

The Michigan Association for Justice is opposed to Senate Bill 882 (Sen. Sanborn). The bill is intended to reverse the Michigan Supreme Court's opinion in *Ostroth v. Warren Regency*, 474 Mich 36 (2006), where the Court, lead by then-Chief Justice Taylor, **unanimously** held in that case that MCL 600.5839 is both a six year statute of limitations and a statute of repose.

Section 5839 provides a six year period of limitations from the date of occupancy of the completed work or one year after the defect was discovered provided the defect was the proximate cause of the injury or damage that occurred and was due to the architect or other professional's gross negligence. However, even this one-year from discovery period ends 10 years after the date of occupancy. This is hardly an unreasonable time period to hold these professionals responsible for their actions. The work they do is creating buildings – buildings that we live in, and work in, that our children go to school in. The types of errors or defects that result from negligence in this sort of work tend to be latent defects. The sort of defects that are not obvious to the casual observer and are not readily discoverable within 2 or 3 year period of limitations this bill would provide.

By changing this section, the bill would change the law and overrule a unanimous Supreme Court decision by specifying that the statute of limitations for architects and engineers would instead be governed by MCL 600.5805 (6) or (10) which provide only a 2 year statute of limitations for malpractice or a 3 year statute of limitations for general negligence. Is 2 years really long enough for a building? In other words, are we willing to give architects and engineers a free pass on their responsibilities to those who are injured as long as the building lasts for 2 years and day?

It is also worth looking at the Court decision that the bill seeks to overturn. The Court's holding stated that the current language of the law accurately set the period of limitations for architects, professional engineers, land surveyors or contractors. The Court noted that the specific language concerning architects and engineers was enacted fully 20 years after the general language outlining normal periods of limitation. The specific limitations period for architects and engineers was added to remove them from normal statutes of limitations.

Clearly the change sought in this legislation is not the result of a "mistake" by the Court that needs correcting – everyone understood that the statute of limitations was to be as the Court held in the *Ostroth case*, even those who now wish to change it. (See attached section of the amicus brief from Ecorse Board of Education.) If the proponents truly wish to argue that 2 years is sufficient time for problems with a building to be discovered – or that they simply do not deserve to be held responsible for their mistakes after 2 years, then let them do so – but the assertion that this merely corrects an error by the Court is false.

Finally, it is interesting that the some people are willing and apparently eager to reverse this unanimous Supreme Court decision that upheld existing understanding of the law, but are unwilling to correct Court decisions that overturned years of precedent, were far from unanimous and the results were far less reasonable.

alternatives--is the Legislature's, not the judiciary's. *Henry v Dow Chem Co*, 2005 Mich LEXIS 1131 (2005) Citing, *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1990).

- C. The Legislative History of MCL 600.5805(14) Indicates That This Amendment was Lobbied For by the Construction Industry and Designed to Clarify that the Six-Year Period of Limitation Would Apply to All Claims.

Denying that the legislature intended to supply a uniform six-year period of limitation and repose for the type of claim before the Court becomes even more difficult when the Michigan Archives available for this matter are examined. Many of the parties with interest in this matter hired lobbyists to support MCL 600.5805(10) now (14), back in 1987 when it was introduced. Furthermore, Courts may look to the legislative history of a statute to ascertain its meaning. See, e.g. *People v Hall*, 391 Mich 175; 215 NW2d 166 (1974) and *Luttrell v Dept of Corrections*, 421 Mich 93; 365 NW2d 74 (1984).

Counsel for Appellees has previously provided the Court with State of Michigan Archives documents and recordings for its review. Ecourse will not duplicate those here. The minutes from the Michigan Senate Judiciary Committee hearing memorializing the debate over what would become Senate Bill 478 of 1988 contain the construction industry's understanding of what MCL 600.5805(10) would serve to accomplish: Dennis Cawthorne, a well-known lobbyist and attorney currently practicing in Lansing, represented the State Society of Architects/Engineers at the October 15, 1987 hearing. From the meeting minutes and the recording of the hearing, it is clear that the architects and engineers "... supported the bill and explained the purpose of this bill is to clarify the statutes of limitations, which is six years." Mike Crawford, of the Construction Association of Michigan also, "... supported SB 478 and indicated the bill does not change policy, it clarifies it." Based on this testimony alone, the bill was voted out of committee unanimously.

The House of Representatives Judiciary Committee also reported on SB 478 favorably and unanimously on March 15, 1988. It was urged to do so, once again, by the State Society of Architects/Engineers through the representation of Dennis Cawthorne. Attorney Cawthorne drafted a letter on firm letterhead urging the House to act as the Senate had and pass SB 478. In his letter, Mr. Cawthorne indicates the understanding that the amendment is to clarify the original intent of section 5839 that all suits against architects, engineers and contractors are subject to the time limits in that statute. This amendment was necessary due to Appeals Court decisions that had "muddied the waters"

Judging by the ruling in *Michigan Millers, supra* in 1992 and the language of the statutes at issue, it seemed as though the six-year period of limitation was established and understood. The Michigan legal community was made more aware of the effects of section 5805(10) (now (14)), through academic means as well. Published in the October 1992 Michigan Bar Journal, Cynthia M. Martinovich authored an article titled: *Two, Three, Now It's Six, Architects and Engineers are in a Fix*. This article discusses the exact same issue, as is now, some thirteen years later, being addressed by this Court. So sure of the application of section 5839 as the correct period of limitation, that Ms. Martinovich wrote the following:

Application of Section 5839 became compulsory following a recent amendment to the Revised Judicature Act. The amendment, Section 5805(10), reads, 'the period of limitations for an action against a state licensed architect, professional engineer or contractor based on an improvement to real property shall be as provided in Section 5839.' Accordingly, Section 5805(10) incorporates Section 5839, a pre-existing minimum six-year limitations period

* * *

Although there is no case law interpreting Sections 5805(10) and 5839(1), it is now indisputable that the correct limitations period for a tort claim against an engineer or architect is at least six years . . . 72 Mich B J 1038 (1992).

So what happened to once again muddy the waters on this issue? The decision in *Witherspoon* in 1994 happened. What seemed so clear between 1988 and at least October of 1992 was turned completely on its head by the incorrectly decided ruling in *Witherspoon*. The Court of Appeals decision in this case simply returned the function of the statutory language to what was sought for by the construction industry back in 1988. Opportunistic parsing of the statutes at issue caused the need to pass SB 478 in 1988, created an unfair and contradictory standard in *Witherspoon* in 1994, and necessitates overdue clarification from this Court in 2005.

Conclusion and Relief Requested

Amicus Curiae Ecorse Board of Education requests that this honorable Court affirm the decision of the Court of Appeals and return clarity to the application of sections 5839 and 5805 as it relates to work performed by architects, engineers and contractors.

Respectfully Submitted,



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