

Certified as a True Copy  
By G. Wenner  
Deputy Clerk  
U.S. District Court  
Western Dist. of Michigan  
Date 6/17/20

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, )  
d/b/a GRAND HEALTH PARTNERS, et al., )  
Plaintiffs, )  
)  
-v- )  
)  
GRETCHEN WHITMER, et al., )  
Defendants. )  
\_\_\_\_\_ )

No. 1:20-cv-414

Honorable Paul L. Maloney

**ORDER**

Pursuant to Local Rule 83.1 and Michigan Court Rule 7.308, the Court finds that Counts I and II in the above-captioned case present unsettled issues of state law that are likely to affect the outcome of the case, such that certification of the questions to the Michigan Supreme Court is appropriate. The Court also finds that certification of the questions to the Michigan Supreme Court will not cause undue delay or prejudice to the parties. Accordingly, the Court certifies the following questions to the Michigan Supreme Court:

1. Whether, under the Emergency Powers of the Governor Act, MCL § 10.31, *et seq.*, or the Emergency Management Act, MCL § 30.401, *et seq.*, Governor Whitmer has the authority after April 30, 2020 to issue or renew any executive orders related to the COVID-19 pandemic.
2. Whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.

To aid the Michigan Supreme Court in resolving the legal questions, this Court presents the following statement of facts:



1. Plaintiff Midwest Institute of Health, PLLC, d/b/a Grand Health Partners (“Grand Health”), is a Michigan limited liability company with its principal place of business located at 2060 East Paris Ave., SE, Suite 100, Grand Rapids, MI 49546. Grand Health is a medical provider that operates out of offices in Grand Rapids, Petoskey, and Grand Haven, Michigan. Grand Health’s physicians provide both bariatric surgery services and general surgery services, including laparoscopic cholecystectomy (gallbladder removal), appendectomy, and various types of hernia surgery and repair. Grand Health also provides endoscopic and colonoscopy services. All endoscopy services and pre- and post-operative care and medical programs take place at Grand Health’s offices, but all surgeries occur at area hospitals, at which Grand Health’s physicians have admitting privileges.

2. Plaintiff Wellston Medical Center, PLLC (“Wellston Medical Center”) is a primary care center located at 14477 Caberfae Hwy Wellston, Michigan 49689.

3. Plaintiff Primary Health Services, PC (“Primary Health Services”) is a primary care center located at 505 W Ludington Ave, Ludington, MI 49431.

4. Wellston Medical Center and Primary Health Services are primary care clinics in West Michigan. They serve patients in primarily rural communities surrounding Wellston and Ludington. Over 90% of their patients are on Medicaid or Medicare.

5. Plaintiff Jeffery Gulick is a resident of Owosso, Michigan, who was scheduled to undergo knee replacement surgery on March 20, 2020.

6. Defendant Gretchen Whitmer is the Governor of Michigan and is being sued in her official capacity.

7. Defendant Dana Nessel is the Attorney General of Michigan and has authority to enforce Michigan law. She is being sued in her official capacity.

8. Defendant Robert Gordon is the Director of the Michigan Department of Health and Human Services. He is being sued in his official capacity.

9. On March 11, 2020, Governor Whitmer issued Executive Order 2020-04, which proclaimed a state of emergency under both the Emergency Management Act, Mich. Comp. Laws § 30.403, and the Emergency Powers of the Governor Act of 1945, Mich. Comp. Laws § 10.31.

10. Governor Whitmer's executive order identified the COVID-19 pandemic as the basis for her declaration of a state of emergency under both statutory regimes.

11. On March 21, 2020, Governor Whitmer issued Executive Order 2020-17, entitled "Temporary restrictions on non-essential medical and dental procedures," which remained in effect until it was rescinded effective May 28, 2020. In relevant part, Executive Order 2020-17 provided that, until the termination of the Governor's declaration of a state of emergency, most medical providers were prohibited from providing any "medical or dental procedure that is not necessary to address a medical emergency or to preserve the health and safety of a patient, as determined by a licensed medical provider." Executive Order 2020-17 prohibited medical providers from providing any bariatric surgery and joint replacement surgery services, "except for emergency or trauma-related surgery where postponement would significantly impact the health, safety, and welfare of the patient." Executive Order 2020-17 provided that any willful violation of its provisions was a misdemeanor.

12. On March 23, 2020, Governor Whitmer issued Executive Order 2020-21, commonly known as the “Stay Home, Stay Safe” order. In the ensuing weeks, Governor Whitmer reissued this order periodically, extending its duration and modifying its scope.

13. On April 1, 2020, Governor Whitmer issued Executive Order 2020-33, which replaced Executive Order 2020-04, declared a state of emergency pursuant to the Emergency Powers of the Governor Act, and proclaimed a state of disaster and a state of emergency under the Emergency Management Act. These declarations were based on the dangers posed by the virus that causes COVID-19.

14. On April 1, 2020, Governor Whitmer also requested that the Michigan Legislature extend the state of emergency by an additional 70 days, as contemplated by the Emergency Management Act.

15. On April 7, 2020, the Michigan Senate and Michigan House of Representatives denied Governor Whitmer’s request to extend the state of emergency for an additional 70 days. Instead, the Michigan Legislature extended the state of emergency declared by Governor Whitmer until April 30, 2020.

16. Meanwhile, Robert Gordon, the Director of the Michigan Department of Health and Human Services (“HHS”), issued an emergency order on April 2, 2020.

17. On April 30, 2020, the Michigan Legislature did not extend Governor Whitmer’s declarations of a state of emergency and a state of disaster.

18. After the Michigan Legislature did not extend her emergency declarations, Governor Whitmer issued on April 30, 2020 three additional Executive Orders: 2020-66, 2020-67, and 2020-68.

19. Executive Order 2020-66 terminated the Governor's declarations of a state of emergency and a state of disaster based upon the COVID-19 pandemic, as required under the Emergency Management Act.

20. Executive Order 2020-68 declared states of disaster and emergency under the Emergency Management Act. Executive Order 2020-68 stated that these renewed states of disaster and emergency remained effective through May 28, 2020.

21. Executive Order 2020-67 stated that a "state of emergency remains declared across Michigan" under the Emergency Powers of the Governor Act and that the state of emergency remained in effect until May 28, 2020.

22. On May 7, 2020, Governor Whitmer issued Executive Order 2020-77, an iteration of her previously issued "Stay Home" order. On May 18, 2020, the Governor rescinded Executive Order 2020-77 and replaced it with Executive Order 2020-92.

23. Also on May 18, 2020, Director Gordon issued an updated emergency order, which rescinded and replaced the April 2 HHS order.

24. On May 21, 2020, the Michigan Court of Claims, in *Michigan House of Representatives and Michigan Senate v. Whitmer*, ruled that Executive Order 2020-67 was a valid exercise of authority under the Emergency Powers of the Governor Act, but that Executive Order 2020-68 was not a valid exercise of authority under the Emergency Management Act. These rulings are currently being challenged on appeal in the Michigan Court of Appeals.

25. On May 22, 2020, Governor Whitmer issued Executive Order 2020-99, declaring an emergency under the Emergency Powers of the Governor Act and—subject to

the ongoing litigation described above—states of emergency and disaster under the Emergency Management Act, due to the COVID-19 pandemic. Executive Order 2020-99 provides that it shall remain in effect until June 19, 2020.

26. Governor Whitmer issued Executive Order 2020-114 on June 5, 2020. Executive Order 2020-114 rescinded and replaced Executive Order 2020-97. Paragraph 9 of Executive Order 2020-114 requires outpatient healthcare facilities and other medical providers to comply with additional industry-specific sanitation and safety protocols, including specific waiting room procedures, limitations on the number of patient appointments, and enhanced telehealth and telemedicine procedures.

27. Grand Health Partners, Wellston Medical Center, and Primary Health Services operate outpatient healthcare facilities and medical offices and, as of June 12, 2020, are required to comply with Executive Order 2020-110 and Executive Order 2020-114, to the extent that those executive orders are enforceable.

28. Grand Health and its patients were impacted by Executive Order 2020-17's prohibition against the provision of bariatric and "non-essential" medical services between March 21, 2020 and May 28, 2020. During that time, Grand Health was unable to provide many of its patients with medical care due to Governor Whitmer's prohibition against the provision of nonessential medical treatment. Although Grand Health continued to provide minimal levels of emergent care to its patients, Grand Health furloughed most of its employees and pushed back almost all of its patients' procedures and post-operative support meetings.

29. Wellston Medical Center and Primary Health Services were also impacted by the Governor's executive orders. Prior to March 2020, these clinics treated an average of 90-100 patients per day, with 16 staff members. Under the Governor's executive order prohibiting non-essential medical treatment, the number of patients who were allowed to be treated by the clinics dropped by 95%.

30. Plaintiff Jeffery Gulick was scheduled to undergo knee replacement surgery on his right knee on March 20, 2020, at Memorial Hospital in Owosso. Due to the Governor's executive orders, his knee replacement surgery could not go forward. Additionally, he could not receive follow up care for the knee replacement surgery that had been performed on his left knee.

This case is hereby **STAYED** until the Michigan Supreme Court resolves the relevant questions or declines to adjudicate the questions certified by this court.

**IT IS SO ORDERED.**

Date: June 16, 2020

/s/ Paul L. Maloney  
Paul L. Maloney  
United States District Judge