Public Policy Position
SB 0895

The Appellate Practice Section is a voluntary membership section of the State Bar of Michigan, comprised of 789 members. The Appellate Practice Section is not the State Bar of Michigan and the position expressed herein is that of the Appellate Practice Section only and not the State Bar of Michigan. The State Bar's position in this matter is to oppose SB 0895.

The Appellate Practice Section has a public policy decision-making body with 24 members. On June 5, 2020, the Section adopted its position after an electronic discussion and vote. 21 members voted in favor of the Section's position, 0 members voted against this position, 0 members abstained, 3 members did not vote.

Oppose

Explanation
The Section opposes SB 0895 for the reasons explained in the attached letter.

***Keller* Permissible:**
The improvement of the functioning of the courts
The availability of legal services to society

Contact Person: Bradley R. Hall
Email: bhall@sado.org

SBM STATE BAR OF MICHIGAN

p (517) 346-6300
p (800) 968-1442
f (517) 482-6248

306 Townsend Street
Michael Franck Building
Lansing, MI 48933-2012

www.michbar.org

APPELLATE PRACTICE SECTION

June 5, 2020

State Bar of Michigan
Board of Commissioners
306 Townsend St
Lansing, MI 48933-2012

Re: Senate Bill No. 895

Dear Commissioners:

The State Bar of Michigan Board of Commissioners has invited comments on Senate Bill No. 895 from the Council for the Appellate Practice Section. By a unanimous vote, the Council has adopted the following comment in opposition to the Bill.

Overview of the Existing Process and Standards for Granting Relief from Judgment

Senate Bill No. 895 (2020) would dramatically alter the procedure that applies when a party files a motion for relief from judgment if:

(1) the judgment was based on a jury verdict;
(2) the request for relief is made more than 21 days after the judgment was entered; and
(3) the request is based on any of the grounds for relief from judgment stated in subsection (2) of the Bill.

The grounds for relief in subsection (2) mirror all but one of the grounds for relief from judgment under Michigan Court Rule 2.612(C). The grounds for relief in that court rule are divided into six categories (a) through (f). The Bill only mentions the grounds stated in categories (a), (b), (c), (d), and (f).

By way of background, MCR 2.612(C) provides an avenue for relief from judgment in civil cases after time has expired to request a judgment notwithstanding the verdict, a new trial, or reconsideration. These latter motions are the typical path for setting aside a jury's verdict and remain undisturbed by this Bill. A motion for relief from judgment is filed on the same docket as the judgment and therefore would typically be reviewed and decided by the same judge that entered the judgment or order. This would ordinarily be the same judge who presided over the trial and the only judge familiar with the record in the case. Except in highly unusual circumstances, the decision on a motion for relief from judgment may be appealed to the Court of Appeals only by leave granted.

The decision-making process for resolving a motion for relief from judgment is currently no different from any other motion. When there are disputed issues of fact that must be resolved to determine whether a party is entitled to relief, the court is not permitted to rely upon allegations alone. *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995). The court will often hold an evidentiary hearing to resolve factual disputes. *Id.* But the court also may "hear the motion on affidavits presented by the parties, or may direct that the motion be heard wholly or partly on oral testimony or deposition." MCR 2.119(E)(2). In the context of a motion for relief from judgment based on fraud, the Court of Appeals has opined on the circuit court's discretion to dispense with a hearing as follows:

> While recognizing that the level of proof relating to allegations of fraud is "of the highest order," we believe that the trial court itself is best equipped to decide whether the positions of the parties (as defined by the motion and response, as well as by the background of the litigation) mandate a judicial assessment of the demeanor of particular witnesses in order to assess credibility as part of the fact-finding process. Some motions undoubtedly will require such an assessment, e.g., situations in which "swearing contests" between two or more witnesses are involved, with no externally analyzable indicia of truth. Other motions will not, e.g., situations in which ascertainable material facts are alleged, such as the contents of a bank account on a particular day. Where the truth of fraud allegations can be determined without reference to demeanor, we do not believe that the law requires a trial court to devote its limited resources to an in-person hearing.
>
> "Credibility" and "demeanor" are not synonymous. Demeanor may be one element in assessing a witness' credibility, but often demeanor plays no such role. Such things as motive to lie, lack of opportunity to observe, and prior inconsistent statements may be more important determinants of credibility. SJI2d 4.01; CJI2d 2.6.

Williams v Williams, 214 Mich App 391, 398–400; 542 NW2d 892 (1995).

Over the course of many decades, Michigan courts have established standards for granting relief under the various categories in MCR 2.612(C)(1). These standards are quite difficult to satisfy. For categories at issue here, the applicable standards are as follows:

> (a) *Mistake, inadvertence, surprise, or excusable neglect.* Relief will only be granted "when the circumstances are extraordinary and the failure to grant the relief would result in substantial injustice." *Gillispie v Bd of Tenant Affairs of Detroit Hous Comm'n*, 145 Mich App 424, 428; 377 NW2d 864 (1985) (addressing GCR 1963, 528.3(1), which had language identical to MCR 2.612(C)(1)(a)). Negligence of a party or his attorney is not normally sufficient grounds for setting aside a default judgment under this rule. *Pascoe v Sova*, 209 Mich App 297, 298–299; 530 NW2d 781 (1995).
>
> (b) *Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).* Four requirements must be met: "(1) the evidence, not simply its materiality, must be newly discovered, (2) the evidence must not be merely cumulative, (3) the newly discovered evidence must be such that it is likely to change the result, and (4) the party

moving for relief from judgment must be found to have not been able to produce the evidence with reasonable diligence." *S Macomb Disposal Auth v Am Ins Co*, 243 Mich App 647, 655; 625 NW2d 40 (2000). The moving party bears the burden of demonstrating that all four requirements are met. *Id.*

(c) *Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party*. The moving party must prove the existence of fraud by "clear and convincing evidence." *Kita v Matuszak*, 55 Mich App 288, 297; 222 NW2d 216 (1974).

(d) *The judgment is void*. This rule applies when the judgment was entered without jurisdiction over the subject matter or the person. *Abbott v Howard*, 182 Mich App 243, 248; 451 NW2d 597 (1990).

(f) *Any other reason justifying relief from the operation of the judgment*. Under this category, "the following three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice." *King v McPherson Hosp*, 290 Mich App 299, 304–305; 810 NW2d 594 (2010) (quoting in *Heugel v Heugel,* 237 Mich App 471, 478–479; 603 NW2d 121 (1999)).

As an additional limitation, the relief available under provisions (a), (b), and (c) cannot be requested more than one year after the judgment was entered. MCR 2.612(C)(2).

Senate Bill No. 895's Novel Judicial Review and Fee-shifting Provisions

Senate Bill 895 does not upset the standards established above, but it would revise the process for deciding motions for relief from judgment in several unusual ways, most of them problematic:

First, the Bill requires the Court to apply a "clear and convincing evidence" burden of proof in every instance. As demonstrated above, this standard already applies to requests for relief from judgment based on fraud and would not change that standard. In other instances, burden of proof would still be inapplicable. A request for relief under category (d), for instance, may be based on lack of subject-matter jurisdiction, which is a question of law resolved only by reference to the allegations in the pleadings. *Clohset v No Name Corp*, 302 Mich App 550, 559–561; 840 NW2d 375 (2013). The clear-and-convincing-evidence standard has no meaning or application in that context. It would, however, require a higher burden of proof than may otherwise be required for newly discovered evidence (b) and other reasons justifying relief (f).

Second, as currently written, the Bill ostensibly mandates an evidentiary hearing on every motion when requested by the opposing party, even when there are no material facts in dispute. When the motion raises a question of law that can be resolved on the pleadings, the Bill would still require an evidentiary hearing. When the motion is supported with an affidavit or document, and the other side offers no countervailing evidence in response, the Bill would still require an evidentiary hearing.

Finally, the Bill requires the extensive involvement of six additional judges to grant a motion for relief from judgment. It requires a three-circuit-judge panel (or fewer if the circuit court has fewer judges) to review and adjudicate the motion, which presumably means they must all participate in the

evidentiary hearing. If the motion is granted, another three judges on the Court of Appeals would be required to review the order and issue an opinion in an appeal of right. If the decision still stands, the case will be assigned to a new judge in the circuit court, one who is likely unfamiliar with the record, and that new judge will preside over the second jury trial.

Apart from changes to the process, the Bill also creates disincentives to filing such motions. If the motion is denied, the Bill requires the moving party to pay the opposing party's attorney fees, but if the motion is granted, it takes away any contractual right to recover attorney fees and costs from the moving party. In the name of "public policy," a party who prevails in a jury trial by defrauding the court would thus be protected from any contractual obligation to pay attorney fees and costs for that trial.

The Appellate Practice Section's Reasons for Opposing the Bill

The Appellate Practice Section opposes this Bill because it improperly invades the province of our independent judiciary in determining the appropriate decision-making process for administering justice, unduly burdens the courts with unnecessary, resource-intensive procedures, derogates the freedom to contract, and protects wrongdoers.

As the case law cited above demonstrates, the court already views the granting of motions for relief from judgment as something that should occur only in extraordinary circumstances. The substantive standards for granting such motions reflect that policy, as they are quite difficult to satisfy. Thus, the current standards already favor protecting the finality of the judgment and denying the motion for relief from judgment. Moreover, circuit court judges have no personal incentive to grant such motions, as doing so only means adding another jury trial to their docket.

Imposing a "clear and convincing evidence" burden of proof and mandating an evidentiary hearing are unnecessary to prevent jury verdicts from being lightly discarded. To start, the "clear and convincing evidence" burden of proof already exists for motions based on fraud. Applying that same standard to motions challenging the court's jurisdiction or newly discovered evidence does not appear either necessary or appropriate. In any event, not every motion for relief from judgment raises questions of fact that require an evidentiary hearing. It is a waste of judicial resources to require an evidentiary hearing even when it will not assist the court in deciding the motion.

Further, the additional process of forming a three-judge panel to review the motion, offering an appeal of right for granted motions, and assigning a new judge for the second trial would consume an inordinate amount of judicial resources while offering little to no additional benefit for ensuring the stringent standards for granting relief are properly applied. The current process already provides a three-judge panel on the Court of Appeals to review orders granting relief from judgment. Though the review would be through an application for leave, that process still results in all allegations of error being reviewed by a panel of three judges with the research assistance of staff. That well-staffed appellate court is more than capable of ensuring that an evidentiary hearing was not improperly denied and that the correct burden of proof and standards for granting relief were applied.

Additionally, fee-shifting and anti-fee-shifting provisions in the Bill are bad policy. The court already has the power to award attorney fees to the opposing party if the motion is frivolous. This additional provision would only dissuade parties from bringing non-frivolous motions. Parties—particularly those of limited means—should not be discouraged from bringing meritorious motions that, for

instance, bring to the court's attention evidence that the court was defrauded or show that relevant evidence was improperly concealed from the jury by another party. At the same time, the provision that bars a court from enforcing contractual fee-shifting provisions derogates the freedom to contract and, worse, would serve to protect parties who obtained a favorable jury verdict through fraud, jury tampering, concealment of evidence, or other improper conduct.

Finally, although the proposed legislation appears intended for civil litigation, it raises serious concerns about motions for relief from judgment in criminal cases under MCR 6.502. Adopted in 1989 and amended several times since, Chapter 6.500 of the Michigan Court Rules establishes a mechanism for seeking postconviction relief from criminal convictions for reasons that could not be raised on direct appeal. While 6.500 motions often involve newly discovered evidence, that evidence typically relates to constitutional violations or other legal defects in the proceedings, rather than the weight of the evidence placed before the jury. Any heightened standards for reviewing these claims could upend criminal postconviction procedure, abrogate decades of jurisprudence, and jeopardize the due process rights of criminal defendants.

Conclusion

In sum, the current process is wholly adequate to protect jury verdicts from being lightly discarded and provide certainty that those verdicts based on a sound record will be respected and enforced. However, it is not and should not be the public policy of this state to enforce a jury verdict which turns out to be tainted by the misdeeds of another party or create barriers to determining that was the case. It does not ordinarily require a panel of three judges in the circuit court to determine when relief from judgment is warranted and when it is not. Imposing such a requirement would result in a tremendous waste of precious judicial resources that is completely unnecessary, given that a three-judge panel in the Court of Appeals is well-positioned to catch any mistakes and ensure the jury's verdict is afforded its due respect. Finally, fee-shifting provisions that dissuade a party from bringing such matters to the court's attention are bad policy. And there is no conceivable logical or moral reason why Michigan law should protect a party from a contractual obligation to pay attorney fees, particularly when that party's improper conduct tainted the initial verdict. For all of these reasons, the Council for the Appellate Practice Section adamantly opposes Senate Bill No. 895.

We thank you for this opportunity to comment.

Very truly yours,

s/Bradley R. Hall
Chair, Appellate Practice Section