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December 21, 2011

The Honorable Kurt Heise
State Representative
State Capitol
P.O. Box 30014
Lansing, MI 48909-7514

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

Re: HB 4998 – Court Procedures

Dear Representative Heise:

At its November meeting, the State Bar of Michigan’s Board of Commissioners unanimously voted to **oppose HB 4998**. In its review, the Board considered a recommendation from the Civil Procedure & Courts Committee.

The Board of Commissioners vote reflects a long-held position that these matters are properly managed within the administrative function of the Courts. The Civil Procedure and Court’s Committee further provided the following analysis:

Section 5732: The Committee generally favors deference to local courts to manage their own dockets, subject to oversight by the Michigan Supreme Court. The mandate of this provision would overrule local autonomy.

Section 5736: The subject-matter of the legislation is procedural and should be left to regulation by the Michigan Supreme Court via the Michigan Court Rules (see MCR 4.201(D)).

Section 5739(2): The subject-matter of the legislation is procedural and should be left to regulation by the Michigan Supreme Court via the Michigan Court Rules This is the subject of a Court Rule, MCR 4.201(G)(1)(b) and should be regulated as a procedural matter, n. Moreover, given the summary nature of “summary” proceedings, there are due process concerns with adjudicating future rent claims, including how applicable defenses (including mitigation) will be addressed.

I have enclosed a copy of MCR 4.201 for your reference.

If you would like to discuss this position in further detail or have questions, please contact me directly at your convenience.

Sincerely,

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CC. Julie I. Fershtman, President
Nell Kuhnmuensch, Governmental Consultant Services, Inc.

Subchapter 4.200 Landlord-Tenant Proceedings; Land Contract Forfeiture

Rule 4.201 Summary Proceedings to Recover Possession of Premises

(A) Applicable Rules; Forms. Except as provided by this rule and MCL 600.5701 *et seq.*, a summary proceeding to recover possession of premises from a person in possession as described in MCL 600.5714 is governed by the Michigan Court Rules. Forms available for public distribution at the court clerk's office may be used in the proceeding.

(B) Complaint.

(1) In General. The complaint must

- (a) comply with the general pleading requirements;
- (b) have attached to it a copy of any written instrument on which occupancy was or is based;
- (c) have attached to it copies of any notice to quit and any demand for possession (the copies must show when and how they were served);
- (d) describe the premises or the defendant's holding if it is less than the entire premises;
- (e) show the plaintiff's right to possession and indicate why the defendant's possession is improper or unauthorized; and
- (f) demand a jury trial, if the plaintiff wishes one. The jury trial fee must be paid when the demand is made.

(2) Specific Requirements.

- (a) If rent or other money is due and unpaid, the complaint must show
 - (i) the rental period and rate;
 - (ii) the amount due and unpaid when the complaint was filed; and
 - (iii) the date or dates the payments became due.
- (b) If the tenancy involves housing operated by or under the rules of a governmental unit, the complaint must contain specific reference to the rules or law establishing the basis for ending the tenancy.
- (c) If the tenancy is of residential premises, the complaint must allege that the lessor or licensor has performed his or her covenants to keep the premises fit for the use intended and in reasonable repair during the term of the lease or license, unless the parties to the lease or license have modified those obligations.
- (d) If possession is claimed for a serious and continuing health hazard or for extensive and continuing physical injury to the premises pursuant to MCL 600.5714(1)(c), the complaint must

(i) describe the nature and the seriousness or extent of the condition on which the complaint is based, and

(ii) state the period of time for which the property owner has been aware of the condition.

(e) If possession is sought for trespass pursuant to MCL 600.5714(1)(d), the complaint must describe, when known by the plaintiff, the conditions under which possession was unlawfully taken or is unlawfully held and allege that no lawful tenancy of the premises has existed between the parties since defendant took possession.

(C) Summons.

(1) The summons must comply with MCR 2.102, except that it must command the defendant to appear for trial in accord with MCL 600.5735(2), unless by local court rule the provisions of MCL 600.5735(4) have been made applicable.

(2) The summons must also include the following advice to the defendant:

(a) The defendant has the right to employ an attorney to assist in answering the complaint and in preparing defenses.

(b) If the defendant does not have an attorney but does have money to retain one, he or she might locate an attorney through the State Bar of Michigan or a local lawyer referral service.

(c) If the defendant does not have an attorney and cannot pay for legal help, he or she might qualify for assistance through a local legal aid office.

(d) The defendant has a right to a jury trial which will be lost unless it is demanded in the first defense response, written or oral. The jury trial fee must be paid when the demand is made, unless payment of fees is waived or suspended under MCR 2.002.

(D) Service of Process. A copy of the summons and complaint and all attachments must be served on the defendant by mail. Unless the court does the mailing and keeps a record, the plaintiff must perfect the mail service by attaching a postal receipt to the proof of service. In addition to mailing, the defendant must be served in one of the following ways:

(1) By a method provided in MCR 2.105;

(2) By delivering the papers at the premises to a member of the defendant's household who is

(a) of suitable age,

(b) informed of the contents, and

(c) asked to deliver the papers to the defendant; or

(3) After diligent attempts at personal service have been made, by securely attaching the papers to the main entrance of the tenant's dwelling unit. A return of service made under subrule (D)(3) must list the attempts at personal service. Service under subrule (D)(3) is effective only if a return of service is filed showing that, after diligent attempts, personal service could not be made.

An officer who files proof that service was made under subrule (D)(3) is entitled to the regular personal service fee.

(E) Recording. All landlord-tenant summary proceedings conducted in open court must be recorded by stenographic or mechanical means, and only a reporter or recorder certified under MCR 8.108(G) may file a transcript of the record in a Michigan court.

(F) Appearance and Answer; Default.

(1) Appearance and Answer. The defendant or the defendant's attorney must appear and answer the complaint by the date on the summons. Appearance and answer may be made as follows:

(a) By filing a written answer or a motion under MCR 2.115 or 2.116 and serving a copy on the plaintiff or the plaintiff's attorney. If proof of the service is not filed before the hearing, the defendant or the defendant's attorney may attest to service on the record.

(b) By orally answering each allegation in the complaint at the hearing. The answers must be recorded or noted on the complaint.

(2) Right to an Attorney. If either party appears in person without an attorney, the court must inform that party of the right to retain an attorney. The court must also inform the party about legal aid assistance when it is available.

(3) Jury Demand. If the defendant wants a jury trial, he or she must demand it in the first response, written or oral. The jury trial fee must be paid when the demand is made.

(4) Default.

(a) If the defendant fails to appear, the court, on the plaintiff's motion, may enter a default and may hear the plaintiff's proofs in support of judgment. If satisfied that the complaint is accurate, the court must enter a default judgment under MCL 600.5741, and in accord with subrule (K). The default judgment must be mailed to the defendant by the court clerk and must inform the defendant that (if applicable)

(i) he or she may be evicted from the premises;

(ii) he or she may be liable for a money judgment.

(b) If the plaintiff fails to appear, a default judgment as to costs under MCL 600.5747 may be entered.

(c) If a party fails to appear, the court may adjourn the hearing for up to 7 days. If the hearing is adjourned, the court must mail notice of the new date to the party who failed to appear.

(G) Claims and Counterclaims.

(1) Joinder.

(a) A party may join:

(i) A money claim or counterclaim described by MCL 600.5739. A money claim must be separately stated in the complaint. A money counterclaim must be labeled and separately stated in a written answer.

(ii) A claim or counterclaim for equitable relief.

(b) Unless service of process under MCR 2.105 was made on the defendant, a money claim must be

(i) dismissed without prejudice, or

(ii) adjourned until service of process is complete

if the defendant does not appear or file an answer to the complaint.

(c) A court with a territorial jurisdiction which has a population of more than 1,000,000 may provide, by local rule, that a money claim or counterclaim must be tried separately from a claim for possession unless joinder is allowed by leave of the court pursuant to subrule (G)(1)(e).

(d) If trial of a money claim or counterclaim

(i) might substantially delay trial of the possession claim, or

(ii) requires that the premises be returned before damages can be determined,

the court must adjourn the trial of the money claim or counterclaim to a date no later than 28 days after the time expires for issuing an order of eviction. A party may file and serve supplemental pleadings no later than 7 days before trial, except by leave of the court.

(e) If adjudication of a money counterclaim will affect the amount the defendant must pay to prevent issuance of an order of eviction, that counterclaim must be tried at the same time as the claim for possession, subrules (G)(1)(c) and (d) notwithstanding, unless it appears to the court that the counterclaim is without merit.

(2) Removal.

(a) A summary proceedings action need not be removed from the court in which it is filed because an equitable defense or counterclaim is interposed.

(b) If a money claim or counterclaim exceeding the court's jurisdiction is introduced, the court, on motion of either party or on its own initiative, shall order removal of that portion of the action to the circuit court, if the money claim or counterclaim is sufficiently shown to exceed the court's jurisdictional limit.

(H) Interim Orders. On motion of either party, or by stipulation, for good cause, a court may issue such interim orders as are necessary, including, but not limited to the following:

(1) Injunctions. The interim order may award injunctive relief

(a) to prevent the person in possession from damaging the property; or

(b) to prevent the person seeking possession from rendering the premises untenable or from suffering the premises to remain untenable.

(2) Escrow Orders.

(a) If trial is adjourned more than 7 days and the plaintiff shows a clear need for protection, the court may order the defendant to pay a reasonable rent for the premises from the date the escrow order is entered, including a pro rata amount per day between the date of the order and the next date rent ordinarily would be due. In determining a reasonable rent, the court should consider evidence offered concerning the condition of the premises or other relevant factors. The order must provide that:

(i) payments be made to the court clerk within 7 days of the date of entry of the order, and thereafter within 7 days of the date or dates each month when rent would ordinarily be due, until the right to possession is determined;

(ii) the plaintiff must not interfere with the obligation of the defendant to comply with the escrow order; and

(iii) if the defendant does not comply with the order, the defendant waives the right to a jury trial only as to the possession issue, and the plaintiff is entitled to an immediate trial within 14 days which may be by jury if a party requests it and if, in the court's discretion, the court's schedule permits it. The 14-day limit need not be rigidly adhered to if the plaintiff is responsible for a delay.

(b) Only the court may order the disbursement of money collected under an escrow order. The court must consider the defendant's defenses. If trial was postponed to permit the premises to be repaired, the court may condition disbursement by requiring that the repairs be completed by a certain time. Otherwise, the court may condition disbursement as justice requires.

(I) Consent Judgment When Party Is Not Represented. The following procedures apply to consent judgments and orders entered when either party is not represented by an attorney.

(1) The judgment or order may not be enforced until 3 regular court business days have elapsed after the judgment or order was entered. The judge shall review, in court, a proposed consent judgment or order with the parties, and shall notify them of the delay required by this subrule at the time the terms of the consent judgment or order are placed on the record.

(2) A party who was not represented by an attorney at the time of the consent proceedings may move to set aside the consent judgment or order within the 3-day period. Such a motion stays the judgment or order until the court decides the motion or dismisses it after notice to the moving party.

(3) The court shall set aside a consent judgment or order on a satisfactory showing that the moving party misunderstood the basis for, or the rights which were being relinquished in, the judgment or order.

(J) Trial.

(1) Time. When the defendant appears, the court may try the action, or, if good cause is shown, may adjourn trial up to 56 days. If the court adjourns trial for more than 7 days, an escrow order may be entered pursuant to subrule (H)(2). The parties may adjourn trial by stipulation in writing or on the record, subject to the approval of the court.

(2) Pretrial Action. At trial, the court must first decide pretrial motions and determine if there is a triable issue. If there is no triable issue, the court must enter judgment.

(3) Government Reports. If the defendant claims that the plaintiff failed to comply with an ordinance or statute, the court may admit an authenticated copy of any relevant government employee's report filed with a government agency. Objections to the report affect the weight given it, not its admissibility.

(4) Payment or Acceptance of Money. The payment or the acceptance of money by a party before trial does not necessarily prevent or delay the proceedings.

(K) Judgment.

(1) Requirements. A judgment for the plaintiff must

(a) comply with MCL 600.5741;

(b) state when and under what conditions, if any, an order of eviction will issue;

(c) separately state possession and money awards; and

(d) advise the defendant of the right to appeal or file a postjudgment motion within 10 days.

If the judgment is in favor of the defendant, it must comply with MCL 600.5747.

(2) Injunctions. The judgment may award injunctive relief

(a) to prevent the person in possession from damaging the property; or

(b) to prevent the person seeking possession from rendering the premises untenable, or from suffering the premises to remain untenable.

(3) Partial Payment. The judgment may provide that acceptance of partial payment of an amount due under the judgment will not prevent issuance of an order of eviction.

(4) Costs. Only those costs permitted by MCL 600.5759 may be awarded.

(5) Notice. The court must mail or deliver a copy of the judgment to the parties. The time period for applying for the order of eviction does not begin to run until the judgment is mailed or delivered.

(L) Order of Eviction.

(1) Request. When the time stated in the judgment expires, a party awarded possession may apply for an order of eviction. The application must:

(a) be written;

- (b) be verified by a person having knowledge of the facts stated;
 - (c) if any money has been paid after entry of the judgment, show the conditions under which it was accepted; and
 - (d) state whether the party awarded judgment has complied with its terms.
- (2) Issuance of Order of Eviction and Delivery of Order. Subject to the provisions of subrule (L)(4), the order of eviction shall be delivered to the person serving the order for service within 7 days after the order is filed.
- (3) Issuance Immediately on Judgment. The court may issue an order immediately on entering judgment if

- (a) the court is convinced the statutory requirements are satisfied, and
- (b) the defendant was given notice, before the judgment of a request for immediate issuance of the order.

The court may condition the order to protect the defendant's interest.

(4) Limitations on Time for Issuance and Execution. Unless a hearing is held after the defendant has been given notice and an opportunity to appear, an order of eviction may not

- (a) be issued later than 56 days after judgment is entered,
- (b) be executed later than 56 days after it is issued.

(5) Acceptance of Partial Payment. An order of eviction may not be issued if any part of the amount due under the judgment has been paid, unless

- (a) a hearing is held after the defendant has been given notice and an opportunity to appear, or
- (b) the judgment provides that acceptance of partial payment of the amount due under the judgment will not prevent issuance of an order of eviction.

(M) Postjudgment Motions. Except as provided in MCR 2.612, any postjudgment motion must be filed no later than 10 days after judgment enters.

(1) If the motion challenges a judgment for possession, the court may not grant a stay unless

- (a) the motion is accompanied by an escrow deposit of 1 month's rent, or
- (b) the court is satisfied that there are grounds for relief under MCR 2.612(C), and issues an order that waives payment of the escrow; such an order may be ex parte.

If a stay is granted, a hearing shall be held within 14 days after it is issued.

(2) If the judgment does not include an award of possession, the filing of the motion stays proceedings, but the plaintiff may move for an order requiring a bond to secure the stay. If the initial escrow deposit is believed inadequate, the plaintiff may apply for continuing adequate escrow payments in accord with subrule (H)(2). The filing of a postjudgment motion together with a bond, bond

order, or escrow deposit stays all proceedings, including an order of eviction issued but not executed.

(N) Appeals From Possessory Judgments.

(1) Rules Applicable. Except as provided by this rule, appeals must comply with MCR 7.101, 7.102, and 7.103.

(2) Time. An appeal of right must be filed within 10 days after the entry of judgment.

(3) Stay of Order of Eviction.

(a) Unless a stay is ordered by the trial court, an order of eviction must issue as provided in subrule (L).

(b) The filing of a claim of appeal together with a bond or escrow order of the court stays all proceedings, including an order of eviction issued but not executed.

(4) Appeal Bond; Escrow.

(a) A plaintiff who appeals must file a bond providing that if the plaintiff loses he or she will pay the appeal costs.

(b) A defendant who appeals must file a bond providing that if the defendant loses, he or she will pay

(i) the appeal costs,

(ii) the amount due stated in the judgment, and

(iii) damages from the time of forcible entry, the detainer, the notice to quit, or the demand for possession.

The court may waive the bond requirement of subrule (N)(4)(b)(i) on the grounds stated in MCR 2.002(C) or (D).

(c) If the plaintiff won a possession judgment, the court shall enter an escrow order under subrule (H)(2) and require the defendant to make payments while the appeal is pending. This escrow order may not be retroactive as to arrearages preceding the date of the posttrial escrow order unless there was a pretrial escrow order entered under subrule (H)(2), in which case the total escrow amount may include the amount accrued between the time of the original escrow order and the filing of the appeal.

(d) If it is established that an appellant cannot obtain sureties or make a sufficient cash deposit, the court must permit the appellant to comply with an escrow order.

(O) Objections to Fees Covered by Statute for Orders of Eviction. Objections shall be by motion. The fee to be paid shall be reasonable in light of all the circumstances. In determining the reasonableness of a fee, the court shall consider all issues bearing on reasonableness, including but not limited to

(1) the time of travel to the premises,

(2) the time necessary to execute the order,

- (3) the amount and weight of the personal property removed from the premises,
- (4) who removed the personal property from the premises,
- (5) the distance that the personal property was moved from the premises, and
- (6) the actual expenses incurred in executing the order of eviction.

Rule 4.202 Summary Proceedings; Land Contract Forfeiture

(A) Applicable Rules. Except as provided by this rule and MCL 600.5701 *et seq.*, a summary proceeding to recover possession of premises after forfeiture of an executory contract for the purchase of premises as described in MCL 600.5726 is governed by the Michigan Court Rules.

(B) Jurisdiction.

(1) Status of Premises. The proceeding may be brought when the premises are vacant or are in the possession of

- (a) the vendee,
- (b) a party to the contract,
- (c) an assignee of the contract, or
- (d) a third party.

(2) Powers of Court. The court may do all things necessary to hear and resolve the proceeding, including but not limited to

- (a) hearing and deciding all issues,
- (b) ordering joinder of additional parties,
- (c) ordering or permitting amendments or additional pleadings, and
- (d) making and enforcing writs and orders.

(C) Necessary Parties. The plaintiff must join as defendants

- (1) the vendee named in the contract,
- (2) any person known to the plaintiff to be claiming an interest in the premises under the contract, and
- (3) any person in possession of the premises, unless that party has been released from liability.

(D) Complaint. The complaint must:

- (1) comply with the general pleading requirements;
- (2) allege
 - (a) the original selling price,
 - (b) the principal balance due, and
 - (c) the amount in arrears under the contract;