STATE OF MICHIGAN
IN THE 46th JUDICIAL CIRCUIT COURT FOR OTSEGO COUNTY

MOORE MURPHY HOSPITALITY, LLC D/B/A IRON PIG SMOKEHOUSE,

Petitioner-Appellant,

v

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.
_____/

Case No.: 2021-18522-AE

HON. COLIN G. HUNTER

BRIEF IN SUPPORT OF DEPARTMENT OF HEALTH AND HUMAN SERVICES' MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, TO STAY PENDING APPEAL

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INTRODUCTION

This Court's opinion invalidating the sanction against Appellant Iron Pig Smokehouse (Iron Pig) and holding MCL 333.2253 unconstitutional comes at a very perilous moment. The Omicron variant has hit Michigan hard, taxing our hospitals and threatening the lives of our most vulnerable residents.

The Department of Health and Human Services (Department) firmly disagrees with this Court's decision and will seek to appeal it. In the meantime, the Department respectfully requests that the Court clarify that its order extends no further than providing relief to the appellant in this matter from the Department's sanction—which is the full relief lawfully available in this administrative appeal. If the Court believes that its order extends more broadly, the Department asks that the Court enter a stay of any such intended effect pending appeal to make clear the Department may continue to exercise its critical public-health authority under MCL 333.2253 in the face of an epidemic that has already killed approximately 30,000 Michiganders.

Pending the resolution of this motion, MCR 7.114(C) provides that this Court's opinion and order will take operative effect in twenty-one days from its issuance: February 3, 2022. The Department is therefore advising the Court that, consistent with MCR 7.114(C) (as well as the law governing the legal effect of the Court's opinion and order once that effect is triggered), the Department will today issue an order under MCL 333.2253 requiring Michigan nursing homes to offer their residents the opportunity to get the most up-to-date immunization for COVID-19. (Nursing Home Order, **Attachment A**). The Department is likewise advising

the Court that other COVID-19 epidemic orders—including those for expedited testing by clinical laboratories, for testing to protect the staff and inmates in correctional facilities, and for testing of long-term care facility workers—will remain in effect for the time being.[1]

The emergency order directed at nursing homes—an order occasioned by the fact that some homes have not offered timely up-to-date vaccinations to residents with waning immunity—exemplifies why it is crucial for the Department to retain authority to move nimbly to address an ongoing epidemic. This case, which involves an administrative appeal of a citation directed at a single entity, is not an appropriate vehicle under the law for handcuffing the state's primary public health agency as it plays its due role in our Constitution's mandate to protect the state's health[2] and moves to address the most lethal pandemic in more than a century.

In recognition of the fact that this administrative appeal did not vest this Court with authority or jurisdiction to provide relief beyond the specific appellant and citation here, and in recognition of the broader confusion and disruption that is already beginning to flow in that regard from this Court's decision, the Department asks this Court to clarify the effect of its decision as limited to the Department's citation of Iron Pig. Alternatively, if this Court declines to do so, the Department requests that this Court enter a stay pending appeal for the reasons set forth below.

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[1] See https://www.michigan.gov/coronavirus/0,9753,7-406- 98178_98455-533660--,00.html

[2] Const 1963, art IV, § 51.

STATEMENT OF FACTS

This past Spring, Iron Pig filed with this Court a document that purported to be a hybrid of a lawsuit and an appeal of the $5,000 fine imposed upon it for allowing indoor dining at a time when such gatherings were prohibited under an epidemic order issued by the Department's Director in November 2020. Among the relief requested by Iron Pig in that original filing was a declaratory judgment determining that MCL 333.2253 was unconstitutional. (See Relief Request C of Iron Pig's Complaint/Claim of Appeal.)

Through a series of discussions and related emails, the Department's counsel made clear to the attorney for Iron Pig that, in light of the claims and requested relief, the matter belonged in the Court of Claims. (See Emails, **Attachment B.**) To resolve the dispute, the parties stipulated to dismissal of the lawsuit, including a striking of the requested declaratory judgment and other relief. It was agreed the matter would proceed simply as an appeal of the agency decision. (Stipulation, **Attachment C.**)

On January 13, 2022, this Court issued its opinion following briefing and argument by the parties. Although not purporting to describe its holding as either a declaratory judgment or injunction, this Court broadly concluded that MCL 333.2253 was an unconstitutional delegation of legislative authority. And it ended this analysis by asserting "MCL 333.2253 is hereby severed from Michigan's Public Health Code." (1/13/22 Opinion, p 31.)

Since that time, media stories have picked up on this Court's broad language purporting to sever this statute from the Public Health Code.[3] Indeed, the Petoskey News included the following excerpt in a recent article:

> "Delaney said Hunter's ruling is not only binding on MDHHS and other state agencies but also local health departments. 'So if the state statute is unconstitutional so is the local statute,' said Delaney. "I think other bars and restaurants should look to this decision and seek the same remedies we probably will in this case.'"[4]

And Iron Pig is using its social media to advance the narrative that this opinion has State-wide consequences. (Iron Pig Facebook post 1/14/22; **Attachment E.**)

[3] E.g., Scott McClallen, *Iron Pig wins COVID court battle* (Jan. 17, 2022), https://www.iosconews.com/news/state/article_33886d1f-5e4f-5bfc-8fa4-044a1fa01e80.html, Beth LeBlanc, The Detroit News, *Northern Michigan judge's ruing casts doubt on public health orders* (Jan. 19, 2022) (**Attachment D**).

[4] Paul Welitzkin, The Petoskey News-Review, *Judge: Basis for emergency orders limiting bars, restaurants fail to pass constitutinal muster* (Jan. 14, 2022), https://www.petoskeynews.com/story/news/local/gaylord/2022/01/14/judge-basis-emergency-orders-limiting-bars-restaurants-fail-pass-constitutional-muster/6528282001/.

ARGUMENT

STANDARD OF REVIEW

The factors for granting or denying a stay pending appeal are the same as those for granting or denying injunctive relief. The Department thus has the burden of showing (1) it is likely to prevail on the merits; (2) it will be irreparably harmed if a stay is not issued; (3) the harm to the Department absent a stay outweighs the harm that the denial would cause Iron Pig; and (4) there will be no harm to the public interest if a stay is issued. See, e.g., *Detroit Fire Fighters Ass'n v Detroit*, 482 Mich 18, 34 (2008) (addressing factors for granting injunctive relief); MCR 7.105(G)(describing factors for stays from administrative decisions); *Michigan Coalition of Radioactive Material Users, Inc v Griepentrog*, 945 F2d 150, 153 (CA 6, 1991).

A. The Department is likely to prevail on the merits.

In its anticipated application for leave to appeal, the Department will raise at least two merits arguments arising from this Court's opinion. One of these will obviously be the assertion this Court's non-delegation argument is incorrect and should be rejected. That argument having been sufficiently advanced already, the Department will not try this Court's patience by repeating it here.

The other argument warrants elaboration. It is a well-settled principle that opinions by Michigan circuit courts have no precedential effect. *People v Hunt*, 171 Mich App 174, 180 (1988); *People v Ward*, 133 Mich App 344, 353 (1984). Only published opinions of the Michigan Court of Appeals and Michigan Supreme Court

have precedential effect. *Hunt*, 171 Mich App at 180. The Iron Pig's attorney made this precise point during oral argument regarding the opinions of the Court of Claims, as this Court acknowledged in the context of its analysis on the contention that the emergency orders did not need to be promulgated as rules. (1/13/22 Opinion, p 6, "[T]he Court nonetheless finds the analysis from Hon[orable] Elizabeth L. Gleicher in that case to be persuasive in application to this case even if it is not binding.").)

It follows, then, that this Court has no more authority to bind other circuit courts to its opinions than it has willingness to be bound by its judicial peers. And while other judges presented with this Court's opinion likely will understand they may embrace it as either persuasively informative or reject it as erroneously analyzed, the general public absorbing media accounts of this Court's statements will attach more significance to them than they can command in another judge's courtroom. This has practical consequences—most importantly in terms of compliance by non-parties to this lawsuit. (See *infra*.)

This matter came to this Court as an appeal from an administrative agency decision. Thus, the sole province of this Court was to determine whether it should "hold unlawful and set aside the decision or order of an agency"—namely, the $5,000 fine imposed on Iron Pig. MCL 24.306(1). This Court had no equitable authority in this appellate context. *Huron Behavioral Health v Dep't of Comm Health*, 293 Mich App 491, 497-498 (2011). And those wishing to bring actions seeking equitable relief from allegedly unconstitutional statutes against the

Department or other State agencies must seek such relief in the Court of Claims. MCL 600.6419.[5] Iron Pig understood this and stipulated to proceed only on an administrative appeal that could not involve a broad declaration like that articulated here. Such language reflects not only did more than this Court has jurisdiction to do, but more than even Iron Pig asked of it.

B. The Department will be irreparably harmed if a stay is not granted.

The Department has been charged by the Legislature with broad responsibilities for taking action to preserve the healthcare system and ensure the public health. These responsibilities are manifest throughout the Public Health Code. MCL 333.2253, in particular, was designed by the Legislature following the Spanish flu to allow the Department to act quickly during an epidemic.

We are now in the midst of the worst epidemic in our Nation's history, and this Court's assertions–that this epidemic-response statute is severed into oblivion even though it remains a vibrant law can only serve to create confusion and promote delays in appropriate implementation of the Department's ongoing

[5] And indeed, even a declaratory judgment properly sought in that forum would only bind the Department in its relationship to Iron Pig here. See *Associated Builders & Contractors v Dir of Consumer & Indus. Servs Dir*, 472 Mich 117, 124 (2010) ("A declaratory judgment is a binding adjudication of the rights and status of litigants which is conclusive in a subsequent action between the parties as to the matters declared") (cleaned up), overruled on other grounds by *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349 (2010). See also *State of Florida v United States Department of Health and Human Services*, 780 F Supp 2d 1307, 1316 (ND Fl, 2011) ("A declaratory judgment establishes and declares 'the rights and other legal relations' between the parties before the court").

epidemic orders. The Department is, on an ongoing basis as this pandemic persists, taking steps calculated to relieve the burden on the healthcare system and protect the most vulnerable. Yet, the possibility some nursing homes may resist assuring the onsite provision of booster shots in light of the publicity surrounding this Court's recent opinion is just one of the dangerous consequences that could flow from the misunderstanding described above.

The struggles of the hospital system in Michigan early in this pandemic, and again in recent months, have been well-documented in the media describing the need to bring in healthcare professionals from outside this State.[6] The Public Health Code has been designed with various mechanisms to confront those struggles. But a significant one that this Court's recent opinion threatens to create confusion about comes from MCL 333.16171, which states:

> "Under the circumstances and subject to the limitations stated in each case, the following individuals are not required to have a license issued under this article for practice of a health profession in this state: . . .
>
> (d) If the director of the department of health and human services determines that control of an epidemic is necessary to protect the public health **under section 2253**, an individual who is authorized to practice a health profession in another state, who would otherwise meet the requirements of this article for licensure, while rendering

[6] Michigan Radio, *New York is offering nurses up to $7K a week. Michigan is offering way less* (April 8, 2020), https://www.michiganradio.org/news/2020-04-08/new-york-is-offering-nurses-up-to-7k-a-week-michigan-is-offering-way-less; NPR, *Worn-out nurses hit the road for better pay, stressing hospital budgets — and morale* (Oct. 20, 2021) ("Henry Ford Health System in Michigan announced plans to bring in hundreds of nurses from the Philippines.",) https://www.npr.org/sections/health-shots/2021/10/20/1046131313/worn-out-nurses-hit-the-road-for-better-pay-stressing-hospital-budgets-and-moral

> medical care during an epidemic-related staffing shortage to meet health professional staffing needs. As used in this subdivision, "epidemic-related staffing shortage" means a shortage of individuals who are licensed under this article during the epidemic. Epidemic-staffing shortage does not include a staffing shortage caused by a labor dispute as that term is defined in section 2 of 1939 PA 176, MCL 423.2." [MCL 333.16171 emphasis added.]

We are struggling through an epidemic. This is an all-hands-on-deck situation. The Legislature created an epidemic-response tool by which hospitals in Michigan may be able to get help from doctors, nurses, and other health care licensees from other States to fill staffing shortages and preserve the healthcare system. This tool has been wielded to help Michigan hospitals.[7] And while this Court's opinion suggests the predicate authority for using that tool is now stripped from the Public Health Code, it is not; the decision only binds the Department in its relationship to Iron Pig here. Even so, the Department seeks this stay so that is clear to all while this matter pends on appeal.

C. The harm to the Department if a stay is granted will outweigh that to the Iron Pig if it is denied.

No harm will come to Iron Pig if this stay is granted. The Department will not seek to collect the $5,000 fine imposed on the Iron Pig while the application and appeal are pending. This stay is being sought instead to guard against the broader confusion and dangerous undue consequences that may flow from a decision that

[7] Exemption of Michigan Licensure Time of Disaster/State of Emergency, LARA (3/16/20) (**Attachment F**).

only binds the Department with respect to the party to this administrative appeal, Iron Pig.

D. There will be no harm to the public if the stay is granted.

This stay is being sought in furtherance of the public health. While this Court may regard MCL 333.2253 as an improper delegation of legislative authority, it made clear it was not endeavoring to call into question the wisdom or effectiveness of the Department's efforts under this epidemic response statute. (1/13/22 Opinion, p 7.) To the extent that the imposition of the fine against Iron Pig represents or reflects a harm to the public, that harm will not occur as a result of the stay.

CONCLUSION AND RELIEF REQUESTED

Consistent with the settled law governing the timing and scope of the effect of this Court's decision, the Department will presently continue taking appropriate actions to preserve Michigan's healthcare system and to protect the public health. This motion has been brought because media reports flowing from this Court's recent opinion, and the Iron Pig's misunderstanding about its legal significance, may impede those lawful efforts by creating confusion about the continued applicability of the epidemic-response statute. The Department respectfully requests that this Court enter an order clarifying the legal effect of its January 13, 2022 opinion in this administrative appeal as limited to the Department's citation of Iron Pig. Alternatively, if this Court disagrees that the legal effect of its opinion is so limited and declines to clarify accordingly, the Department requests a stay of any intended precedential effect of the opinion—that is, of any effect intended by this Court beyond Iron Pig's citation—pending appeal.

Respectfully submitted,

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