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Comment to proposed amendment 2020-08

I represent property owners in the State of Michigan and file summary proceeding cases in numerous district courts on a regular basis. In 21 years of practice, I have not witnessed such a dramatic attempt to change well established court procedures as displayed by the proposed amendments to MCR 4.201. Further, nearly every proposed change tips the scales of justice in one direction by adding irrational and inefficient delays to the process of summary proceedings; proceedings which are legislatively designed to be conducted without the customary legal formalities. The current framework has existed for over 60 years.

The proposed amendments are premised upon three erroneous and offensive conclusions: first, that all landlords are slumlords whose goal is eviction; second, that all tenants are uneducated, victims who require paternalistic protection, and third, that the duly elected district court judges of our State are incapable of performing the duties they were entrusted to carry out. Respectfully, the proposed amendments to MCR 4.201 should be denied in their entirety and Administrative Order 2020-17 be rescinded.

Specific comments to the proposed amendments

Preamble states the following: "Still, the court system will long be dealing with the ***effects*** brought about by the greatest health crisis in our generation." The proposed amendment does not disclose what these "effects" are. Prior to administrative orders 2020-08 and 2020-17 warnings were voiced about the covid induced “flood/tsunami/avalanche” of evictions. Those failed to materialize.

Temporary suspension of Local Administrative Orders requiring a written answer pursuant to MCL 600.5735(4). Why? If a local court has developed a particular procedure that is not contrary to the MCRs or statutes, why should it not be allowed?

Proposed MCR 4.201 (B)(3)(c): This provision requires a plaintiff to certify the premises is "in compliance with applicable state and local health and safety laws," This is a major leap from the current requirements of the court rule. Forced compliance with local ordinances (aka "Rental Licenses") is not something the Michigan legislature has prioritized. Perhaps this is because many rental license ordinances have been deemed unconstitutional by Federal Courts. In addition, what exactly are "local health and safety laws"? Are local health departments now parties to private contracts between individuals? The real effect of this proposed amendment is that landlords will be denied access to justice if they lack a permission slip from some local agency. Often this agency is at fault for not timely inspecting the property and issuing the certificate, despite collecting the fees for the inspection.

Proposed MCR 4.201 (C)(3)(f): Providing information regarding the availability of rental and other housing assistance is laudable. However, who is required to provide this information and when? More distressing is the inclusion of "Pursuant to SCAO guidelines". These guidelines are now requirements by reference. Based upon recent experience they can be changed at any time

and with little or no notice. The reference to "Pursuant to SCAO guidelines" should not be contained anywhere in the new court rules.

Proposed MCR 4.201 (F): Zoom has been a net positive to summary proceedings and increased access to justice. The focus should be on best practices for use of the technology so that courts and court clerks are not frustrated by it.

Proposed MCR 4.201 (G)(4): Jury Demand. This is one of the most catastrophic proposed changes to MCR 4.201. Again, what potential effects of the post Covid pandemic is this amendment attempting to cure? In 3 years (2018-2020) there have been roughly 520,000 summary proceedings filed in Michigan. Of those, there were only 19 jury verdicts. This is statistically zero. The proposed amendment would allow a defendant to wait until the eve (48 hours) of whatever trial date has been scheduled to demand a jury trial. In practice, this would immediately postpone the case for at least a month and probably much longer due to the scarcity of civil juries in our district courts. In addition to delay, this rule will disincentive landlords from negotiating an amicable resolution with their tenants as the jury demand will serve as the ultimate (unfair) leverage in those negotiations. (This proposal is especially egregious when read in conjunction with MCR 4.201 (K)(b) *below*.)

Proposed MCR 4.201 (G)(5)(a)(ii): Personal service requirement for default entry. This is a major change to summary proceedings, which are *in rem* proceedings. Requiring personal service is an inequitable hurdle that is not grounded in the reality of summary proceedings. The filing of an action to recover property is preceded by a required written notice and is not a surprise to the defendant. Further, all courts in Michigan mail the defendant a copy of the pleadings and notice to appear. This requirement also has the added effect of rewarding litigants who evade service and ignore court orders to appear.

Proposed MCR 4.201 (G)(5)(b): Pleading and proof requirements. This provision expands the discretion of the judge to review the undefined “pleading and proof” elements. This proposal contrasts with MCR 2.603 which allows for the Clerk to enter defaults and default judgments.

Proposed MCR 4.201 (I)(3): Another reference to “SCAO Guidelines”. This provision allows for a stay of proceedings if the defendant pronounces the magic words: “I have applied for assistance”. The use of the “stay” is a holdover from the CERA program and the understanding then that nearly all CERA applications would be approved and there were few, if any, strings attached to the funding. Now the stay accompanies a litany of strings, from compliance with unknown local health and safety laws, repair requirements, open ended rights to a jury trial and no mention of the well-established right to an rent escrow account for summary proceedings that are delayed beyond 56 days. Will a stay bond be required as is elsewhere in the rules? Further, no process is established for lifting the stay in an equitable or efficient manner. As Justice Viviano articulates, this amendment does not respect the legislature’s choice regarding summary proceedings. See MCL § 600.5714(1)(a).

This provision is also a glaring example of how overburdened, the already overwhelmed district court clerks will be as a result of these proposed changes to the procedures. Nearly every single summary proceeding file will need to be processed by civil clerks multiple times (filing, mailing

notice of second hearing, possible notice of stay, possible notice of lifting stay, notice of pretrial, notice of trial, copy of judgment, etc..). The cost of postage alone should give the Supreme Court pause in considering a court rule that virtually guarantees hundreds of thousands of mostly unnecessary adjournments within the district courts.

Proposed MCR 4.201 (K)(1)(b): This seemingly minor change tilts the playing field dramatically to one side. The flaw is evident by reviewing the specific words of the first sentence. Why are "pretrial motions" not to be heard until "when the trial begins"? This absurdity is written to deny the district court judges their discretion and opportunity to determine the "triable issue(s)" before trial. In the case of a jury trial, the court would need to impanel a jury before making the determination that there is "no triable issue". For bench trials, parties would need to prepare for trial, subpoena witnesses, etc., in the event that the trial court finds a triable issue.

Proposed MCR 4.201 (K)(2)(a): Requirements to conduct repetitive pretrials are unnecessary and inequitable. This rewards defendants who ignore the summons and other court orders to appear*.

*Here the proposed amendment includes a paragraph after 4.201 (K)(2)(a)(vi) and before (b) that clearly states that the above concern is accurate. This unusual, unnumbered insertion provides blanket authority to re-set the procedural clock anytime a litigant appears in court, notwithstanding any prior hearings, notices to appear, summons, etc. that were ignored.

Proposed MCR 4.201(K)(2)(c)(ii): Personal service requirement. As with Proposed MCR 4.201 (G)(5)(a)(ii) above, this is a major change to summary proceedings and places an inequitable hurdle in front of the Plaintiff. This clause is also confusingly drafted to conflict with the primary language of (K)(2)(c) which reference "pretrial" whereas this section refers to "trial". This requirement also has the added effect of rewarding litigants who evade service and ignore court orders to appear.

Proposed MCR 4.201(K)(2)(c)(iv): Consent judgment "fair terms" requirement. While most of these proposed amendments remove discretion from the district court judges, this addition grants discretion to the judges that does not exist. Further, this rule would result in wildly different results across Michigan, and even within courts themselves, as individual judges would be authorized to serve as the de facto attorney for a party. This is judicial overreach sanctioned by the court rule.

Proposed MCR 4.201(N)(1): Changes to the stay requirement for post judgment motions. This change is unnecessary and confusing as to why it is needed.

Respectfully, the proposed amendments to MCR 4.201 should be denied in their entirety and Administrative Order 2020-17 be rescinded.

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