiff’s attempt to exercise jurisdiction over the Archdiocese of Baltimore would violate the Due Process Clause, and the Archdiocese of Baltimore should be dismissed.

- b. Limited Jurisdiction is improper because the cause of action did not arise from any actions of the Archdiocese of Baltimore’s in Michigan.

The second part of the Due Process analysis requires that “the cause of action must arise from the defendant’s activities in the state.” *Vargas*, 247 Mich App at 284 (citation omitted) (emphasis added). Due process can only be met if the defendant acted in Michigan and those

actions by defendant led to the cause of action. Specific jurisdiction is limited “to claims arising out of the act or acts creating the jurisdictional relationship between the defendant and the state.” *Wulf Oil Corp v Grebe Drilling Co*, 93 Mich App 793, 799; 287 NW2d 344, 347 (1979) (citing *Sifers v. Horen*, 385 Mich 195 (1971)). Here, the Archdiocese of Baltimore engaged in no action in Michigan that led to Plaintiff’s cause of action. Again, the Plaintiff provides no factual basis for the assertion that the Archdiocese of Baltimore conducted any activity in the state whatsoever.

- c. Limited Jurisdiction is improper because the Archdiocese of Baltimore’s activities were not substantially connected with Michigan to make the exercise of jurisdiction over the Archdiocese reasonable.

Finally, Plaintiff does not meet his burden in establishing that the Archdiocese of Baltimore’s actions were substantially connected with Michigan to make the exercise of jurisdiction over the Archdiocese reasonable. For the exercise of specific jurisdiction to comport with “notions of fair play and substantial justice,” courts examine the following reasonableness factors: “the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the more efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.” *Witbeck*, 428 Mich at 669 (quoting *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 292 (1980)) (internal quotations omitted). Nothing in the Complaint supports the finding that the exercise of personal jurisdiction over the Archdiocese of Baltimore would be reasonable.

The Plaintiff has failed to establish through a *prima facie* showing that the Archdiocese of Baltimore purposefully availed itself of the privileges of Michigan, that the alleged misconduct arose from the Archdiocese’s activities in Michigan, and that the Archdiocese’s activities were substantially connected with Michigan to make the exercise of jurisdiction reasonable. Therefore,

the Archdiocese of Baltimore cannot be subject to specific jurisdiction in Michigan and Plaintiff's Complaint should be dismissed.

II. IN THE ALTERNATIVE, PLAINTIFF'S CLAIM AROSE 22 YEARS AGO AND IS BARRED BY THE STATUTE OF LIMITATIONS.

Plaintiff's claim should, alternatively and pursuant to MCR 2.116(C)(7), be dismissed because it is barred by the statute of limitations. In reviewing a motion under MCR 211.6(C)(7), the court accepts as true the plaintiff's well-pleaded allegations but also considers the pleadings, affidavits or other evidence filed to determine whether the claim is barred by limitation as a matter of law. *Blazer Foods, Inc v Restaurant Props*, 259 Mich App 241, 245; 673 NW2d 805 (2003). Plaintiff's claim arose 22 years ago, when he was approximately 16 years old.¹ Plaintiff asserts a claim of negligence against the Archdiocese of Baltimore, and such a claim is generally subject to a three-year statute of limitations under Michigan law. MCL 600.5805(2). Plaintiff's claim must be dismissed as a matter of law because there is no statutory exception that would permit his filing of this claim 22 years after it accrued. *See, e.g., Lemmerman v Fealk*, 449 Mich 56; 534 NW2d 695 (1995).

A. Plaintiff's Claim Is Barred By The Applicable Statute Of Limitations.

The relevant allegations from Plaintiff's complaint are that in 1999, he was a resident of the W. J. Maxey Boys Training School, located in Livingston County. Ex. B, Compl. ¶ 8. Plaintiff further alleges that in 1999 Defendant Fr. Lobert sexually abused Plaintiff at the W. J. Maxey Boys Training School. *Id.* at ¶¶ 9-10. Plaintiff's allegations then jump ahead 21 years to November of 2020, at which time Plaintiff alleges that he revealed to his therapist for the first time that he was abused by Fr. Lobert. *Id.* at ¶ 11.

¹ Plaintiff does not allege his date of birth but upon information and belief, he was born in 1982.

In the leading case on the statute of limitations in this area, *Lemmerman v Fealk*, the Supreme Court of Michigan expressly rejected the argument that repressed memory should toll the running of the applicable statute of limitations. In *Lemmerman*, the Supreme Court of Michigan heard consolidated cases of two plaintiffs who sought to sue their relatives for alleged sexual abuse when plaintiffs were minors some forty to fifty years earlier. 449 Mich at 61-63. The Michigan Supreme 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).

The *Lemmerman* Court also reiterated the purposes behind statutes of limitations, writing:

[Statutes of limitation] encourage the prompt recovery of damages; they penalize plaintiffs who have not been industrious in pursuing their claims; they ‘afford security against stale demands when the circumstances would be unfavorable to a just examination and decision’; they relieve defendants of the prolonged fear of litigation; they prevent fraudulent claims from being asserted; and they ‘remedy ... the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert.’

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 (internal citations and quotations omitted). The *Lemmerman* Court also rejected common law extensions of the applicable statute of limitations, stating:

we decline to apply the discovery rule or disability tolling statute to indefinitely extend the time limitation for bringing tort actions based on alleged sexual abuse of the plaintiffs when they were children. Neither the discovery rule nor the grace period extended to plaintiffs suffering from the disability of insanity comprehends extension of the limitations periods as a result of repression of memory of the

alleged sexual assaults. We defer to the Legislature to consider the appropriateness of extending the limitation period for commencement of suit in such situations.

Id. at 79-80. Thus, Plaintiff's claim is barred by the statute of limitations and should be dismissed unless he establishes that a statutory exception applies.

B. No Statutory Exception Exists To Save Plaintiff's Claim From Dismissal.

In 2018, the Michigan Legislature enacted a law that adjusted the statute of limitations applicable to minor victims of criminal sexual conduct. MCL 600.5851b. That statute provides limited exceptions to the otherwise applicable statute of limitations in cases of child sexual abuse, and appears to be the basis on which Plaintiff believes his claims are timely filed. MCL 600.5851b(1) contains two exceptions for when the alleged victim files suit before:

- (a) "the individual reaches the age of 28 years"; or
- (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."

The first exception, in 5851b(1)(a), does not apply here because, among other reasons, Plaintiff does not allege he was under 28 years old when he filed this lawsuit, and in fact Plaintiff was approximately 38 years old.

Thus, it seems that Plaintiff relies on the second exception, "the b(1)(b) Exception," since he mirrors language from that subsection in his Complaint, at paragraph 13, when he alleges that prior to counseling in November 2020, "Plaintiff did not discover, nor through the exercise of reasonable diligence should he have discovered, both the psychological injuries he suffered and the causal relationship between his psychological injuries and the criminal sexual conduct of Defendant Fr. Richard Lobert." However, even assuming the truth of this conclusory allegation, Plaintiff's reliance on the b(1)(b) Exception fails because the b(1)(b) Exception only applies prospectively—the exception does not contain the express legislative statement of retroactive

application that is necessary for the court to apply the exception retroactively. *See generally, Davis v State Employees' Ret Bd*, 272 Mich App 151, 155–56, 725 NW2d 56, 60 (2006).

As the Michigan Supreme Court has stated recently: “Statutes are presumed to apply prospectively only unless a contrary intent is clearly manifested.” *Brewer v AD Transp Exp, Inc*, 486 Mich 50, 56, 782 NW2d 475, 478 (2010) (citing *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich. 578, 583 (2001)); *see also Davis*, 272 Mich App at 155 (“We note that the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively.” (quoting *Lynch*, 486 Mich at 584)). The b(1)(b) Exception contains no explicit intent that the exception be applied to claims that arose 22 years earlier and would otherwise be time-barred.

The Legislature’s “expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself.” *Davis*, 272 Mich App. at 155-56 (citing *Chesapeake & O R Co v Pub Service Comm*, 382 Mich. 8, 23 (1969); *Briggs v Campbell, Wyant & Cannon Foundry Co*, 379 Mich 160, 164–165 (1967); *In re Davis' Estate*, 330 Mich 647, 651–652 (1951); *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 662 (2002); *Olkowski v Aetna Cas & Surety Co*, 53 Mich App 497 (1974), *aff'd* 393 Mich 758).

In *Frank W Lynch & Co v Flex Technologies, Inc*, the Michigan Supreme Court recently confirmed that without express statutory language indicating that an amendment should be applied retroactively, the amendment should only apply prospectively:

We agree with defendants that there is nothing in the language of the [statute] suggesting a legislative intent that this statute be applied retroactively.... Most instructive is the fact that the Legislature included no express language regarding retroactivity. *See, e.g., Chesapeake & O. R. Co. v. Public Service Comm.*, 382 Mich. 8, 22–23(1969). We note that the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively. *See, e.g., MCL 141.1157; MSA 5.3188(257)* (“This act shall be applied retroactively ...”); *MCL 324.21301a; MSA 13A.21301a* (“The changes in liability that are

provided for in the amendatory act that added this subsection shall be given retroactive application”).

463 Mich 578, 583–84; 624 NW2d 180, 182-83 (2001) (parenthetical omission in original).

More specifically in this context, Michigan courts have long held that the presumption against retroactive application applies particularly to amendments relating to statutes of limitations:

there exists a plethora of cases extending over 100 years of jurisprudence that provide that statutes of limitations enacted by the Legislature are to be applied prospectively absent a clear and unequivocal manifestation of a legislative preference for retroactive application. *In re DeBancourt's Estate*, 279 Mich. 518, 529 (1937); *McKesson v. Davenport*, 83 Mich. 211, 215 (1890); *Harrison v. Metz*, 17 Mich. 377, 378–379 (1868); *Great Lakes Gas Transmission Co. v. State Treasurer*, 140 Mich. App. 635, 650–651 (1985); *Pryber v. Marriott Corp.*, 98 Mich. App. 50, 55 (1980), *aff'd* 411 Mich. 887 (1981), citing ... 20 Michigan Law & Practice, Statute of Limitations, § 3, p. 546 (“Statutes of limitations operate prospectively unless an intent to have the statute operate retrospectively clearly and unequivocally appears from the context of the statute itself.”); *Int'l Business Machines Corp. v. Dep't of Treasury*, 75 Mich. App. 604, 612–614 (1977).

Davis, 272 Mich App at 161.

As a matter of statutory construction, the b(1)(b) Exception provides no indication that the legislature intended it to apply retroactively and therefore the b(1)(b) Exception can only apply prospectively—that is, to claims that arise after June 12, 2018 (the effective date of the b(1)(b) Exception), or at least to claims that were not otherwise time-barred as of June 12, 2018. As of June 12, 2018, Plaintiff's claim was obviously and completely barred by the otherwise applicable three-year statute of limitations since the claim arose in 1999. Without an express statutory indication that the b(1)(b) Exception should apply retroactively to such a barred claim, the claim must be dismissed.

This conclusion is reinforced by the fact that applying the b(1)(b) Exception to this case would revive a claim that was otherwise completely barred by the statute of limitations and such

revival implicates vested rights of the Defendants and would be unlawful itself under Michigan law because of concerns of due process under the Michigan Constitution.

It is possible that prior to the complete running of the statute of limitations, the legislature has greater latitude to retroactively adjust a statute of limitations on a still-live claim. For example, in *In re Straight's Estate*, 329 Mich 319, 325 (1951) the Michigan Supreme Court accepted the general rule announced in 34 Am Jur, 37, Limitations of Actions, Sec. 33 that: "There is no vested right in the running of the statute of limitations unless it has been completely run and barred the action, so that as to existing causes of action which are not barred, the statute may be amended." Once a claim is completely time-barred by a statute of limitations a vested right is created, and "[a] statute may not be applied retroactively if it abrogates or impairs vested rights, creates new obligations, or attaches new disabilities concerning transactions or considerations occurring in the past." *Davis*, 272 Mich App at 158 (citing *Doe v Dep't of Corrections (On Remand)*, 249 Mich App 49, 61 (2001)."

Even if the b(1)(b) Exception could have some limited retroactive application to claims that were not completely barred, it cannot be applied to claims such as Plaintiff's that were completely barred as of the effective date, June 12, 2018. For example, even if a plaintiff whose claim as a minor arose in 2017 (and thus whose claim was not barred by the statute of limitations as of June 12, 2018) might have until his 28th birthday to bring a claim under b(1)(a) or until three years after he discovers his injury and the causal relationship between the injury and the criminal sexual conduct under b(1)(b), the law is particularly clear that if that plaintiff's claim was barred as of June 12, 2018, it cannot permissibly be revived by the legislature through a retroactive change in the statute of limitations.

CONCLUSION

For the foregoing reasons, it is respectfully requested that Defendant's motion be granted and Plaintiff's Complaint against Defendant Roman Catholic Archdiocese of Baltimore be dismissed with prejudice.

Respectfully submitted,

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Dated: July 16, 2021

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

BRIAN McLAIN,

Plaintiff,

v

Case No. 21-31108-NO

Hon. L. Suzanne Geddis

FR. RICHARD LOBERT, THE ROMAN CATHOLIC
DIOCESE OF LANSING and THE ROMAN CATHOLIC
ARCHDIOCESE OF BALTIMORE, individually and
jointly and severally.

Defendants.

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**PLAINTIFF'S RESPONSE TO DEFENDANT ARCHDIOCESE OF BALTIMORE'S
MOTION FOR SUMMARY DISPOSITION**

Now Comes Plaintiff, by and through his attorneys, JOHNSON LAW, PLC, and for his
Response to Defendant Archdiocese of Baltimore's Motion for Summary Disposition, states as
follows:

For the reasons set forth in the accompanying brief below, Archdiocese of Baltimore did act within the State of Michigan by its agent/employee/representative Father Richard Lobert, and Brian McLain's claims are valid and timely under MCL 600.5851b.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny Defendant's Motion for Summary Disposition.

BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT ARCHDIOCESE OF BALTIMORE'S MOTION FOR SUMMARY DISPOSITION

Now Comes Plaintiff, by and through his attorneys, JOHNSON LAW, PLC, and for his Brief in Support of his Response to Defendant Archdiocese of Baltimore's Motion for Summary Disposition, states as follows:

Facts

Brian McLain's Past

Brian McLain was a troubled youth, who was entered into the Maxey Boys School in July 1998. He attended that school until July 1999. In approximately March 1999, when Brian was 16 years old, Richard Lobert, a priest ordained by the Archdiocese of Baltimore, and working as a priest at the Maxey Boys School for the Archdiocese of Detroit and Diocese of Lansing, sexually assaulted Brian McLain by forcing Brian to perform masturbatory acts upon him. Brian was a minor at the time this sexual assault occurred. (Exhibit A, Complaint)

Brian McLain eventually became dependent upon alcohol and opiates, and suffered from bipolar disorder and ADHD. He takes anti-psychotics such as Seroquel and Artane, amphetamines such as Adderall, and Suboxone to treat his mental illnesses and drug dependency. In November 2020, through psychotherapy, he first connected his significant mental health challenges with the trauma that Richard Lobert exacted upon him.

The history and connection between Father Richard Lobert, Diocese of Lansing, and Archdiocese of Baltimore

Defendant Archdiocese of Baltimore brings a motion stating that the State of Michigan lacks jurisdiction as the Archdiocese has not “purposefully availed” itself to Michigan. As will be shown, it “purposefully availed” itself through the establishment of its priest, Father Richard Lobert, as a practicing priest in Michigan under the faculties of the Archdiocese of Baltimore.

Father Richard Lobert was originally ordained to be a priest by the archbishop of Baltimore in 1975. (see **Exhibit B**, Facebook post regarding the 43rd anniversary of Richard Lobert’s ordination).¹ He served various churches under the ecclesiastical jurisdiction of the Archdiocese of Baltimore from 1975 until 1994. (**Exhibit C**, Archdiocese of Baltimore Statement on the Removal of the Priestly Faculties of Father Richard Lobert).² In 1995, Richard Lobert moved to Michigan and began to serve in the school community at Father Gabriel Richard High School, and conduct other activities under the jurisdiction of the Diocese of Lansing. (**Exhibit D**, Diocese of Lansing Statement regarding Reverend Richard Lobert)³ [emphasis added]. Nevertheless, Richard Lobert was and remained “a priest of the **Archdiocese of Baltimore**.” *Id.* Following an internal investigation by the Diocese of Lansing regarding complaints of sexual abuse by Richard Lobert, the Archdiocese of Baltimore made the following statement on January 5, 2021: “Father Lobert is **a priest of the Archdiocese of Baltimore**, and in light of this information, the **Archdiocese of Baltimore has removed the archdiocesan priestly faculties** of Father Lobert.” (**Exhibit C**) [emphasis added].

¹ Accessed online <https://www.facebook.com/FGRHSAnnArbor/photos/today-marks-the-43rd-anniversary-of-fr-loberts-ordination-to-the-priesthood-than/1666413506774255/> on September 20, 2021

² Accessed online <https://www.archbalt.org/press-release-01-05-21/> on September 20, 2021

³ Accessed online <https://www.dioceseoflansing.org/news/statement-regarding-reverend-richard-lobert-april-16-202> on September 20, 2021

Therefore, from 1975 to January 5, 2021, Father Richard Lobert was a priest of the Archdiocese of Baltimore and had priestly faculties under that Archdiocese. Therefore, until further discovery is conducted to ascertain to what extent the Archdiocese of Baltimore supervised the activities of its priest, Father Richard Lobert, while he was conducting activities in the Diocese of Lansing, or to what extent it had knowledge of Richard Lobert's propensities to sexually assault, dismissal on these grounds would be premature.

Standard of Review

Defendant Archdiocese of Baltimore brings a Motion for Summary Disposition pursuant to MCR 2.116(C)(1) and (7).

"The legal question of whether a court possesses personal jurisdiction over a party is also reviewed *de novo*." *Yoost v Caspari*, 295 Mich. App. 209 (2012) (citing *W H Froh, Inc v Domanski*, 252 Mich App 220, 225 (2002)). Whether the exercise of personal jurisdiction over a nonresident is consistent with the notions of fair play and substantial justice required by the Due Process Clause of the Fourteenth Amendment is also reviewed *de novo*. *Id.*, citing to *Jeffrey v Rapid American Corp*, 448 Mich 178, 184-186 (1995).

A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence; if such material is submitted and the substance or content of the supporting proofs are admissible in evidence, then it must be considered. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817, 823 (1999). However, unlike a motion under subsection (C)(10), neither movant nor the responding party is required to file supportive material, and the opposing party need not reply with supportive material. Rather, the contents of the Complaint are accepted as true unless contradicted by documentation submitted by the movant. *Id.*, citing *Patterson v Kleiman*, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994). As such, "All well-

pleaded allegations are accepted as true and construed in favor of the nonmoving party.” *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997).

In this motion, Defendant Archdiocese of Baltimore has provided an affidavit in an effort to refute Plaintiff's claims regarding personal jurisdiction. However, Plaintiff has documented proof contradicting the statements made in that affidavit, and at this early juncture, without discovery, the contents of the Complaint should be accepted as true.

Law

Defendant Archdiocese of Baltimore brings a motion for summary disposition, arguing that 1) the State of Michigan lacks jurisdiction over it, and 2) Brian McLain's claim is barred by the statute of limitations, and therefore that the claim against Archdiocese of Baltimore should be dismissed for Father Lobert's sexual assault of Brian McLain when he was a minor. However, defendant is mistaken, as the Archdiocese of Baltimore purposefully availed itself to the State of Michigan by establishing its priest, Father Richard Lobert, as a practitioner in the State of Michigan. Furthermore, Michigan law supports Brian's ability to bring a claim against his assaulter.

I. The State of Michigan has Personal Jurisdiction over the Archdiocese of Baltimore

Personal jurisdiction requires establishing whether a “defendant's acts fall within the long-arm statute” and if “the exercise of jurisdiction over the defendant comports with due process.” *Green v Wilson*, 455 Mich 342, 347 (1997). Personal jurisdiction “may be established by way of general personal jurisdiction or specific (limited) personal jurisdiction.” *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 427 (2001). When determining whether a case comports with due process,

“The due process analysis concerns three questions: first, has the defendant purposefully availed itself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws; second, does the cause of action arise from the defendant's activities in the state; and third, are the defendant's activities so substantially connected with Michigan that they make the exercise of jurisdiction over the defendant reasonable.”

In the present case, the Archdiocese of Baltimore has specific limited personal jurisdiction in Michigan for the purposes of litigation as it pertains to the actions of Richard Lobert. Under MCL 600.715,

“The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against such corporation arising out of the act or acts which create any of the following relationships: (2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort.”

As previously established, at the time of the sexual assault, Richard Lobert was “a priest of the **Archdiocese of Baltimore**.” (Exhibit D) [emphasis added]. Through him engaging in conduct in the areas under the jurisdiction of the Diocese of Lansing, the Archdiocese of Baltimore acted within the State of Michigan. Richard Lobert held priestly faculties with that entity until it “removed the archdiocesan priestly faculties of Father Lobert” on January 5, 2021. Through Lobert’s conduct and permitting his transfer to Michigan, the Archdiocese of Baltimore “purposefully availed” itself to the State of Michigan. Lobert’s sexual assault, while a “a priest of the Archdiocese of Baltimore,” occurred in Michigan. The State of Michigan is therefore a reasonable jurisdiction to try this case, regarding a priest living and acting in Michigan under the Diocese of Lansing with priestly faculties in the Archdiocese of Baltimore sexually assaulting a Michigan minor, Brian McLain.

Defendants’ reliance on other cases such as *Doe v Roman Cath Diocese of Boise, Inc* or *Catholic Diocese of Green Bay v John Doe* is misplaced. The only statements that Plaintiff has to

rely upon other than the self-serving affidavit provided by the Chancellor of the Archdiocese of Baltimore at this early juncture are those of the Diocese of Lansing and Archdiocese of Baltimore on public websites, in which both entities have stated that “Father Lobert is a priest of the Archdiocese of Baltimore, and in light of this information, the Archdiocese of Baltimore has removed the archdiocesan priestly faculties of Father Lobert.”

II. Brian McLain's claim under MCL 600.5851b is brought timely

As Defendant Diocese of Lansing states in its Motion for Summary Disposition, in *Lothian v City of Detroit*, 414 Mich 160, 164-167; 324 NW2d (1982), the court summarized some of the policies supporting the application of the statute of limitations as follows:

A statutory limitations period represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action. A statute of limitations is a statute of presumption. The fact of ‘delay extending to the limit prescribed’, without further proof, ‘is itself a conclusive bar’ to suit . . .

Limitations periods created by statute are grounded in a number of worthy policy considerations. They encourage the prompt recovery of damages . . . ; they penalize plaintiffs who have not been industrious in pursuing their claims . . . ; they “afford security against stale demand when the circumstances would be unfavorable to a just examination and decision” . . . ; they relieve defendants of the prolonged fear of litigation . . . ; they prevent fraudulent claims from being asserted . . . ; and they “ ‘remedy *** the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert’ “ (citations omitted).

As stated in *Lothian*, the policy consideration for statute of limitations represents a “reasonable period of time that a claimant will be given in which to file an action.” It also encourages “prompt recovery of damages . . . security against stale demand . . . [and] remedy the general inconvenience resulting from delay in the assertion of a legal right.”

In this context, Brian McLain first connected the causal relationship between his sexual assault and his mental health maladies in November 2020. He has brought suit within three years of making this connection as is required under accrual option of the statute, which became effective

on June 12, 2018. The mental health professional who counselled Brian McLain as Brian made this causal connection noted these temporally recent findings regarding Brian's injuries, and his past assaults, and thus the claim is "fresh" and not "stale." There would also be no prejudice to Richard Lobert, the Diocese of Lansing, or the Archdiocese of Baltimore, as sexual assault has never been allowed under Michigan law, and the recovery of damages for injuries caused by sexual assault has always been permitted under Michigan law. The fact that the Michigan Legislature enacted MCL 600.5851b to generally expand the time that a victim of sexual assault as a minor has to file a lawsuit claiming civil damages for such shows the general intent of the Legislature in this situation: to protect victims of sexual assault, not to protect their abusers. Brian McLain's case violates none of the reasonable policy decisions behind application of statutes of limitation, as suit was filed within the time prescribed under MCL 600.5158b, namely "at any time before . . . 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."

Despite defendants' assertion, this is not a case of "retroactivity." Defendants attempt to bind the "accrual" of this case to the date the sexual assault took place. Under Defendants' analysis of the law, since the sexual assault took place before June 12, 2018, the controlling statute cannot be applied "retroactively." However, Defendants' claims misconstrue the plain language of the statute. MCL 600.5851b states that:

"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." [emphasis added]

Reading of the statute shows that the only temporal considerations relevant to when the claim accrues are 1) that, “while a minor,” an individual was the victim of sexual assault and 2) that the case is filed before the individual reaches 28 years of age, or within three years of connecting the causal relationship between the criminal sexual conduct and the injury.

Brian McLain first realized the causal connection between his mental illnesses and drug dependency and being sexually assaulted by Richard Lobert through counseling with a therapist in November 2020, at which time he disclosed that he was sexually assaulted while a minor at Maxey Boys School. Thus, his claim under MCL 600.5158b did not accrue until November 2020. That accrual date is after the effective date of MCL 600.5851b.

Because Brian McLain only realized the causal connection between his past sexual assault and his mental illnesses and drug dependency through counseling that began on November 2020, Brian’s claim “accrued” with this discovery, which was after the passage of MCL 600.5851b. There is no need to consider Defendants’ urging to consider whether Plaintiff’s claims should be evaluated by an analysis of the retroactive application of the statute, because his claim accrued after the effective date of that statute.

Defendant Archdiocese of Baltimore’s reliance on *Lemmerman v Fealk*, 449 Mich 56, 63-64; 534 NW2d 695 (1995) is misplaced. *Lemmerman* interpreted the definition of accrual under MCL 600.5805. It was decided in 1995, before the effective date of MCL 600.5851b, to interpret MCL 600.5805. Plaintiff’s claims do not rely upon MCL 600.5805, but rather MCL 600.5851b. The definition of “accrual” in MCL 600.5805 has no bearing on when a case accrues under MCL 600.5851b, a statute specifically designed to be an “exception to period of limitations” (see the Prefatory-Materials Canon) that would normally control sexual assaults, to protect individuals who suffered sexual assault while a minor. MCL 600.5805, admittedly, is the general statutory

provision that would bar Plaintiff's claims. However, Plaintiff brings his claims under MCL 600.5851b, a statute specifically passed into law as an exception to the general period of limitations that allows him to bring claims for sexual assault he suffered as a minor.

Defendant Archdiocese of Baltimore claims that "repressed memories" are not supported by Michigan law. This is another "red herring" argument. Plaintiff's claims do not rely upon "repressed memory." Rather, they rely upon Brian McLain's recent connection between his mental illnesses and drug dependency with the sexual assault he suffered as a minor perpetrated by Father Lobert.

Brian McLain first made the connection between his problems and Father Lobert's sexual assault in November 2020. This was because Brian McLain was already a troubled youth prior to the incident, and he did not realize the extent that Father Lobert's sexual assault further drove him down the path toward mental illness and drug dependency that would lead to the problems that Brian McLain continues to suffer from daily.

Plaintiff expects that, through the course of discovery and through continued expert examination and review of his case, he will be able to support the claim and explain the rationale for why he could not previously understand the connection between the sexual assault and his mental illness and drug dependency. Therefore, Plaintiff's claims cannot be dismissed, as Plaintiff expects that he will be able to establish the foundation for his being unaware of the connection between his injuries and the sexual assault suffered at the hands of Father Lobert.

Although irrelevant in this particular context, since Brian McLain's claim did not "accrue" prior to the passage of MCL 600.5851b, Plaintiff nonetheless will address defendant's assertions that the Legislature only meant to apply it prospectively, and therefore protect only individuals sexually assaulted as children after the passage of the statute.

The major canons that defendant Archdiocese of Baltimore ignores are 1) the Ordinary-Meaning Canon, under which words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense; 2) the Surplusage Canon, under which every word and every provision is to be given effect (*verba cum effectu sunt accipienda*) and that none should be ignored or needlessly be given an interpretation that causes it to duplicate of another provision or to have no consequence, and 3) the Prefatory-Materials Canon, under which a preamble, purpose clause, or recital is a permissible indicator of meaning.

Under the ordinary meaning doctrine, the Court must interpret what the meaning of “at any time before . . . 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.” Defendant Lobert asserts that the Court must examine when the sexual assault occurred and to decide the question of whether the Legislature intended this provision to be retroactive. The Legislature's intent is made clear by 1) the practical effect of in passing this statute to extend the statute of limitations and 2) by the plain meaning of the words “at any time before . . . three years after the date the individual discovers . . . both the individual's injury and the causal relationship between the injury and the criminal sexual conduct.” The words “at any time” being modified by the following words in the statute, “before . . . three years after the date the individual discovers . . . both the individual's injury and the causal relationship between the injury and the criminal sexual conduct” shows that the Legislature meant to have claims accrue based upon when the “causal relationship between the injury and the criminal sexual conduct” occurred. If the Legislature meant to establish a temporal component based upon the year the sexual assault occurred or the passing of the statute, they could

have easily done so, as the Michigan Legislature precisely did under the more specific provisions of MCL 600.5158b(3), which pertain to physician assaults not germane to the present case.

Defendant Archdiocese of Baltimore argues that MCL 600.5158b(3) shows a specific “retroactive” intent. However, defendant’s reading of MCL 600.5158b(3) is faulty. MCL 600.5158b(3) merely states that:

“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 . . .”

Defendant argues that, because the Legislature added specific dates of “December 31, 1996” and “before 2 years before the effective date of the amendatory act,” Legislature intended this statute to have a “retroactive” effect. However, this is based on a faulty reading of MCL 600.5851b(1) and (3). MCL 600.5851b(1)’s only temporal requirements depend on the age of the claimant when he wishes to bring suit (before 28 years old) or within three years of when he makes the causal connection between the criminal sexual misconduct suffered as a minor and his injury. Under no explicit or implicit reading of the statute is the date upon which the assault occurred a factor (so long as the victim was a minor when the assault took place).

MCL 600.5851b(3) provides relief to individuals who can bring suit “regardless of any period of limitation under subsection (1)” In this regard, the Legislature did not intend to make MCL 600.5851b(3) retroactive while making MCL 600.5851b(1) prospective only; it meant to allow individuals to bring suit “regardless of any period of limitation under subsection (1)” and thus bring suit even if the individual is (a) over the age of 28, and (b) more than three years have elapsed since the individual connected his/her injuries with the sexual assault suffered as a minor, so long as the victim can prove the other elements contained within MCL 600.5851b(3).

MCL 600.5851b is a specific physician-based exception intended to allow individuals over the age of 28 who had long since connected their injuries with sexual assaults suffered as minors (many at the hands of a physician whose tenure as a gymnastics medical director and Michigan State University occurred from 1997 to 2015). Defendants in this case are not physicians.

Only two organizations opposed the signing of MCL 600.5851b: 1) the American Tort Reform Association, an organization diametrically opposed to personal injury lawsuits and plaintiffs, and 2) the Michigan State Medical Society, the organization involved in the tenure of a physician who happened to be particularly affected by the passage of MCL 600.5851b(3). The Michigan Legislature passed MCL 600.5851b in the exact form opposed by these organizations.

Richard Lobert and the other Defendants in this lawsuit were protected by the former statute of limitations. MCL 600.5851b was specifically passed to be an “exception to period of limitations” (see the Prefatory-Materials Canon) that would normally control sexual assaults, to protect individuals who suffered sexual assault while a minor.

The Legislature meant to protect all victims of sexual assaults as minors, not just those who happened to be sexually assaulted after the passage of the statute. This can be determined by reading the plain language of the statute, in which the only temporal considerations are whether the claimant was sexually assaulted as a minor, and whether the claimant has turned 28 or more than three years have passed since the victim reasonably connected the abuse to claimed damages. This intent can be further determined through the language of subsection (3), which would allow suit specifically for individuals who happened to be sexually assaulted by a physician between 1997 and 2016, regardless whether that individual is over the age of 28 or whether they had connected their injuries with the sexual assault more than three years prior.

For the reasons stated above, the Legislature manifested its intent to have MCL 600.5851b apply, and thus claims “accrue,” when the connection between the injury and sexual assault as a minor was made. It is not dependent on whether the sexual assault occurred before or after the passage of the statute.

Despite that clear manifestation, Defendant relies on the holdings of a number of cases in purported support of its position that the statute should not be applied “retroactively.” Such cases include *LaFontaine Saline Inc. v Chrysler Group LLC*, 496 Mich 26, 38; 852 NW2d 78 (2014); *Davis v State Employees' Ret Bd*, 272 Mich App 151, 155; 725 NW2d 56, 60 (2006); and *Frank W Lynch & Co v Flex Technologies, Inc.*, 463 Mich 578, 583; 624 NW2d 180, 182 (2001). Defendant, however, misanalyses and misapplies the holdings of these cases to the present claims regarding Brian McLain.

In *LaFontaine*, the Court decided that whether a statute should be applied “retroactively” depends on applying four factors (known hereby in Michigan jurisprudence as the *LaFontaine* factors).

“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.”

The application of these factors was further reinforced by the *Buhl* decision (*Buhl v City of Oak Park*, ___ NW2d ___; 2021 (attached as **Exhibit E**)). Thus, the *LaFontaine* factors must be analyzed to determine whether MCL 600.5851b is to be applied “retroactively.”

The first *LaFontaine* factor to be considered is “whether there is specific language providing for retroactive application.” In this regard, there is indeed specific language that shows

that MCL 600.5851b was meant to apply “retroactively” and prospectively. Namely, the statute states that:

“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.” [emphasis added]

The words “at any time before whichever of the following is later” mean that the statute applies “**at any time**” either (a) or (b) is true, whichever is later. This is specific language showing 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.

Defendant relies on *Davis* to make the assertion that “the rules of construction or operation are subservient” to the assumption against retroactivity, and thus that, because the statute does not explicitly state that it is to be applied retroactively, it is meant to only be applied prospectively. However, Defendant fails to acknowledge that “our Supreme Court in *Lynch, id.* at 583-584, stated: The Legislature's intent to apply an amended statute retroactively can be express ***or implied.***” *Davis* at 156 (citing *Thompson v Merritt*, 192 Mich App 412, 417 (1991)). Again, MCL 600.5851b's only temporal considerations for bringing suit are whether the person does so before he/she becomes 28 years old, or within three years of when he/she made the causal connection between his/her injury and the sexual assault. Had the Legislature intended the application of MCL 600.5851b to depend on when the sexual assault occurred, it would have expressed that.

The second *LaFontaine* factor, much like in *Buhl*, is not applicable to the current case because it does not pertain to a specific antecedent event.

Regarding the third *LaFontaine* factor, whether the retroactivity would “impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past,” Plaintiff respectfully submits that no vested right of Defendant is involved in this case. In *Buhl, supra* at P. 8, the Court found that MCL 691.1402a(5) should not be read retroactively to apply to plaintiff’s case because:

“the subsequent application of the open and obvious danger doctrine would result in the dismissal of plaintiff’s lawsuit because retroactive application would relieve defendant of the legal duty it owed to plaintiff at the time the injury occurred. In other words, because plaintiff’s claim had already accrued on the day she was injured, the retroactive application of MCL 691.1402a(5) would effectively rewrite history as to the duty defendant owed plaintiff by absolving defendant of its duty”

In Brian McLain’s case, Defendants have no “vested right” that would be impaired by “retroactive” effect of MCL 600.5851b. Prior to MCL 600.5851b being enacted, it was still illegal to sexually assault a minor in Michigan. Thus, a defendant still had the duty to refrain from sexually assaulting a minor, and corporate/organizational defendants would still have the duty to supervise and monitor their employees/agents/representatives to prevent them from sexually assaulting minors. MCL 600.5851b does not change this duty. It merely prescribes an alternate time in which a claimant can make a claim due to the breach of duty, causation, and resulting damages committed or caused by offending defendants. Furthermore, there is no “duty with respect to transactions or considerations,” as there was no contractual agreement between Lobert and McLain allowing for this sexual assault to occur. Although Defendant Archdiocese of Baltimore relies on *In re Straight’s Estate*, 329 Mich 319, 325 (1951) [emphasis added] for the notion that “there is no vested right in the running of the statute of limitations unless it has been completely run,” this is no longer the case in Michigan, and has been overturned in subsequent cases,. “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). [emphasis added] (citing to *Pryber v Marriott Corp*, 98 Mich App 50, 57; 296 NW2d 597 (1980), *aff'd* 411 Mich 887 (1981)). Defendant's claim that it had a right to rely upon the previous statute of limitations in this case is clearly erroneous.

The fourth *LaFontaine* factor also favors Plaintiff: "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." Defendants' assertions fail in two regards. Applying the plain language of MCL 600.5851b, the claim accrued when Brian McLain connected the causal relationship between his mental health illnesses and the sexual assault suffered by Father Lobert. This was after the enactment of MCL 600.5851b, and thus the claim "is [not] antecedent to the enactment of the statute." Therefore, the analysis of whether MCL 600.5851b should be applied retroactively is moot. However, even if one bases the accrual upon the date of the injury, the fourth *LaFontaine* factor nonetheless supports Brian McLain's claim, as the act does not affect the vested rights of the parties. The core duties that defendants owed Brian McLain are completely unchanged by MCL 600.5851b. Moreover, "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).

There is a "well-established rule that 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 488 (1988). "Generally, remedial statutes are those which provide a remedy . . . for the enforcement of rights and the redress of injuries. They also include statutes intended for the correction of defects, mistakes and omissions in the civil institutions and the administration of the state." *White v Gen Motors Corp*, 431 Mich 387, 396-397; 429 NW2d 576 (1988), quoting 3 Sands, Sutherland Statutory Construction (4th ed), § 60.02, p 60. In this case, it is clear that the Legislature intended to suppress the evil of predators sexually abusing children by allowing those who suffered sexual

abuse as children redress against their assaulters for the horrible injuries they suffered as children, without the predators being able to hide behind the general three-year statute of limitations that would apply if the individual were assaulted as an adult.

Conclusion

This is not a case involving questions of the “retroactivity” of a statute. MCL 600.5851b became effective on June 12, 2018. It provides for an accrual date of up to three years from the time a victim makes a causal connection between abuse suffered as a minor, and resultant damage. Plaintiff made this causal connection through psychotherapy in November 2020. His claim accrued **after** the statute became effective, not before, as Defendants argue.

Brian McLain connected his mental illnesses and the sexual assault he suffered as a minor at the hands of Richard Lobert in November 2020, when he met with his therapist and discussed his past traumas. Thus, he connected the two after the passage of MCL 600.5851b, and this case does not seek to apply retroactive effect to the statute.

Furthermore, it is clear from the language of the statute that it was meant to act both “retroactively” and prospectively to protect individuals who were victimized by pedophiles as minors. The statute allows one to bring a claim “at any time” before the claimant is 28 years old or within three years after connecting his injuries and the sexual assault suffered, whichever is later. Nothing in this statute requires a consideration as to when the sexual assault occurred, other than regarding minority of the victim at the time of the assault. According to defendant, MCL 600.5851b(3) (the irrelevant “physician” clause) provides specific dates, and therefore was the only section to be “retroactive;” rather, that subsection was added to provide relief to individuals over the age of 28 who had **long since** connected their injuries with sexual assaults suffered as minors at the hands of a physician. MCL 600.5851b generally protects all individuals sexually

assaulted as minors so long as they bring the claim within the time period set in the statute. MCL 600.5851b(3) allows older individuals to bring claims for injuries that they have long since recognized, but does not diminish the protections stated in the general provision of MCL 600.5851b(1). Subsection (3) is not meant to modify that general provision. MCL 600.5851b(3) merely allowed certain individuals to bring claims against physicians “regardless of any period of limitation under subsection (1).”

When applying the *LaFontaine* factors to this case, it is clear that the statute should be applied retroactively to sexual assaults that occurred before enactment of the statute. MCL 600.5852b states that suit may be brought “at any time before whichever of the following is later,” which means that the statute applies “at any time” either (a) or (b) is true, whichever is later. This is specific language (factor one) showing 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. Had the Legislature intended the application of MCL 600.5851b to depend on when the sexual assault occurred, it would have expressed that. Factor two is not germane to this case, as the statute does not make a mention of any specific antecedent event. Furthermore, factors three and four also support Brian McLain’s claims as there is no impairment of vested rights. The duty to refrain from sexually assaulting minors was the same in 1999 as it is today. A defendant still had, and has, the duty to refrain from sexually assaulting a minor, and corporate/organizational defendants had, and still have, the duty to supervise and monitor their employees/agents/representatives to prevent them from sexually assaulting minors. Although defendants argue that “each Defendant had the vested right to believe no negligence claim could be sustained regarding 1999 acts or omissions,” Michigan law has expressly rejected

that notion. "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). [emphasis added]

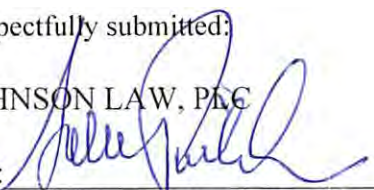
Regarding whether the Archdiocese of Baltimore purposefully availed itself to Michigan, it is too early at this juncture to determine such without discovery. At this point, although the Archdiocese has submitted a self-serving affidavit by the Chancellor of the Archdiocese of Baltimore in support of the notion that it had severed ties with Father Lobert, statements made by the Diocese of Lansing and Archdiocese of Baltimore on publicly accessible websites contradict this notion. According to those statements, Richard Lobert was "a priest of the Archdiocese of Baltimore" and "the Archdiocese of Baltimore . . . removed the archdiocesan priestly faculties of Father Lobert" as late as January 5, 2021, showing that Richard Lobert did have connections with the Archdiocese of Baltimore, and thus that the Archdiocese of Baltimore had substantial contact with Michigan through its contact and connection with Richard Lobert.

For these reasons, Plaintiff respectfully requests that this Honorable Court deny Defendant's Motion for Summary Disposition.

Respectfully submitted:

JOHNSON LAW, P.C.

BY:



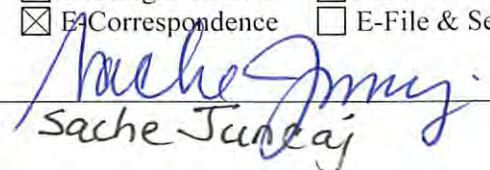
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ANTHONY P. SINISHTAJ (P82128)
Attorneys for Plaintiff

Dated: September 23, 2021

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause at their respective addresses disclosed on the pleadings on the 23rd day of September, 2021 by:

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| <input checked="" type="checkbox"/> US Mail Delivery | <input type="checkbox"/> Hand Delivery |
| <input type="checkbox"/> Overnight Courier | <input type="checkbox"/> Facsimile |
| <input checked="" type="checkbox"/> E-Correspondence | <input type="checkbox"/> E-File & Serve |



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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

BRIAN McLAIN,

Plaintiff,

v

CASE NO. 21-31108-NO
HON. L. SUZANNE GEDDIS

FR. RICHARD LOBERT,
THE ROMAN CATHOLIC DIOCESE
OF LANSING and THE ROMAN
CATHOLIC ARCHDIOCESE OF
BALTIMORE, Individually and
jointly and severally,

Defendants.

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FR. LOBERT'S MOTION FOR SUMMARY DISPOSITION

For his motion, brought under MCR 2.116(C)(7), Father Richard Lobert says:

1. Plaintiff claims that Father Lobert is liable to him under a single claim of negligence. A negligence claim is subject to a three-year statute of limitations.

2. Plaintiff says that Father Lobert's negligent acts took place in 1999. The three-year statute of limitations would bar any suit brought after 2002.
3. A "repressed memory" does not toll the three-year statute of limitations for negligent claims under Michigan law. Lemmerman v Fealk, 449 Mich 56, 63-64 (1995).
4. A recent amendment to the three-year statute of limitation for certain criminal sexual conduct claims, MCL 600.5851b, does not save Plaintiff's untimely claim against Father Lobert.
5. MCL 600.5851b does not save Plaintiff's claim because it took effect in 2018, and does not have retroactive effect.
6. Statutory amendments like MCL 600.5851b apply **prospectively** unless the Legislature manifests its intent to have it apply retroactively. This expression of intent must "appear clearly, directly, and unequivocally from the context of the statute." Davis v State Employees' Ret Bd, 272 Mich App 151, 155 (2006).
7. There is nothing in MCL 600.5851b that clearly, directly, and unequivocally shows that the Legislature intended it to be applied retroactively.
8. In fact, the amendment makes clear that it is retroactive only where the criminal sexual conduct claim occurs in the physician-patient context.
9. Father Lobert relies upon the Brief in Support which accompanies this Motion.

For these reasons, Fr. Richard Lobert asks that the Court grant his motion and dismiss with prejudice Plaintiff's Complaint.

SIMEN, FIGURA & PARKER, P.L.C.

BY: 

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Date: July 16, 2021

STATE OF MICHIGAN
IN THE LIVINGSTON COUNTY CIRCUIT COURT

BRIAN McLAIN,

Plaintiff,

v

CASE NO. 21-31108-NO

HON. L. SUZANNE GEDDIS

FR. RICHARD LOBERT,
THE ROMAN CATHOLIC DIOCESE
OF LANSING and THE ROMAN
CATHOLIC ARCHDIOCESE OF
BALTIMORE, Individually and
jointly and severally,

Defendants.

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FATHER LOBERT'S BRIEF IN SUPPORT OF
MOTION FOR SUMMARY DISPOSITION

Introduction

Plaintiff cannot maintain his negligence claim against Fr. Lobert because he did not file it within the applicable three-year statute of limitations. Any attempt by him to invoke MCL 600.5851b, which extends the statute of limitations for criminal sexual conduct claims, fails because that statute is not retroactive.

Statement of Facts

Plaintiff claims that Fr. Lobert sexually abused him sometime in 1999. *Complaint, para 10*. He also claims that he first divulged this abuse to his therapist in November 2020, *Complaint, para 11*, which enabled him to discover, for the first time, the “causal relationship between his psychological injuries and the criminal sexual conduct of Defendant Father Richard Lobert.” *Complaint, para 13*. Plaintiff filed this lawsuit in April 2021, twenty-two years after the claimed abuse took place.

Analysis

I. The three-year statute of limitations bars Plaintiff's negligence claim.

For the sake brevity, Fr. Lobert relies upon the Diocese of Lansing's Motion and Brief on this same subject. They are comprehensive and complete, and Fr. Lobert relies upon them as his own. He only wishes to elaborate on one point that the Diocese of Lansing raises; specifically, the Court must look no further than the plain language of MCL 600.5851b to see that the Legislature wanted the extended statute of limitations applied to some criminal sexual conduct claims, but not to others, and Plaintiff's claim falls within the latter group.

MCL 600.5851b(3) says:

(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.*** (*emphasis added*).

In clear and uncertain terms, this section recognizes claims against ***medical professionals*** for conduct that occurred within a two-year period (December 31, 1996 and June 12, 2016), ***before*** this amendment took effect.

The doctrine of *expressio unius est exclusio alterius* is instructive here. It means that the expression of one thing is the exclusion of another. It has been described as “a rule of construction that is a product of logic and common sense.” Hoerstman Gen. Contracting Inc. v Hahn, 474 Mich 66, 74 (2006). Simply put, it means that “when people say one thing they do not mean something else.” Feld v Robert & Charles Beauty Salon, 435 Mich 352, 362 (1990) (*opinion by Riley, C.J.*), quoting 2A Sands, *Sutherland Statutory Construction (4th ed.)*, § 47.24, p. 203.

Applying that doctrine to this case, the Legislature gave retroactive effect to the extended statute of limitations for claims against medical professionals only. Because

Plaintiff's claim does not fall within that select group, he cannot maintain it and the Court must dismiss it.

Relief Requested

For these reasons, Father Richard Lobert asks that the Court grant his motion under MCR 2.116(C)(7) and dismiss, with prejudice, Plaintiff's claims against him.

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BY: 

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Date: July 16, 2021

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

BRIAN McLAIN,

Plaintiff,

v

Case No. 21-31108-NO

Hon. L. Suzanne Geddis

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DIOCESE OF LANSING and THE ROMAN CATHOLIC
ARCHDIOCESE OF BALTIMORE, individually and
jointly and severally.

Defendants.

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**PLAINTIFF'S RESPONSE TO DEFENDANT RICHARD LOBERT'S MOTION FOR
SUMMARY DISPOSITION**

Now Comes Plaintiff, by and through his attorneys, JOHNSON LAW, PLC, and for his
Response to Defendant Richard Lobert's Motion for Summary Disposition, states as follows:

1. Denied. Pursuant to MCL 600.5851b(1)(b), "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 . . . : 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.” The accrual date of Plaintiff’s claim is the date upon which his three-year “discovery period” began. The Complaint alleges that this “discovery” date was November 2020, which is after the statute became effective.

2. Denied. Pursuant to MCL 600.5851b(1)(b), “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 . . . : 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.” The accrual date of Plaintiff’s claim is the date upon which his three-year “discovery period” began. The Complaint alleges that this “discovery” date was November 2020, which is after the statute became effective.

3. Denied in the form stated; Plaintiff’s claims need not rely upon allegations of “repressed memory.” MCL 600.5851b(1)(b) provides specific relief for victims of sexual abuse under circumstances, and within a time frame, plainly applicable to Plaintiff’s claims as set forth in his Complaint.

4. Denied. MCL 600.5851b(1)(b) provides specific relief for victims of sexual abuse under circumstances, and within a time frame, plainly applicable to Plaintiff’s claims as set forth in his Complaint.

5. Denied. MCL 600.5851b(1)(b) provides specific relief for victims of sexual abuse under circumstances, and within a time frame, plainly applicable to Plaintiff's claims as set forth in his Complaint.

6. Denied. MCL 600.5851b grants a cause of action, as of June 12, 2018, to any person who was the victim of sexual assault while a minor, provided that a. that individual has not yet turned 28 years old, or b. brings suit before "three years after the date the individual discovers . . . both the individual's injury and the causal relationship between the injury and the criminal sexual conduct." By its plain language, the second of these provisions acknowledges that the claim does not accrue until the victim makes the causal connection. Even if the statute is read to apply only prospectively to claims that accrue after its effective date, McLain's claim, as alleged in the Complaint, did not accrue until November 2020, when, through psychotherapy, he made the causal connection between the sexual assault he suffered at the hands of Father Lobert, and his substance dependency issues, bipolar disorder, and other mental health illnesses. Therefore, his claim accrued after the effective date of the statute, and does not require a reading that MCL 600.5851b applies "retroactively."

7. Denied. MCL 600.5851b grants a cause of action, as of June 12, 2018, to any person who was the victim of sexual assault while a minor, provided that a. that individual has not yet turned 28 years old, or b. brings suit before "three years after the date the individual discovers . . . both the individual's injury and the causal relationship between the injury and the criminal sexual conduct." By its plain language, the second of these provisions acknowledges that the claim does not accrue until the victim makes the causal connection. Even if the statute is read to apply only prospectively to claims that accrue after its effective date, McLain's claim, as alleged in the Complaint, did not accrue until November 2020, when, through psychotherapy, he made the causal

connection between the sexual assault he suffered at the hands of Father Lobert, and his substance dependency issues, bipolar disorder, and other mental health illnesses. Therefore, his claim accrued **after** the effective date of the statute, and does not require a reading that MCL 600.5851b applies “retroactively.”

8. Denied. The language of MCL 600.5851b(3) does not make the statute retroactive in the physician-patient context. It allows individuals to claim sexual assault by a physician while they were minors ***even if*** they were over 28 years old and had long ago connected their damages to the sexual assault suffered as minors. Furthermore, Father Lobert is not, upon information and belief, a physician. This section does not apply to him, nor does it limit Plaintiff's cause of action.

9. Denied. For the reasons stated in Plaintiff's brief, Defendant Lobert's assertions fail, and MCL 600.5851b allows Brian McLain to bring suit in this case.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny Defendant's Motion for Summary Disposition.

BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT RICHARD LOBERT'S MOTION FOR SUMMARY DISPOSITION

Now Comes Plaintiff, by and through his attorneys, JOHNSON LAW, PLC, and for his Brief in Support of his Response to Defendant Richard Lobert's Motion for Summary Disposition, states as follows:

Facts

Brian McLain was a troubled youth, who was entered into the Maxey Boys School in July 1998. He attended that school until July 1999. In approximately March 1999, when Brian was 16 years old, Richard Lobert, a priest ordained by the Archdiocese of Baltimore, and working as a priest at the Maxey Boys School for the Archdiocese of Detroit and Diocese of Lansing, sexually

assaulted Brian McLain by forcing Brian to perform masturbatory acts upon him. Brian was a minor at the time this sexual assault occurred. (**Exhibit A**, Complaint)

Brian McLain eventually became dependent upon alcohol and opiates, and suffered from bipolar disorder and ADHD. He takes anti-psychotics such as Seroquel and Artane, amphetamines such as Adderall, and Suboxone to treat his mental illnesses and drug dependency. In November 2020, through psychotherapy, he first connected his significant mental health challenges with the trauma that Richard Lobert exacted upon him.

Standard of Review

. Defendant Lobert brings a Motion for Summary Disposition pursuant to MCR 2.116(C)(7). A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence; if such material is submitted and the substance or content of the supporting proofs are admissible in evidence, then it must be considered. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817, 823 (1999). However, unlike a motion under subsection (C)(10), neither movant nor the responding party is required to file supportive material, and the opposing party need not reply with supportive material. Rather, the contents of the Complaint are accepted as true unless contradicted by documentation submitted by the movant. *Id*, citing *Patterson v Kleiman*, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994). As such, “All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party.” *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997).

In this motion, Defendant Lobert has provided no documentation refuting Plaintiff's claims. As such, the contents of the Complaint are accepted as true.

Law

Defendant Lobert brings a motion for summary disposition, arguing that Brian McLain's claim is barred by the statute of limitations, and therefore that the claim against Richard Lobert should be dismissed for his sexual assault of Brian McLain when he was a minor. However, defendant is mistaken, as Michigan law supports Brian's ability to bring a claim against his assaulter.

I. Brian McLain's claim under MCL 600.5851b "accrued" after the effective date of this statute. Whether the statute applies retroactively to such claims is moot.

Despite defendants' assertion, this is not a case of "retroactivity." Defendants attempt to bind the "accrual" of this case to the date the sexual assault took place. Under Defendants' analysis of the law, since the sexual assault took place before June 12, 2018, the controlling statute cannot be applied "retroactively." However, Defendants' claims misconstrue the plain language of the statute. MCL 600.5851b states that:

"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." [emphasis added]

Reading of the statute shows that the only temporal considerations relevant to when the claim accrues are 1) that, "while a minor," an individual was the victim of sexual assault and 2) that the case is filed before the individual reaches 28 years of age, or within three years of connecting the causal relationship between the criminal sexual conduct and the injury.

Brian McLain first realized the causal connection between his mental illnesses and drug dependency and being sexually assaulted by Richard Lobert through counseling with a therapist

in November 2020, at which time he disclosed that he was sexually assaulted while a minor at Maxey Boys School. Thus, his claim under MCL 600.5158b did not accrue until November 2020. That accrual date is **after** the effective date of MCL 600.5851b.

Because Brian McLain only realized the causal connection between his past sexual assault and his mental illnesses and drug dependency through counseling that began on November 2020, Brian's claim "accrued" with this discovery, which was after the passage of MCL 600.5851b. There is no need to consider Defendants' urging that Plaintiff's claims should be evaluated by an analysis of the retroactive application of the statute, because his claim accrued after the effective date of that statute.

II. MCL 600.5851b applies "retroactively" to protect the claims of individuals who were preyed upon as children by sexual predators

Although irrelevant in this particular context, since Brian McLain's claim did not "accrue" prior to the passage of MCL 600.5851b, Plaintiff nonetheless will address defendant Lobert's assertions that the Legislature only meant to protect individuals sexually assaulted as children after the passage of the statute.

Defendant Lobert concurs in the arguments of the Diocese of Lansing's Motion for Summary Disposition, including the flawed "retroactivity" theory. Plaintiff herein also addresses the additional argument made by Defendant Lobert, based upon the statutory canon of "*expressio unius est exclusio alterius*" (or that the expression of one thing means the exclusion of another), and that, since MCL 600.5851b(3) provides specific retroactive dates, the Legislature therefore meant for MCL 600.5851b(3) to be retroactive, but not the rest of MCL 600.5851b. Defendant Lobert's assertions are disproven by application of the policy decisions behind the establishment of statutes of limitation and other pertinent canons of statutory interpretation.

As Defendant Diocese of Lansing states in its Motion for Summary Disposition, in *Lothian v City of Detroit*, 414 Mich 160, 164-167; 324 NW2d (1982), the court summarized some of the policies supporting the application of the statute of limitations as follows:

A statutory limitations period represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action. A statute of limitations is a statute of presumption. The fact of 'delay extending to the limit prescribed', without further proof, 'is itself a conclusive bar' to suit . . .

Limitations periods created by statute are grounded in a number of worthy policy considerations. They encourage the prompt recovery of damages . . . ; they penalize plaintiffs who have not been industrious in pursuing their claims . . . ; they "afford security against stale demand when the circumstances would be unfavorable to a just examination and decision" . . . ; they relieve defendants of the prolonged fear of litigation . . . ; they prevent fraudulent claims from being asserted . . . ; and they " 'remedy *** the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert' " . . . (citations omitted).

As stated in *Lothian*, the policy consideration for statute of limitations represents a "reasonable period of time that a claimant will be given in which to file an action." It also encourages "prompt recovery of damages . . . security against stale demand . . . [and] remedy the general inconvenience resulting from delay in the assertion of a legal right."

In this context, Brian McLain first connected the causal relationship between his sexual assault and his mental health maladies in November 2020. He has brought suit within three years of making this connection as is required under accrual option of the statute, which became effective on June 12, 2018. The mental health professional who counselled Brian McLain as Brian made this causal connection noted these temporally recent findings regarding Brian's injuries, and his past assaults, and thus the claim is "fresh" and not "stale." There would also be no prejudice to Richard Lobert, the Diocese of Lansing, or the Archdiocese of Baltimore, as sexual assault has never been allowed under Michigan law, and the recovery of damages for injuries caused by sexual assault has always been permitted under Michigan law. The fact that the Michigan Legislature

enacted MCL 600.5851b to generally expand the time that a victim of sexual assault as a minor has to file a lawsuit claiming civil damages for such shows the general intent of the Legislature in this situation: to protect victims of sexual assault, not to protect their abusers. Brian McLain's case violates none of the reasonable policy decisions behind application of statutes of limitation, as suit was filed within the time prescribed under MCL 600.5158b, namely "at any time before . . . 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."

Furthermore, canons that defendant Lobert's arguments ignore are 1) the Ordinary-Meaning Canon, under which words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense; 2) the Surplusage Canon, under which every word and every provision is to be given effect (*verba cum effectu sunt accipienda*) and that none should be ignored or needlessly be given an interpretation that causes it to duplicate of another provision or to have no consequence, and 3) the Prefatory-Materials Canon, under which a preamble, purpose clause, or recital is a permissible indicator of meaning.

Under the ordinary meaning doctrine, the Court must interpret what the meaning of "at any time before . . . 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." Defendant Lobert asserts that the Court must examine when the sexual assault occurred and to decide the question of whether the Legislature intended this provision to be retroactive. The Legislature's intent is made clear by 1) the practical effect of in passing this statute to extend the statute of limitations and 2) by the plain meaning of the words "at any time before . . . three years after the date the individual

discovers . . . both the individual's injury and the causal relationship between the injury and the criminal sexual conduct.” The words “at any time” being modified by the following words in the statute, “before . . . three years after the date the individual discovers . . . both the individual's injury and the causal relationship between the injury and the criminal sexual conduct” shows that the Legislature meant to have claims accrue based upon when the “causal relationship between the injury and the criminal sexual conduct” occurred. If the Legislature meant to establish a temporal component based upon the year the sexual assault occurred or the passing of the statute, they could have easily done so, as the Michigan Legislature precisely did under the more specific provisions of MCL 600.5158b(3), which pertain to physician assaults not germane to the present case.

Defendant Lobert argues that MCL 600.5158b(3) shows a specific “retroactive” intent. However, defendant’s reading of MCL 600.5158b(3) is faulty. MCL 600.5158b(3) merely states that:

“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 . . .”

Defendant argues that, because the Legislature added specific dates of “December 31, 1996” and “before 2 years before the effective date of the amendatory act,” Legislature intended this statute to have a “retroactive” effect. However, this is based on a faulty reading of MCL 600.5851b(1) and (3). The only temporal requirements of MCL 600.5851b(1) depend upon the age of the claimant when he filed suit (before 28 years old) or within three years of when he makes the causal connection between the criminal sexual misconduct suffered as a minor and his injury. Under no explicit or implicit reading of the statute is the date upon which the assault occurred a factor (so long as the victim was a minor when the assault took place).

MCL 600.5851b(3) provides relief to individuals who can bring suit “regardless of any period of limitation under subsection (1)” In this regard, the Legislature did not intend to make MCL 600.5851b(3) retroactive while making MCL 600.5851b(1) prospective only; it meant to allow individuals to bring suit “regardless of any period of limitation under subsection (1)” and thus bring suit even if the individual is (a) over the age of 28, and (b) more than three years have elapsed since the individual connected his/her injuries with the sexual assault suffered as a minor, so long as the victim can prove the other elements contained within MCL 600.5851b(3).

MCL 600.5851b is a specific physician-based exception intended to allow individuals over the age of 28 who had long since connected their injuries with sexual assaults suffered as minors (many at the hands of a physician whose tenure as a gymnastics medical director and Michigan State University occurred from 1997 to 2015). Defendants in this case are not physicians.

Only two organizations opposed the signing of MCL 600.5851b: 1) the American Tort Reform Association, an organization diametrically opposed to personal injury lawsuits and plaintiffs, and 2) the Michigan State Medical Society, the organization involved in the tenure of a physician who happened to be particularly affected by the passage of MCL 600.5851b(3), The Michigan Legislature passed MCL 600.5851b in the exact form opposed by these organizations.

Richard Lobert and the other Defendants in this lawsuit were protected by the former statute of limitations. MCL 600.5851b was specifically passed to be an “exception to period of limitations” (see the Prefatory-Materials Canon) that would normally control sexual assaults, to protect individuals who suffered sexual assault while a minor.

The Legislature meant to protect all victims of sexual assaults as minors, not just those who happened to be sexually assaulted after the passage of the statute. This can be determined by reading the plain language of the statute, in which the only temporal considerations are whether

the claimant was sexually assaulted as a minor, and whether the claimant has turned 28 or less than three years have passed since the victim reasonably connected the abuse to claimed damages. This intent can be further determined through the language of subsection (3), which would allow suit specifically for individuals who happened to be sexually assaulted by a **physician** between 1997 and 2016, **regardless** whether that individual is over the age of 28 or whether they had connected their injuries with the sexual assault more than three years prior.

Conclusion

This is not a case involving questions of the “retroactivity” of a statute. MCL 600.5851b became effective on June 12, 2018. It provides for an accrual date of up to three years from the time a victim makes a causal connection between abuse suffered as a minor, and resultant damage. Plaintiff made this causal connection through psychotherapy in November 2020. His claim accrued **after** the statute became effective, not before, as Defendants argue.

Brian McLain connected his mental illnesses and the sexual assault he suffered as a minor at the hands of Richard Lobert in November 2020, when he met with his therapist and discussed his past traumas. Thus, he connected the two after the passage of MCL 600.5851b, and this case does not seek to apply retroactive effect to the statute.

Furthermore, it is clear from the language of the statute that it was meant to act both “retroactively” and prospectively to protect individuals who were victimized by pedophiles as minors. The statute allows one to bring a claim “at any time” before the claimant is 28 years old or within three years of connecting his injuries and the sexual assault suffered, whichever is later. Nothing in this statute requires a consideration as to when the sexual assault occurred, other than regarding minority of the victim at the time of the assault. According to defendant, MCL 600.5851b(3) (the irrelevant “physician” clause) provides specific dates, and therefore was the


only section to be "retroactive;" rather, that subsection was added to provide relief to individuals over the age of 28 who had **long since** connected their injuries with sexual assaults suffered as minors at the hands of a physician. MCL 600.5851b generally protects all individuals sexually assaulted as minors so long as they bring the claim within the time period set in the statute. That MCL 600.5851b(3) allows older individuals to bring claims for injuries that they have long since recognized, but does not diminish the protections stated in the general provision of MCL 600.5851b(1). Subsection (3) is not meant to modify that general provision. MCL 600.5851b(3) merely allowed certain individuals to bring claims against **physicians** "regardless of any period of limitation under subsection (1)."

For these reasons, Plaintiff respectfully requests that this Honorable Court deny Defendant's Motion for Summary Disposition.

Respectfully submitted,

JOHNSON LAW, PLC

BY:



SAMUEL H. PIETSCH (P30173)
VEN R. JOHNSON (P39219)
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Attorneys for Plaintiff

Dated: September 23, 2021

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause at their respective addresses disclosed on the pleadings on the 23rd day of September, 2021 by:

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| <input checked="" type="checkbox"/> US Mail Delivery | <input type="checkbox"/> Hand Delivery |
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STATE OF MICHIGAN

IN THE 44th CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

BRIAN MCLAIN,

Plaintiff,

Case Number: 21-31108-NO

v

RICHARD LOBERT, ROMAN CATHOLIC DIOCESE
LANSING, and ROMAN CATHOLIC DIOCESE
BALTIMORE

Defendants.

_____ /

MOTIONS FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE L. SUZANNE GEDDIS, CIRCUIT JUDGE

Howell, Michigan - Thursday, December 9, 2021

APPEARANCES:

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KATHERINE WENZEL, CER 5839
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1 Howell, Michigan

2 Thursday, December 9, 2021 - 4:45 p.m.

3 COURT CLERK: Calling the matter of Brian McLain
4 versus Richard Lobert, 21-31108-NO. Appearances, please.

5 MR. PEITSCH: Good afternoon, your Honor, and all
6 counsel, this is Samuel Peitsch of Johnson Law, appearing for
7 the plaintiff.

8 THE COURT: Thank you.

9 MR. MEAGHER: Tom Meagher, your Honor, for the
10 Diocese of Lansing.

11 THE COURT: Thank you.

12 MR. KINKOPF: David Kinkopf, with the firm
13 Gallagher Evelius and Jones of Baltimore, Maryland, on behalf
14 of the Archdiocese of Baltimore. We're admitted Pro Hac
15 Vice.

16 THE COURT: Okay, thank you.

17 MR. MYERS: And good afternoon, your Honor, Roger
18 Myers, co-counsel for defendant, Archdiocese of Baltimore as
19 well.

20 THE COURT: Thank you.

21 MR. GILDNER: Good afternoon, your Honor, Michael
22 Gildner, on behalf of Father Richard Lobert.

23 THE COURT: All right, thank you. Okay. This is a
24 complicated case of sorts. There is Richard Lobert's motion
25 for summary disposition under MCR 2.116(C)(7); the Diocese of

1 Lansing's motion for summary disposition under the same court
2 rule; and Archdiocese of Baltimore's motion for summary
3 disposition under MCR 2.116(C)(1) and (C)(7). I have gone
4 over, gone over the facts in this case. I do believe I
5 understand them. Is there anything that was not written that
6 you want to emphasize in this particular motion? I don't
7 need a rehash of what you wrote in your motion, I've got it.

8 MR. GILDNER: On behalf of Father Lobert, no your
9 Honor, I stand on the written submissions.

10 THE COURT: Okay.

11 MR. KINKOPF: Your Honor, Dave Kinkopf, on behalf
12 of the Archdiocese of Baltimore.

13 THE COURT: Uh-huh.

14 MR. KINKOPF: I don't think there's anything new
15 that is not in our papers. Frankly, I think we lay out -- I
16 had planned to address, you know, briefly the, the issues as
17 we see them. I think it's pretty --

18 THE COURT: Well I know the issues, that the pr-,
19 that's the thing. I'm trying to speed this up because we've
20 been on --

21 MR. KINKOPF: Sure.

22 THE COURT: -- the record since 8 o'clock this
23 morning. This is our last case and it's long -- it's a
24 fairly lengthy motion and I know that you want to emphasize
25 some things for the record, however, I have gone through the

Motion for Summary Disposition Hearing Transcript

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1 issues and if there's anything new, I'd be happy to hear it.
2 If there's nothing new, I'd ask you to stand on your briefs
3 if, if at all possible.

4 MR. KINKOPF: Your Honor, we have nothing new. I'd
5 be happy to try to simplify it for your Honor, very briefly
6 but in terms of anything new, I don't have anything new to
7 add to the papers.

8 THE COURT: All right. Anybody else?

9 MR. MEAGHER: Judge, Tom Meagher.

10 THE COURT: Uh-huh.

11 MR. MEAGHER: Tom Meagher for the Diocese of
12 Lansing. Unless Mr. Peitsch has something that I think I
13 need to respond to, I'll stand by the brief as well.

14 THE COURT: Okay.

15 MR. PEITSCH: And, thank you, your Honor, and from
16 the plaintiff's perspective, simply reiterate that the
17 judgment on the pleadings at this point is entirely
18 premature, in addition to the substantive points that I
19 raised. Thank you.

20 THE COURT: Thank you. Okay. I am going to start
21 -- this is a lengthy opinion. Maybe I should just do a
22 written opinion because this is so lengthy. I think that's
23 what I'll do. I think I will issue a written opinion. If
24 anyone wishes to return to argue more about the court's
25 written opinion, I'd be happy to allow that. There may be a

1 situation where I deny the motion for summary disposition at
2 this time but that doesn't mean that you might bring one in
3 the future. Do you understand what I'm saying, everybody?

4 MR. MEAGHER: Yes.

5 MR. PEITSCH: The plaintiff's counsel understands
6 and appreciates that. Thank you.

7 THE COURT: Thank you. Again, I, I hate to cut you
8 off but I do want this -- this is an important case to
9 everyone involved and I want to be thorough in my opinion so
10 I think it's best that I do an opinion and then send it to
11 you. If there are any issues that you wish to return to, I'd
12 be happy to hear them. As I said, the motion for summary
13 disposition, there may be one that I would deny at this time
14 but may become more ripe later on for summary disposition.
15 So I'm going to give you those opportunities. But read my
16 opinion first. I think it may help you where I find the law
17 to go and what I think about the statute of limitations, your
18 motions for summary dispositions for everyone involved. For
19 the plaintiff, the Diocese and the Archdiocese. Okay?

20 MR. MEAGHER: Thank you, Judge.

21 THE COURT: All right.

22 MR. GILDNER: Judge, if I, if I could just raise a
23 housekeeping matter?

24 THE COURT: Yes, of course.

25 MR. GILDNER: Not knowing when this opinion will

1 arrive, I just wanted to advise your Honor that the
2 scheduling order has discovery terminating in early January
3 with case eval shortly thereafter, and I just did --

4 THE COURT: There's going to be no problem --

5 MR. GILDNER: Of course depending upon --

6 THE COURT: -- with adjourning the matter because
7 of COVID and I have -- I do criminal cases, too, and criminal
8 comes before civil and I also do divorces and PPOs and a lot
9 of other things so it is not going to be a problem to adjourn
10 it. I don't want this case rushed. This is an important
11 case, like I said, to everyone involved. I want to be
12 correct in my rulings. I want to be thorough and I want all
13 of you to get all the information that you need because that
14 always makes it easier for trial if it goes to trial. Okay?

15 MR. MEAGHER: Judge, I, I hate to make this any
16 longer but I do have one question. When you talk about once
17 we get your opinion we, we can if we want to address it with
18 you --

19 THE COURT: Uh-huh.

20 MR. MEAGHER: -- you know, normally there'd be a 14-
21 day time limit for filing a motion for reconsideration. I'm
22 not sure if that's what you're talking about or if instead
23 you're saying a chance to come before you if we want to
24 independent of the reconsideration rule?

25 THE COURT: I'd be willing to do that.

Motion for Summary Disposition Hearing Transcript

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1 MR. MEAGHER: Okay, thank you.

2 THE COURT: Okay. I don't want to force anybody
3 because of our lack of timeliness for this hearing. I don't
4 want anyone to feel rushed or concerned that you didn't get
5 your part in. If the court is mistaken, like I said, I
6 certainly want to hear your position and I'm willing to
7 listen, so I would allow a motion after the time frame of the
8 motion for reconsideration if you need it. Because the
9 holidays are upon us, it's going to be very difficult and for
10 you guys to get back on the docket, we're extraordinarily
11 busy as you know, that emergency hearings are everywhere, so
12 I most certainly would be willing to leave it open for any
13 concerns or critique that you have of my opinion. How's
14 that?

15 MR. MEAGHER: Thank you, Judge.

16 MR. GILDNER: Will your Honor be --

17 THE COURT: Uh-huh.

18 MR. GILDNER: Will your chambers be emailing that
19 opinion to us or doing it by mail?

20 THE COURT: We usually do email if we can. Is that
21 alright?

22 MR. GILDNER: Terrific. It would be -- that would
23 be my preference if I have any say in it, yes.

24 THE COURT: Mail is so slow these days. I'm so
25 afraid that people aren't going to receive things at the same

Motion for Summary Disposition Hearing Transcript

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1 time. Different areas seem to be delivering mail quite
2 promptly. There are other places that don't get their mail
3 at all so I get very concerned about regular mail so we would
4 do it probably by email. It would be the fastest --

5 MR. GILDNER: Terrific.

6 THE COURT: -- way for, for you. Okay?

7 MR. GILDNER: Thank you much.

8 THE COURT: Thank you. Thank you everybody. I
9 appreciate your courtesy.

10 MR. MEAGHER: Thank you, Judge.

11 MR. PEITSCH: Likewise, thank you.

12 THE COURT: Thank you.

13 MR. PEITSCH: Thank you all.

14 (At 4:56 p.m., proceedings concluded)

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Motion for Summary Disposition Hearing Transcript

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1 I certify that this transcript, consisting of 11 pages, is a
2 complete, true, and correct transcript of the Motions for Summary
3 Disposition, and testimony taken on this case on Thursday,
4 December 9, 2021.
5
6

7 2/8/22
8 Dated

Katherine Wenzel
Katherine Wenzel, CER 5839
(517) 285-5378

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STATE OF MICHIGAN

44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

BRIAN McLAIN,

Plaintiff,

Case No. 21-31108-NO
Hon. L. Suzanne Geddis

v

FR. RICHARD LOBERT, THE ROMAN
CATHOLIC DIOCESE OF LANSING and
THE ROMAN CATHOLIC ARCHDIOCESE
OF BALTIMORE, individually and jointly
and severally,

Defendants.

ORDER

At a session of said Court held in the City of Howell,
County of Livingston, State of Michigan, on the 13th
of January, 2022.

**PRESENT: HONORABLE L. SUZANNE GEDDIS,
CIRCUIT COURT JUDGE**

THIS MATTER HAVING COME BEFORE THE COURT on Defendant Archdiocese of Baltimore’s Motion for Summary Disposition under MCR 2.116 (C)(1) and (C)(7), Defendant Lobert’s Motion for Summary Disposition under MCR 2.116 (C)(7) and Defendant Diocese of Lansing’s Motion for Summary Disposition under MCR 2.116 (C)(7). For the reasons set forth below, these motions are DENIED.

I. BACKGROUND:

Brian McLain, a 16-year old troubled youth, was a resident of the WJ Maxey Training School from July 1998 to July of 1999. McLain alleges that Lobert, a priest ordained by the Archdiocese of Baltimore, regularly visited the school to provide religious services and counseling to residents. McLain asserts that beginning in March of 1999, Lobert found ways to be alone with him and induced him to perform masturbatory acts upon Lobert. McLain asserts he felt powerless to refuse Lobert’s demands. McLain later became dependent on alcohol and opiates, and suffered

from bipolar disorder and ADHD. He takes anti-psychotics such as Seroquel and Artane, amphetamines such as Adderall, and Suboxone to treat his drug dependency. In November of 2020, through psychotherapy, McLain alleges he first connected his significant mental health and drug dependency issues with the sexual abuse trauma inflicted by Lobert.

McLain filed a Complaint in April of 2021, alleging negligence against Lobert, the Diocese of Lansing (Diocese) and the Archdiocese of Baltimore (Archdiocese), i.e., that Lobert had a duty to refrain from sexually assaulting minors, and the Diocese and Archdiocese had a duty to supervise and monitor their employees/agents/representatives to prevent them from sexually abusing minors.

All Defendants filed motions for summary disposition under MCR 2.116(C)(7), asserting that the statute of limitations has run on all of McLain's claims. In addition, the Archdioceses asserts it is entitled to Summary Disposition under MCR 2.116 (C)(1), arguing this Court has no jurisdiction over the Archdiocese and it should be dismissed from the suit.

a. Jurisdiction Over the Archdiocese of Baltimore

The Archdiocese argues this Court lacks personal jurisdiction (general and limited) as it is headquartered in Maryland and does not have the requisite "minimum contacts" with Michigan so as to afford personal jurisdiction under Michigan's long arm statutes.

Michigan's Long Arm Statute, MCL 600.711, governs *general* personal jurisdiction, and provides as follows:

The existence of any of the following relationships between a corporation and the state shall constitute a **sufficient basis of jurisdiction** to enable the courts of record of this state to exercise **general personal jurisdiction over the corporation** and to enable such courts to render personal judgments against the corporation.

- (1) Incorporation under the laws of this state.
- (2) Consent, to the extent authorized by the consent and subject to the limitations provided in section 745.
- (3) The carrying on of a continuous and systematic part of its general business within the state.

Michigan's Long Arm Statute, found at MCL 600.715, governs *limited* personal jurisdiction, and provides as follows:

The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of

this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against such corporation arising out of the act or acts which create any of the following relationships:

- (1) The transaction of any business within the state.
- (2) **The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort.**
- (3) The ownership, use, or possession of any real or tangible personal property situated within the state.
- (4) Contracting to insure any person, property, or risk located within this state at the time of contracting.
- (5) Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant.

The Archdiocese makes clear it does not consent to the jurisdiction of this Court. The Archdiocese argues McLain's Complaint does not allege the Archdiocese carried or carries on a continuous and systematic part of its general business within the state Michigan.

In support of that argument, the Archdiocese attached the affidavit of Diane L. Barr, the Chancellor of the Archdiocese of Baltimore, wherein she stated, in part:

- Lobert was ordained by the Archdiocese of Baltimore in 1975, and served there until 1995.
- Lobert was not an employee, and had no assignment from the Archdiocese of Baltimore in 1999.
- Lobert has not been an employee of the Archdiocese of Baltimore since 1996 and has not received a salary, employee benefits or assignments from the Archdiocese of Baltimore since 1996.
- Lobert sought employment in Michigan in 1995. He received permission from the Archbishop of Baltimore to go to Michigan for "employment and ministry".
- Since 1995, Lobert has been employed and engaged in ministry in Michigan, outside the territory of the Archdiocese of Baltimore.
- When in Michigan, Lobert was not acting under the supervision or control of the Archdiocese of Baltimore.
- Since 1996, the Archdiocese of Baltimore has had no operations, locations, officers or employees in Michigan. The Archdiocese has also not leased or owned property, has never registered to do business, has not been involved with goods or services or held bank accounts in Michigan since that time.

The Archdiocese argues that under these facts, the long arm statute is *not* satisfied, and there is no basis for this Court to exercise personal jurisdiction over it.

In response to these arguments, McLain produced a statement from the Archdiocese indicating that in January of 2021, Lobert remained a "priest of the Archdiocese of Baltimore".

McLain asserts this statement confirms Lobert was a priest of the Archdiocese of Baltimore from 1975 to January 5, 2021, and had priestly faculties under that Archdiocese.

It is not contested that Father Lobert was ordained by the Archdiocese of Baltimore in 1975 and served in various churches under the jurisdiction of the Archdiocese of Baltimore from 1975 to 1994. It is also not contested that in 1995, Lobert moved to Michigan, worked as a chaplain at Father Gabriel Richard High School and conducted other activities under the jurisdiction of the Diocese of Lansing. However, while Diane Barr asserts in her affidavit that the Archdiocese had no employees in Michigan and provided no services in Michigan, (see Barr Affidavit dated 7/12/21, pg. 3), in connection with an internal investigation conducted by the Diocese of Lansing regarding complaints of sexual abuse by Lobert, the Archdiocese published an official press release on January 5, 2021, entitled, ‘Statement on the Removal of the Priestly Faculties of Father Richard Lobert’, which stated:

“Father Lobert, is a priest of the Archdiocese of Baltimore, and in light of this information, the Archdiocese of Baltimore has removed the archdiocesan priestly faculties of Father Lobert. Father Lobert is not permitted to minister in the Archdiocese of Baltimore while the Diocese of Lansing is conducting its investigation”.

This statement tends to show that to some extent Lobert was still acting under the jurisdiction, control and/or at the direction of the Archdiocese at the time McLain alleges he was sexually abused by Lobert. While a plaintiff bears the burden of establishing personal jurisdiction over a defendant, plaintiff need only make a prima facie showing to overcome a motion for summary disposition. *Glenn v TPI Petroleum, Inc.*, 305 Mich App 698, 705 (2014). If McLain is ultimately able to demonstrate such jurisdiction/direction/ control, he may well be able to establish the minimum contacts necessary to satisfy the requirements of Michigan long-arm statute governing limited personal jurisdiction, MCL 600.715.

The Court finds that McLain has, for the purposes of this motion, made a prima facie showing that the Archdiocese of Baltimore had/has the necessary minimum contacts with Michigan so as to allow this Court to exercise limited personal jurisdiction over it. While further discovery may clarify this issue and demonstrate otherwise, it is premature at this point to grant the Archdiocese’s Motion for Summary Disposition under MCR 2.116(C)(1).

b. Defendants' Motions for Summary Disposition under MCR 2.116(C)(7)

MCR 2.116(C)(7) permits summary disposition ‘because of release, payment, prior judgment, or immunity granted by law.’ *Clay v Doe*, 311 Mich App 359, 362 (2015). The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). A party may support a motion under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence but the substance or content of the supporting proofs must be admissible. The documentary evidence is considered in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7). If there is no factual dispute, whether a plaintiff’s claim is barred under a principle set forth in MCR 2.116(C)(7), is a question of law for the court to decide. When a relevant factual dispute does exist, summary disposition is not appropriate. *Moraccini v City of Sterling Hts.*, 296 Mich App 387, 391 (2012).

Defendants argue McLain’s negligence claim arises from incidents that allegedly occurred in 1999, and since a negligence claim has a 3-year statute of limitations, any claim McLain may have possessed expired in 2002. Defendants assert McLain cannot rely on a claim of “repressed memory” as such claims do not toll the statute of limitations in Michigan. Defendants also assert the recent amendment to the 3-year statute of limitations for certain Criminal Sexual Conduct (CSC) claims, under MCL 600.5851b, does not save McLain’s negligence claim because the statute took effect in 2018 and was not given retroactive effect. Defendants note that statutory amendments apply prospectively unless the legislature manifests the intent “clearly, directly, and unequivocally...” for them to apply retroactively. *Davis v State Emp’ees Ret Bd.*, 272 Mich App 151, 155 (2006). Defendants contend MCL 600.5851b was expressly made retroactive only for CSC claims occurring in the context of the physician-patient relationship and by failing to address retroactivity as to the remainder of the statute, the legislature must have intended for it *not* to apply in the context of any other relationships, including the instant matter.

In a nutshell, Defendants argue McLain cannot maintain this negligence action since he did not file it within the 3-year statute of limitations, and he cannot rely upon MCL 600.5851b, which extends the statute of limitations for certain CSC claims, because the statute is not retroactive.

McLain responds that he is not relying upon a repressed memory, so any such reference by Defendants is irrelevant. McLain asserts his claim did not accrue until November of 2020, when he first made the causal connection between the sexual abuse by Lobert, and his substance abuse and other mental health issues. McLain notes his Complaint alleges the “discovery” date of the sexual abuse was November of 2020, which is *after* the date the statute became effective, so the issue of retroactivity is not applicable or relevant to this case. See MCL 600.5851b. Even if the statute only applies prospectively, McLain asserts the language of the statute makes clear that under subsection (b) a claim does not accrue until the victim makes the causal connection between the sexual abuse and their injuries. Lastly, McLain asserts Defendants’ reliance upon section 3 of the statute is misplaced and misleading as Lobert is not a physician.

In Michigan, the statute of limitations for a general negligence claims is 3 years. MCL 600.5805. However, in 2018, our Legislature enacted MCL 600.5851b (effective 6/12/2018), which amended the statute of limitations in cases where a minor is the victim of CSC. This statute is designed to protect individuals victimized by pedophiles as minors by expanding the time for them to file claims.

MCL 600.5851b, Minor Victims of Criminal Sexual Conduct, provides as follows:

(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.

[emphasis added]. P.A.1961, No. 236, § 5851b, added by P.A.2018, No. 183, Imd. Eff. June 12, 2018.

Defendants ignore section 1 (a)-(b), and focus instead on section 3. However, that reliance is misplaced as section 3 applies only to claims of sexual abuse of a minor in the context of a physician-patient relationship. There are no allegations that Lobert is or was a physician. The statute as a whole does *not* confine itself to instances where a physician sexually abuses a minor. To interpret section 3 in the manner Defendants suggest would render section 1 meaningless.

Under section 1(a), a minor victim of CSC may file a lawsuit any time before turning 28. Because McLain was over the age of 28 when he filed his claim, he must then turn to section 1(b). Under section 1(b), the statute requires a plaintiff to establish:

1. The sexual assault occurred while the victim was a *minor*, and,
2. The case was filed within 3 years after he made a causal connection between the CSC and his injuries.

McClain's Complaint alleges he first made the causal connection between his sexual abuse and his emotional difficulties in November of 2020 as a result of undergoing psychotherapy with his therapist where he was discussing past traumas. McLain asserts that due to the fact he was already a troubled youth prior to the abuse, he "did not realize the extent that Father Lobert's sexual assault further drove him down the path toward mental illness and drug dependency that would lead to the problems that...he continues to suffer from daily". The statute expressly allows the victim to bring a claim any time within 3 years of connecting their sexual abuse to their injuries. Stated another way, the triggering event for the running of the statute of limitations under section

1 (b) is *not* when the sexual assault occurred, but when victim connected the injury to the sexual assault. As McLain brought his suit within 3 years of discovering this connection, his suit is timely for purposes of MCL 600.5851b.

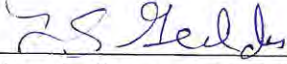
Defendants reference a number of cases that discuss retroactivity, but are incorrect in their assertion those cases apply here¹. McLain is not seeking to have the 2018 change in the law applied retroactively to acts that occurred in 1999. Instead, McLain asserts his claim *did not accrue* until he ‘discovered’ the causal connection between the abuse by Lobert and his injuries. This is a critical distinction. At no point does the statute refer to the date of the abuse as a starting point for the calculation of the statute of limitations. The *only* temporal consideration contained in the statute is that a claim be brought before the victim turns 28, or within 3 years of the victim connecting their abuse to their damages. Under the plain language of the statute, minor victims of sexual abuse may be afforded decades within which to bring a claim.

Even assuming, *arguendo*, that retroactivity was an issue here, its application would not bar McLain’s Complaint. 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 principle.” *Frank W Lynch & Co. v Flex Technologies, Inc.*, 463 Mich 578, 583 (2001). MCL 600.5851b expressly expanded the timeframe within which that a victim has to file a claim for damages for sexual assault and included a ‘discovery’ component. This evidences the intent of the Legislature in enacting this legislation, *i.e.*, 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. If the Legislature meant to establish a temporal component based on the year of the assault, it would surely have done so. To be sure, this is exactly what the Legislature did when it included the more specific time limitations set forth in section 3.

¹ The statute allows a victim to bring a claim “at any time” before turning 28 or within 3 years of connection with assault with the injury, whichever is later. MCL 600.5851b generally protects all such victims just so long as they bring their claims within the timeframe set forth in the statute. As retroactivity is not an issue, the Court finds no reason to review the *LaFontaine Factors*. See *LaFontaine Saline, Inc. v Chrysler Group, LLC*, 496 Mich 26, 38 (2014), and *Buhl v Oak Park*, ___ NW2d ___ (2021 WL 2350031).

Accordingly, as McLain's suit is timely under MCL 600.5851b, Defendants' Motions for Summary Disposition under MCR 2.116(C)(7) are hereby DENIED.

IT IS SO ORDERED.

 1/13/23
Hon. L. Suzanne Geddis (P35307)
Circuit Court Judge

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

**STATE OF MICHIGAN
COURT OF APPEALS**

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 granted¹ 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

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 Pesley*, 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

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

Order

**Michigan Supreme Court
Lansing, Michigan**

September 27, 2023

Elizabeth T. Clement
Chief Justice

165741-2

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden
Justices

BRIAN McLAIN,
Plaintiff-Appellant,

v

SC: 165741
COA: 360163
Livingston CC: 21-031108-NO

ROMAN CATHOLIC DIOCESE OF LANSING,
Defendant-Appellee,

and

RICHARD LOBERT and ROMAN CATHOLIC
ARCHDIOCESE OF BALTIMORE,
Defendants.

_____ /

BRIAN McLAIN,
Plaintiff-Appellant,

v

SC: 165742
COA: 360173
Livingston CC: 21-031108-NO

ROMAN CATHOLIC ARCHDIOCESE OF
BALTIMORE,
Defendant-Appellee,

and

RICHARD LOBERT and ROMAN CATHOLIC
DIOCESE OF LANSING,
Defendants.

_____ /

On order of the Court, the application for leave to appeal the April 27, 2023 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall address whether: (1) 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, and if not, (2) 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. The total time allowed for oral argument shall be 40 minutes: 20 minutes for the appellant and 20 minutes for the appellees, to be divided at their discretion. MCR 7.314(B)(1).

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.



b0920

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 27, 2023

Handwritten signature of Larry S. Royster in black ink.

Clerk