

STATE OF MICHIGAN
IN THE SUPREME COURT

In re CERTIFIED QUESTIONS FROM THE
UNITED STATES DISTRICT COURT, WESTERN
DISTRICT OF MICHIGAN, SOUTHERN
DIVISION.

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a
GRAND HEALTH PARTNERS, WELLSTON
MEDICAL CENTER, PLLC, PRIMARY HEALTH
SERVICES, PC, and JEFFERY GULICK,
Plaintiffs,

v

GOVERNOR OF MICHIGAN,
MICHIGAN ATTORNEY GENERAL, and
MICHIGAN DEPARTMENT OF HEALTH AND
HUMAN SERVICES DIRECTOR,
Defendants.

**The appeal involves a ruling
that a statute or other state
governmental action is
invalid.**

**DEFENDANT ATTORNEY GENERAL DANA NESSEL'S RESPONSE IN
SUPPORT OF GOVERNOR AND DIRECTOR OF DEPARTMENT OF
HEALTH AND HUMAN SERVICES' MOTION TO PROVIDE THAT ANY
PRECEDENTIAL VALUE OF THE COURT'S OCTOBER 2 DECISION DOES
NOT TAKE EFFECT UNTIL OCTOBER 30**

On October 5, the Governor and the Director of the Department of Health and Human Services filed a motion asking this Court to provide that its October 2, 2020 opinion does not take any precedential effect until 28 days after its issuance, consistent with the enforcement date under MCR 7.315(C)(2)(a). Despite the fact that the Attorney General has publicly announced that she will not criminally enforce any Executive Orders in place after April 30, 2020, (*AG Press Secretary Issues Statement Regarding Michigan Supreme Court's Recent Decision*, Press

Release (October 4, 2020)),¹ she nevertheless supports the Governor and the Director’s motion for three reasons.

First, the Attorney General agrees that, notwithstanding the context of a federal certified question, both the Michigan Court Rules (specifically MCR 7.315(2)(a) and MCR 7.315(C)) and this Court’s Internal Operating Procedures on remittitur (IOP 7.315(C)(1)) support the request to delay any precedential effect of this Court’s opinion. And this Court has discretion to grant this 28-day period. See *Riley v Northland Geriatric Ctr*, 425 Mich 668, 680–681 (1986) (“This Court will not equate issuance of an order or judgment for execution or enforcement purposes . . . with the precedential effect of an opinion for guidance and authority[.]”) (citation to older court rules omitted).

Second, there are significant practical reasons for granting the request. Because the Governor’s Executive Orders touched on nearly all aspects of state governance, this Court’s October 2, 2020 opinion striking down a significant source of authority for those Orders has generated a panoply of questions in the civil arena, both for state agencies and for the ordinary citizen. An interim period is needed in which the State can make an orderly transition from the Executive Orders to other measures that are necessary to address the demands of the pandemic—regardless of whether those measures are instituted by the Legislature or by an executive agency.

¹ Available at: https://www.michigan.gov/ag/0,4534,7-359-92297_47203-541288--,00.html.

Third, allowance for a transition period will avert the chaos that will otherwise result from this Court's October 2, 2020 opinion having immediate precedential effect. The abrupt discontinuance of Executive Orders, with nothing to fill the gap, leaves Michigan and its citizens in a precarious situation—compounding the perilous situation that the pandemic itself already presents. That is, some of the gaps left open by the sudden invalidation of the Executive Orders will be monumental.

Take Executive Order 2020-142,² issued on June 30, 2020. That order provided a structure to support all Michigan schools as they planned for a return of education in the fall, and, while it allowed for some flexibility in addressing particular district needs, it required school districts to adopt a COVID-19 Preparedness and Response Plan, which would lay out how they would cope with the disease under the various phases of the Michigan Safe Start Plan. If the October 2, 2020 opinion has immediate precedential effect, are school children potentially left with no safety measures in place? Will schools have any guidance or accountability if they must quickly transition in the event of a second wave, or, ideally, a lessening of the pandemic's devastating effects?

Also, take Executive Order 2020-76, which was issued May 6, 2020 (though made retroactive until March 16, 2020) and expands unemployment eligibility and cost-sharing.³ This order, among other things, allows those who must leave work

² Available at: https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html.

³ See *id.*

due to COVID-19 to collect unemployment benefits. If the precedential effect of the October 2, 2020 opinion is immediate, are those workers who left their jobs in reliance on this order—in particular, those who desperately need the funds—now unable to collect?

The Legislature is presumably hard at work on these important issues. But COVID-19 waits for no one, and parents, students, teachers, and schools need interim guidance. Postponing the precedential effect of the Court’s opinion would allow for maintenance of the status quo pending future guidance.

Similar examples abound in all areas of government. Indeed, the Legislature, in its response to the motion, concedes that the Executive Orders “limited and regulated almost every aspect of daily life.” (Legislature’s 10/6/2020 Response, p 1.) A delay in the precedential effect of the October 2, 2020 opinion will allow for some semblance of organization during this uncertain time.

In short, Attorney General Dana Nessel requests that this Court grant the Governor and Director Gordon’s motion to provide that the Court’s October 2, 2020 opinion does not take any precedential effect until 28 days after its issuance, consistent with the enforcement date under MCR 7.315(C)(2)(a).

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General
Counsel of Record

s/Ann M. Sherman
Ann M. Sherman (P67762)
Deputy Solicitor General
Rebecca A. Berels (P81977)
Assistant Attorney General
Department of Attorney General
Attorneys for the Attorney General
P.O. Box 30212, Lansing, MI 48909
(517) 335-7628
ShermanA@michigan.gov
BerelsR1@michigan.gov

Dated: October 9, 2020

RECEIVED by MSC 10/9/2020 9:31:09 AM