



## Oppose SB 882

**The members of the Michigan Association for Justice oppose SB 882 because it drastically shortens the period of limitations for filing a claim against an architect or engineer whose negligent or improper work has caused someone harm.**

- Injuries involving buildings tend to occur from latent defects. The shorter the period of limitations the less time to find out all of the facts concerning who participated in the construction and design of the building before filing a case.
- The period is already quite short considering its purpose. Buildings should be expected to last longer than 6 years before those who designed or built them are no longer responsible their negligence.
- The proponents of the bill previously argued the opposite side of this argument when seeking a change in the law in 1987. A change in the law to clarify that the law should be understood to apply exactly as the Court applied it in the *Ostroth* case (the Michigan Supreme Court case this bill would overturn).

### **The History**

The period of limitations overlapping the period of repose (as the law currently stands post-*Ostroth*) was written and enacted first in 1967. A 1980 Supreme Court decision (*O'Brien*, 401 Mich 1 at 115) supported this view.

In 1985, the law was amended to increase the period of repose to 10 years and added a provision for a one year discovery "look back" in the event of "gross negligence."

In 1987, the law was amended again to make the clarifications noted in the *Ostroth* decision – amendments which were supported and encouraged by the architects and engineers. In 1992, the *Michigan Millers Mutual Insurance Co. v. West Detroit Building Co., Inc.*, 196 Mich. App. 367 (1992) case upheld that clarification. Then in 1994, the *Witherspoon v. Guilford*, 203 Mich. App. 240 (1994) case upheld the bill's proponents' position that a statute of limitations period should be allowed to run within the statute of repose.

It was not until the *Ostroth* case was taken to the Michigan Supreme Court that the discrepancy between these to conflicting appellate court cases was resolved. At that point, that Supreme Court unanimously held that the position of the bill's proponents and the holding in *Witherspoon* were incorrect.

### **The proponents of SB 882 fought for the opposite reading of the law in 1987.**

In 1987, the State Society of Architects and Engineers, sought a legislative fix to this section of law in an effort to clarify two court decisions which had at muddied the waters concerning how the statute of limitations worked. That fix was intended to "clarify the statute of limitation, which is 6 years" according to the Society's lobbyist at that time – Dennis Cawthorne. See attached Supreme Court brief, Page 11 – 13.

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of Senate Bill 478, which is the bill that amended MCL 600.5805 by adding subsection (14) (Back then it was subsection 10). [Appendix 73b] The court stated that these were, "the only available documents that provide evidence of the Legislature's intent in amending §5805." 196 Mich App @ 375.

Not so. We also have in Appellees' Appendix, from the State of Michigan Archives, the minutes of the Senate Committee on Judiciary [64b] from October 15<sup>th</sup>, 1987 stating that Dennis Cawthorne, a representative of the State Society of Architects/Engineers, "... supported the bill and explained the purpose of this bill is to clarify the statutes of limitations, which is 6 years." (Emphasis supplied) Mike Crawford of the Construction Association of Michigan also, "... supported SB 478 and indicated the bill does not change policy, it clarifies it."

These statements acknowledging that the statute of limitations is 6 years were made on behalf of two of the same organizations which, as *amicus* briefers in this case, now urge a different statute of limitations!

From the same archives an actual tape of the hearing has been obtained and is included in appellees' Appendix [72b]. Everybody knew and understood that the purpose of the bill was to reverse the Court of Appeals holding in *Burrows v. Bildigare/Bublys, Inc.*, 158 Mich App 175, 404 NW2d 650 (1987)

and to adopt the dissenting opinion of Judge T. M. Burns in that case. Judge Burns disagreed with the majority in *Burrows* and with the panel in *Marysville v. Pate, Hirn & Bogue, Inc.*, 154 Mich App 655, 397 NW2d 859 (1986). He opined that §5805(14) conjoined with §5839 to provide a 6-year statute of limitations for all claims of every kind against architects, professions engineers, surveyors and contractors. At the hearing, on the tape recording, it was commented that Judge Burns was a former legislator. [72b]

In the House of Representatives Committee on Judiciary the bill was reported out favorably and unanimously on March 15<sup>th</sup>, 1988. [78b] It was urged to do so by a letter from Dennis Cawthorne, Esq., of Fitzgerald, Hodgman, Cox, Cawthorne & McMahon dated March 19<sup>th</sup>, 1988. [82b] He had spoken in person to the Senate committee on behalf of the architects and engineers. In his letter to the House judiciary committee he indicates the understanding that the amendment is to clarify the original intent of §5839 that all suits against architects are subject to the time limits contained in MCLA 600.5839. He explained that this amendment was necessary because, in his view, two Court of Appeals decisions had, "...greatly muddied the waters..."

They received what they requested, a six-year statute of limitations; measured not from the date a cause of action

accrues, but from the date a project is completed. Now they seek a second bite of the apple, an opportunity to muddy the waters again after the legislature has clearly written its fiat.

Many courts, and the Michigan Courts in particular, have repeatedly cautioned against judicial muddying of the statutory waters. This court is required to give effect to the Legislature's intent as expressed in the language of its statutes, if that language is unambiguous, "...as most such language is." *Garg, supra* at 472 Mich281. It must presume the Legislature intended the meaning expressed. No further judicial construction is required, or even permitted. A statute must be enforced as written. *Garg, supra* at 281. In *Henry v The Dow Chemical Company*, 2005 MichLEXIS 1131 (July 13<sup>th</sup>, 2005) this court reiterated that it is the job of the Legislature, not the courts, to make social policy. Placing a premium on one societal interest at the expense of another, of identifying priorities and of choosing between competing alternatives is for the people's chosen representatives in the legislatures, not the courts.

It is rather odd to have a statute of limitations measured from the date of completion of a job instead of from the date of an injury or damage, but that is what the legislature did and it must have its reasons. Whatever they are, its will is