STATE OF MICHIGAN
IN THE COURT OF APPEALS

DAVID KRIEGER, et al.,

Plaintiffs-Appellees,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY, et al.,

Defendants-Appellants.

Court of Appeals Nos. 359895; 359896; 359897; 359898; 359899; 359900; 359901; 359902; 359903; 359904; 359905; 359906; 359907; 359908; 359909; 359910; 359911; 359912; 359913; 359914; 359915; 359916; 359917; 359918; 359919

Court of Claims Nos. 20-000094-MM; 20-000102-MM; 20-000103-MM; 20-000111-MM; 20-000112-MZ; 20-000116-MM; 20-000118-MM; 20-000121-MM; 20-000140-MM; 20-000151-MM; 20-000156-MM; 20-000230-MM; 20-000232-MZ; 20-000233-MM; 20-000235-MM; 20-000236-MM; 20-000237-MM; 20-000239-MM; 20-000240-MZ; 20-000241-MM; 20-000245-MM; 20-000246-MM; 20-000257-MM; 20-000260-MM; 20-000262-MM

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THE STATE OF MICHIGAN, THE DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY, THE DEPARTMENT OF NATURAL RESOURCES, ATTORNEY GENERAL DANA NESSEL IN HER OFFICIAL CAPACITY, THE DEPARTMENT OF ATTORNEY GENERAL, MARIO FUSCO, AND LUCAS TRUMBLE'S BRIEF ON APPEAL

Dana Nessel
Attorney General

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

Nathan A. Gambill (P75506)
Assistant Attorney General
Attorneys for Defendants-Appellants

Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
gambilln@michigan.gov

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STATEMENT OF JURISDICTION

The Court of Claims consolidated 25 lawsuits, in which the State of Michigan, the Department of Environment, Great Lakes, and Energy (EGLE), the Department of Natural Resources (DNR), Attorney General Dana Nessel in her official capacity, the Department of Attorney General, Mario Fusco, and Lucas Trumble are all named as defendants. The defendants' briefing in the Court of Claims addressed the claims against each of the defendants, and the Court of Claims' May 21, 2021 opinion and order applied to all 25 lawsuits. But the May 21, 2021 opinion only discussed claims against EGLE and DNR. To avoid confusion and the potential switch of some defendants onto a different litigation track than EGLE and DNR (which did not seem to be the intent of the Court of Claims), all defendants—not just EGLE and DNR—filed a timely motion for reconsideration on June 7, 2021. The Court of Claims denied the motion for reconsideration on August 2, 2021.

All defendants then filed a timely claim of appeal on August 6, 2021 under MCR 7.202(6)(a)(v) because the Court of Claims' opinion denied defendants' assertion of governmental immunity made pursuant to a motion under MCR 2.116(C)(7). On November 8, 2021, a panel of this Court entered an order dismissing defendants' timely claim of appeal for lack of jurisdiction. And on December 21, 2021, the panel denied a timely motion for reconsideration of that order.

Defendants filed a timely application for leave to appeal under MCR 7.205(A)(4)(b) on January 11, 2022, and this Court granted the application on June 10, 2022. This Court also consolidated the appeals in all 25 cases.

Though defendants' briefing below addressed all the claims against them, Plaintiffs did not address all claims, nor did the Court of Claims' May 21, 2021 opinion. Defendants do not request this Court to rule in the first instance on those claims. Instead, this brief addresses the issues on which the Court of Claims ruled. For that reason, a reference to Defendants or State Defendants below refers to EGLE and DNR, because those are the defendants mentioned by the Court of Claims in its May 21, 2021 ruling.

STATEMENT OF QUESTIONS PRESENTED

1. Can State Defendants' allegedly negligent regulation of a third party's private property put Plaintiffs' private property to a "public use" under the Takings Clause?

   Defendants-Appellants' answer: No.

   Plaintiffs-Appellees' answer: Yes.

   Trial court's answer: Did not answer.

2. Can State Defendants' allegedly negligent regulation of a third party's private property be "directly aimed" at Plaintiffs' private property such that the regulation of the third party has "taken" Plaintiffs' private property under the Takings Clause?

   Defendants-Appellants' answer: No.

   Plaintiffs-Appellees' answer: Yes.

   Trial court's answer: Yes.

3. Can State Defendants use a motion under MCR 2.116(C)(7) to argue that an "inverse condemnation" claim is just a tort claim to which State Defendants are immune?

   Defendants-Appellants' answer: Yes.

   Plaintiffs-Appellees' answer: No.

   Trial court's answer: No.

4. If Plaintiffs make a publicly available government document of which the court can take judicial notice the basis of their legal claim, should the court consider the document if it performs a MCR 2.116(C)(8) analysis?

   Defendants-Appellants' answer: Yes.

   Plaintiffs-Appellees' answer: No.

   Trial court's answer: No.

CONSTITUTIONAL PROVISION INVOLVED

Const 1963, art 10, § 2

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record.

"Public use" does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.

In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.

Any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by this section, by statute, or otherwise, shall be preserved and shall not be abrogated or impaired by the constitutional amendment that added this paragraph.

INTRODUCTION

This matter arises from the tragic failure of the privately owned and operated Edenville Dam. The dam's owners are now bankrupt. As part of their effort to recover against someone, Plaintiffs filed misguided lawsuits against State Defendants. Plaintiffs allege that State Defendants negligently regulated the dam. But since their negligence claims are barred by law, Plaintiffs attempt to circumvent State Defendants' immunity by labeling their tort claims as "inverse condemnation" claims. The Court of Claims erroneously allowed Plaintiffs' claims to proceed despite the settled law forbidding Plaintiffs' strategy.

To pursue just compensation under Michigan's Takings Clause—Const 1963, art 10, § 2—it is not enough for Plaintiffs to allege that State Defendants caused damage to their property. That is what would be required in tort. Instead, Plaintiffs must show that State Defendants took their private property and put it to a public use without first filing suit to condemn it. This includes a showing that State Defendants took affirmative acts directly aimed at Plaintiffs' property. But Plaintiffs cannot satisfy the Takings Clause. State Defendants' regulation of the privately owned and operated Edenville Dam does not even put the *dam* to a "public use," let alone put *Plaintiffs' properties* to a public use. Nor is regulation of the private third-party dam an affirmative act specifically aimed at Plaintiffs' property. There would be no limit on inverse condemnation claims if persons whose property is damaged by a private third party can pursue the government under the Takings Clause simply because the government regulated that private third party.

The Court of Claims also erred below by disregarding this Court's precedent governing dispositive motion practice. This Court authorizes the government to attack inverse condemnation claims using the MCR 2.116(C)(7) standard, which requires a reviewing court to consider documents that contradict the factual allegations in a complaint. Many of Plaintiffs' allegations are flatly contradicted by publicly available government documentation submitted by State Defendants. But the Court of Claims recast State Defendants' motion as one brought under MCR 2.116(C)(8), and declined to consider the publicly available government documentation, even though Plaintiffs quoted from it and made it the basis of their claims.

The Court of Claims' holding disregards the language of the Takings Clause and establishes a standard by which state agencies that are statutorily required to regulate a broad range of activities are exposed to "inverse condemnation" claims when a regulated private actor damages the property of others. This Court should reverse the Court of Claims' opinion and dismiss the inverse condemnation claims against State Defendants in their entirety.

STATEMENT OF FACTS

The federal government set the levels of Wixom Lake.

The Edenville Dam was a long, earthen embankment located at the confluence of the Tittabawassee and Tobacco rivers. It formed Wixom Lake, a 2,600-acre artificial impoundment. *Boyce Hydro Power, LLC*, 159 FERC ¶ 62292, at *1 (2017). The dam had a powerhouse that was used to generate hydroelectricity to the benefit of its private owners. *Id.* Importantly, the earthen embankment would form a lake regardless of whether the powerhouse was used to generate electricity. The embankments had "a maximum height of 54.5 feet." *Id.* The spillways on top of the earthen embankments that allowed water to flow through the dam could only control the impoundment level by several feet—they could not prevent the dam from impounding water. (See, e.g., App vol 2, p 352, explaining that the embankment continued "to hold back a substantial amount of water.")

In 1976, the federal government determined that the dam needed a license from the Federal Energy Regulatory Commission (FERC) to use equipment that could generate electricity. *Wolverine Power Corp*, 85 FERC ¶ 61063, 61204 (1998). At that time, it was owned and operated by the Wolverine Power Corporation. *Id.* Historically, Wolverine had temporarily "drawn down" Wixom Lake up to "four feet in the late winter" before returning the lake to "normal pool elevations" in the spring. *Id.* But when Wolverine Power applied for a hydroelectric license, "local residents and recreational users" of Wixom Lake, along with the Wixom Lake Association, objected "that large fluctuations of reservoir levels adversely affect

boaters and lake-front residences," and asked FERC to "limit such fluctuations." *Id.* at 61205. When FERC issued the requested license in 1998, it agreed with the residents and required Wolverine Power to lower Wixom Lake "no more than three feet" during the winter. *Id.* at 61209. Specifically, FERC ordered that Wixom Lake (with minimal variation) could be lowered to "672.8 feet" in the winter as long as it was returned in the spring to a "normal pool elevation of 675.8 feet," which was the level it was required to be for the rest of the year. *Id.* at 61213. Once FERC issued its license, the dam was no longer within the State of Michigan's dam safety jurisdiction. MCL 324.31506(2)(a).

By 2003, Wolverine Power defaulted on its mortgage, and Synex Michigan, LLC purchased the Edenville Dam out of foreclosure. *Wolverine Power Corp. Synex Energy Res, Ltd Synex Michigan, LLC*, 107 FERC ¶ 62266, 64498 (2004). In 2004, FERC transferred Wolverine Power's license to Synex Michigan, which "agreed to accept all the terms and conditions of the licenses, and to be bound by the licenses as if it were the original licensee." *Id.* at 64499. That, of course, included the "winter" and "normal" water level requirements imposed by the original 1998 license. In 2007, "Synex Michigan, LLC changed its name to Boyce Hydro Power, LLC." *Boyce Hydro Power, LLC*, 159 FERC ¶ 62292, at *2 (2017).

Plaintiffs' Complaints allege that state agencies controlled the Edenville Dam. (Complaints in App p 31, ¶ 103; App p 60, ¶ 103; App p 81, ¶ 96; App p 114, ¶ 96; App p 139, ¶ 85.) But that allegation is contradicted by the public record from FERC referenced above. It is also contradicted by publicly available documents.

Boyce Hydro was made up of a conglomerate of trusts and LLCs controlled by Lee Mueller and his cousin, Stephen Hultberg. (App vol 2, pp 359–360.) When Boyce Hydro sought bankruptcy protection, it filed documents with that court explaining which property was owned and operated by which entity in the conglomerate, and the filing plainly identifies the Edenville Dam as one of Boyce Hydro's assets. (*Id.*)

Once FERC transferred Wolverine Power Corporation's license to Boyce Hydro, it soon learned that the practice of Mr. Mueller—Boyce Hydro's operator—was to disregard or mislead regarding several requirements of Boyce's FERC license for the Edenville Dam. See *Boyce Hydro Power, LLC*, 159 FERC ¶ 62292, at *2–26 (2017) (detailing more than 15 years of violations). In September 2018, FERC finally revoked Mr. Mueller's license for the Edenville Dam, noting that it did "not often revoke a license," but that Mr. Mueller's "history of obfuscation and outright disregard" of license obligations left it with no choice. *Boyce Hydro Power, LLC*, 164 FERC ¶ 61178, at *15 (2018). It was at the point of license revocation that the Edenville Dam became regulated by EGLE rather than FERC. (Complaints in App p 31, ¶ 59; App p 60, ¶ 59; App p 114, ¶ 40; App p 139, ¶ 42.)

The revocation of Boyce's license to use its powerhouse to generate electricity did not mean the dam's earthen embankments would—or could—stop impounding water. As noted above, the earthen embankments rose up to 54 feet tall. *Boyce Hydro Power, LLC*, 159 FERC ¶ 62292, at *1 (2017). FERC could have ordered the removal of the earthen embankments that impounded the water but since the embankments did not need to be removed for Boyce to stop using its powerhouse,

FERC concluded that circumstances did "not mandate removal or any modification of the dam" for the license revocation to be effective. *Boyce Hydro Power, LLC*, 164 FERC ¶ 61178, at note 137 (2018).

Midland and Gladwin Counties petitioned the circuit court to set the levels of Wixom Lake.

On October 4, 2018, EGLE dam safety personnel met Mr. Mueller's wife, Michele, at the dam at Mr. Mueller's request and visually inspected the dam. (Complaints in App p 31, ¶¶ 60–61; App p 60, ¶¶ 60–61; App p 114, ¶¶ 42–43; App p 139, ¶¶ 45–46.) The inspection was not required by statute. During the inspection, "there were no observed deficiencies that would be expected to cause immediate failure of the dam." (App vol 2, p 163.) Plaintiffs make the inspection report a basis of their claims and allege that the large earthen embankments could not operate without "approval" and could have somehow stopped impounding water if EGLE staff had not performed the inspection. (Complaints in App p 31, ¶ 105; App p 60, ¶ 105; App p 81, ¶ 98; App p 114, ¶ 98; App p 139, ¶ 79.) Both the FERC record discussed above, and the inspection report contradict that allegation. (App vol 2, p 163.)

Since the FERC license that had required Mr. Mueller to maintain "winter" and "normal" lake levels on Wixom Lake had been revoked, there was no longer a mandate for Mr. Mueller to maintain the lake at any level above the spillway's sill height. In October 2018, Midland and Gladwin Counties decided to pursue a court order setting a lake level under Part 307 (Inland Lake Levels) of the Natural

Resources and Environmental Protection Act (NREPA), MCL 324.30701 et seq. (Complaints in App p 31, ¶¶ 74–78; App p 60, ¶¶ 74–78; App p 81, ¶¶ 58–62; App p 114, ¶ 45; App p 139, ¶ 48.) On October 9, 2018, and October 16, 2018, respectively, Gladwin County and Midland County enacted resolutions: 1) directing their legal counsel to seek an order from the circuit court establishing an enforceable lake level for Wixom Lake; 2) delegating the county's Part 307 authority to the Four Lakes Task Force; and 3) appointing Spicer Group, Inc. as the engineer for the project. (App vol 2, pp 202–209.) The Counties determined that obtaining a court order setting the level of Wixom Lake was "necessary . . . in order to protect the public's health, safety, and welfare, to best reserve the natural resources of the state, and to preserve and protect the value of property around the lake." (*Id.*)

Plaintiffs allege that the "raising and lowering of water levels of Wixom Lake are a state prerogative, and such actions are the actions of the state." (Complaints in App p 31, ¶ 73; App p 60, ¶ 73; App p 81, ¶ 57; App p 114, ¶ 61.) But the Counties' consolidated lake level petition and its exhibits—which Plaintiffs attached to their brief below and identify as a basis of their claims (see, e.g., complaint in App p 139, ¶¶ 48–52)—contradict that allegation. The Counties' resolutions do not refer to or seek to partner with or rely on any state agency in any way. Under Part 307, it was the Counties—not State Defendants—who were responsible to "provide for and maintain that normal level." MCL 324.30708(1).

On January 25, 2019, the Counties filed their petition in the circuit court asking the court to set the levels of Wixom Lake to the identical levels FERC had

required when it had regulated the Edenville Dam. (App vol 2, pp 187–198.) Part 307 does authorize EGLE to be a "petitioner" in some circumstances to seek a lake level order from a circuit court. MCL 324.30706. But EGLE was not the "petitioner" for the Counties' petition regarding Wixom Lake—the Counties were. (App vol 2, pp 187–198.) Instead, EGLE is defined as an "interested party" in all Part 307 proceedings and must receive notice of any petition to set a lake level in Michigan. MCL 324.30701(g) and MCL 324.30707(3). Therefore, as indicated in the statute, EGLE appeared[1] in the Counties' Part 307 proceeding regarding Wixom Lake and filed comments related to the petition. Plaintiffs identify EGLE's comments as a basis for its allegation that the raising and lowering of Wixom Lake were state prerogatives. (Complaints in App p 31, ¶ 73; App p 60, ¶ 73; App p 81, ¶ 57; App p 114, ¶ 61; App p 139, ¶¶ 48–52.) But the filing contradicts that allegation. EGLE's only request was that the Part 307 order incorporate the water quality requirements of the previous FERC permit, and to specify that state permits may be required to perform work authorized by the order. (App vol 2, pp 216–222.)

The circuit court held a hearing on the Counties' petition on May 3, 2019, in which the Counties' consulting engineer, Spicer Group, testified as an expert witness in support of setting the levels of Wixom Lake. (App vol 2, pp 224–272.) Again, Plaintiffs identify the Part 307 hearing—and the resulting order—as a basis for its allegation that the raising and lowering of Wixom Lake were state

[1] DNR also appeared, but only as a property owner because it owned land on the lake.

prerogatives and attached the hearing transcript to their brief below. (Complaints in App p 31, ¶ 73; App p 60, ¶ 73; App p 81, ¶ 57; App p 114, ¶ 61; App p 139, ¶¶ 48–52.) But the transcript and order contradict that allegation. No representative of any state agency addressed the court. Mr. Mueller did not participate in the proceedings at all. The court entered the Counties' requested order, setting the levels of Wixom Lake to the same levels previously ordered by FERC, on July 18, 2019. (Complaint in App p 139, ¶ 52; App vol 2, pp 273–278.)

EGLE and DNR regulated the Edenville Dam.

On September 25, 2019, Boyce Hydro—using the Four Lakes Task Force as its agent—applied for a permit from EGLE. (Complaints in App p 31, ¶¶ 66–67, 105; App p 60, ¶¶ 66–67, 105; App p 81, ¶¶ 50–51, 98; App p 114, ¶¶ 53–54, 98; App p 139, ¶¶ 54–55, 79.) Plaintiffs allege that the application was a request to lower Wixom Lake in the *spring of 2020* and they make the application a basis of their claims. (*Id.*) But the application itself contradicts that allegation. (App vol 2, p 286.) The application was a request to drop the level of Wixom Lake lower than the 672.8 feet the circuit court order allowed in the *winter of 2019–2020*, then to return the lake to the normal pool elevation of 675.8 feet by April 15, 2020. (*Id.*) EGLE denied Boyce's request for the lower-than-usual winter drawdown. Boyce performed it, anyway.

On December 12, 2019, EGLE sent Boyce an enforcement notice. (Complaints in App p 31, ¶¶ 66, 70, 105; App p 60, ¶¶ 66, 70, 105; App p 81, ¶¶ 50, 54, 98; App p 114, ¶¶ 53, 56, 98; App p 139, ¶¶ 55, 79.) Because Plaintiffs allege

that Boyce was trying to lower Wixom Lake in the spring of 2020, they allege that the enforcement notice was EGLE's attempt to keep Boyce from doing so, and they make the notice a basis of their claims. (*Id.*) But the notice contradicts that allegation. It advised Boyce to mitigate the natural resources damages it was causing by returning Wixom Lake to the winter level established by the circuit court. (App vol 2, pp 294–296.) Boyce did not follow the notice. Instead, it applied for a permit—again with the Four Lakes Task Force as its agent—to perform construction work on the Edenville Dam over the winter of 2019–2020. (Complaints in App p 31, ¶ 105; App p 60, ¶ 105; App p 81, ¶ 98; App p 139, ¶ 55.) Plaintiffs allege that the application was an attempt by Boyce to repair the dam and EGLE denied the application, and Plaintiffs make the application a basis of their claims. (*Id.*) But the application and the associated permit contradict that allegation. EGLE *granted* the permit request to perform construction on the dam. (App vol 2, pp 299–317.)

On February 27, 2020, Boyce—again with the Four Lakes Task Force as its agent—applied to return Wixom Lake to its normal pool elevation in the spring of 2020. (Complaints in App p 31, ¶¶ 66, 71–72, 105; App p 60, ¶¶ 66, 71–72, 105; App p 81, ¶¶ 50, 55–56, 98; App p 114, ¶¶ 53, 57–58, 98; App p 139, ¶¶ 54, 64, 79.) EGLE granted the requested permit.[2] Plaintiffs allege that the permit was an

[2] Returning impoundments in the spring to the normal pool elevation established by a circuit court does not ordinarily require a permit from EGLE. The permit here was only appropriate because Boyce had operated outside the bounds of the circuit court order.

attempt to "force" Boyce to return Wixom Lake to its normal pool elevation against Boyce's wishes and they make the application and permit a basis of their claims. (*Id.*) But the application and permit contradict that allegation. The permit was *permission* to perform a requested activity, not an *order* compelling unwilling activity. (App vol 2, pp 318–333.) Boyce then returned Wixom Lake to the normal pool elevation established by the circuit court. (Complaints in App p 31, ¶ 71; App p 60, ¶ 71; App p 81, ¶ 55; App p 114, ¶ 57; App p 139, ¶ 64.)

On April 30, 2020, EGLE and DNR filed suit against Boyce for the natural resource damages it had caused by drawing Wixom Lake down over the winter lower than its established winter level. (Complaints in App p 114, ¶¶ 53, 59, 98; App p 139, ¶¶ 54, 64, 79.) Plaintiffs allege that the lawsuit was an attempt to "force" Boyce to return Wixom Lake to its normal pool elevation in the spring of 2020 against Boyce's wishes and they make the lawsuit a basis of their claims. (*Id.*) But Boyce had already set Wixom Lake to its normal pool elevation when the lawsuit was filed, as Plaintiffs acknowledge, and the lawsuit contradicts Plaintiffs' allegations. The suit sought monetary relief for *past* damages and an injunction that the Boyce entities comply with the law in the future. (App vol 2, pp 334–349.)

The Edenville Dam failed.

On May 19, 2020, after several days of significant rain, a segment of the Edenville Dam's embankment on the far eastern side failed, sending much of its impounded water downstream. (See, e.g., App p 31, ¶ 34.) Plaintiffs allege that various state agencies and employees caused the privately owned and operated

Edenville Dam to fail. (Complaints in App p 31, ¶¶ 11–18; App p 60, ¶¶ 16–18; App p 81, ¶¶ 94–95; App p 114, ¶¶ 94–95; App p 139, ¶ 79.) Plaintiffs allege that their property was damaged by the additional flooding that occurred because of the dam's failure. (Complaints in App p 31, ¶¶ 99–103; App p 60, ¶¶ 99–103; App p 81, ¶¶ 73–74; App p 114, ¶ 16; App p 139, ¶ 78.) Notably, under Part 315 of NREPA (Dam Safety), MCL 324.32501 et seq., the owner of the Edenville Dam had authority to take any "action necessary to mitigate emergency conditions if imminent danger of failure exists." MCL 324.31512(1). It did not need to seek approval beforehand from State Defendants or any other government entity.

Following the Edenville Dam's failure, Mr. Mueller and his operating companies stopped cooperating with state agencies' efforts to inspect the dam or to maintain the integrity of the remaining portion of the dam. Thus, to carry out their responsibilities, the agencies were required to obtain administrative search warrants and a temporary restraining order against Mr. Mueller and his companies. (App vol 2, pp 350–358.) These documents further contradict Plaintiffs' allegation that state agencies controlled the Edenville Dam. (Complaints in App p 31, ¶ 103; App p 60, ¶ 103; App p 81, ¶ 96; App p 114, ¶ 96; App p 139, ¶ 85.)

On May 4, 2022, the Independent Forensic Team investigating the failure of the Edenville Dam released a 500-page report, in which it studied various hypothetical scenarios to determine if they would have prevented the dam's failure based on the precipitation event in May 2020. One of the hypothetical scenarios it studied was Plaintiffs' core legal theory (scenario #7 in the report): what if EGLE

had not granted Boyce's request to return Wixom Lake to its normal level in April 2020 and Boyce had kept the lake at the level it was during the winter of 2019/2020? The report determined that if Boyce had *not* returned Wixom Lake to its normal level in April 2020, it "would have resulted in less than 0.2 feet difference in peak lake level." (App vol 2, p 378.) The report concluded, therefore, that the effect of that action "would very likely have been too small to prevent the dam failure." (App vol 2, p 383.)

PROCEEDINGS BELOW

A total of 25 lawsuits were filed against State Defendants in the Court of Claims between May 22, 2020 and December 17, 2020. The Court of Claims consolidated the suits under a single briefing and hearing schedule. The suits are mostly "mass tort" suits in which several, named individual plaintiffs file suit. But some of the suits are putative class action suits. Most of the plaintiffs allege that their property was damaged by flood waters, but some also allege that even if they were not downstream from the dam failure, their property values have decreased because they no longer have a lake in front of their property.

The various defendants in the suits, though primarily EGLE and DNR, began filing dispositive motions to dismiss the complaints. But the Court of Claims eventually ordered that Plaintiffs file a single, consolidated response and that Defendants file a single, consolidated reply. The Court held a dispositive motion

hearing on November 13, 2020.[3] State Defendants argued that Plaintiffs' property damage claims were not inverse condemnation claims, but negligence claims to which State Defendants were immune.

On May 21, 2021, the Court of Claims issued its opinion, granting in part and denying in part State Defendants' motion for summary disposition. Rather than analyzing all 25 complaints individually, the Court of Claims selected five complaints as a representative sampling of the allegations against State Defendants. (App p 17, n 5.) Those are the five complaints used above for the Statement of Facts section. The Court of Claims held that State Defendants are immune to Plaintiffs' trespass-nuisance claims but held that the same facts also give rise to an inverse condemnation claim, to which State Defendants are not immune. (App pp 14–22.) The Court of Claims denied State Defendants' motion for reconsideration on August 2, 2021. (App p 23.)

STANDARD OF REVIEW

This Court reviews the Court of Claims' denial of State Defendants' motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118 (1999). When adjudicating motions under MCR 2.116(C)(7), this Court "must" consider any documents submitted by the movant—not just the pleadings—and accepts as true

[3] Plaintiffs who filed suit after the motion briefing and hearing had been completed agreed that their claims would also be governed by the Court of Claims' forthcoming opinion.

only well-pleaded allegations in the complaint that are not contradicted by the documents. *Maiden*, 461 Mich at 119 (1999); MCR 2.116(G)(5).

Unlike an analysis under MCR 2.116(C)(10), which focuses on whether a *trial* is needed to resolve factual disputes, courts review the evidence under the (C)(7) standard to determine whether an *evidentiary hearing* on governmental immunity is needed. *Dextrom v Wexford Cnty*, 287 Mich App 406, 428–433 (2010). If there is a genuine dispute about facts needed for courts to determine "the ultimate [legal] issue of whether governmental immunity applies," then courts schedule an evidentiary hearing to resolve those issues. *Id*. But if there is no genuine factual dispute, courts simply decide the immunity issue as a matter of law without an evidentiary hearing. *Id*.

The (C)(7) analysis is also different from the (C)(10) analysis in another respect. Under (C)(10), nonmovants cannot rely on their pleadings to establish a genuine factual dispute, they *must* submit evidence. MCR 2.116(G)(4). But under (C)(7), a nonmovant *can* rely on their pleading, and "need not reply with supportive material." *Maiden v Rozwood*, 461 Mich 109, 119 (1999). The consequence of that choice is that if the movant has submitted evidence, the nonmovant cannot rely on allegations in their complaint "contradicted by documentation submitted by the movant." *Id*; *Dextrom*, 287 Mich App at 428–429.

To determine whether there is a factual dispute such that an evidentiary hearing is needed, courts consider the evidence submitted by the parties and the uncontradicted allegations of the complaint. *Maiden*, 461 Mich at 119; *Dextrom*,

287 Mich App at 428–429. If courts determine that a question of fact exists such "that factual development could provide a basis for recovery," then courts schedule an evidentiary hearing. *Dextrom*, 287 Mich App at 431–432. If not, then courts decide the legal question of whether the plaintiff has avoided the government's immunity. *Id*.

Even though State Defendants moved under MCR 2.116(C)(7), as explained below, the Court of Claims erroneously disregarded the (C)(7) standard and procedure, and instead adjudicated State Defendants' motion under MCR 2.116(C)(8). (App pp 11–14.) The Court of Claims then erroneously applied its selected standard. Under MCR 2.116(C)(8), a reviewing court decides the motion "on the basis of the pleadings alone." *Gorman v Am Honda Motor Co, Inc*, 302 Mich App 113, 131 (2013). But when a complaint references a document as the basis of its claim, that document becomes "a part of the pleading for all purposes" under MCR 2.113(C)(2). Additionally, courts can take judicial notice of public knowledge "at any stage of the proceeding." MRE 201(b) and (e). Below, the Court of Claims did neither.

ARGUMENT

I. Plaintiffs' property damage claims are not the result of State Defendants' abuse of their eminent domain power.

A. Issue Preservation

State Defendants' core argument below was that the property damage claims Plaintiffs labeled as constitutional "inverse condemnation" claims are, if anything, just regular negligence claims to which State Defendants are immune. The Court of Claims erroneously rejected that argument. (App pp 14–21.)

B. Analysis

Tort claims can arise simply because a person's property is damaged by the negligent act of another. The Court of Claims' error below was to assume that an inverse condemnation claim was no different than a tort claim. From the Court of Claims' perspective, all Plaintiffs had to allege to make out a Takings Clause claim was that their property was significantly damaged by State Defendants. (App pp 16–21.) But the Michigan Supreme Court and this Court have rejected that interpretation of the Takings Clause. Unlike a tort claim, an inverse condemnation claim can only arise if the government has "taken" private property "for public use without just compensation therefore being first made or secured in a manner prescribed by law." Const 1963, art 10, § 2. Put another way, "the State of Michigan recognizes a cause of action, often referred to as an inverse or reverse condemnation suit, for a de facto taking when the state fails to utilize the

appropriate legal mechanisms to condemn property for public use." *Peterman v State Dep't of Nat Res*, 446 Mich 177, 187–188 (1994).

The Michigan Supreme Court explains that "each state by virtue of its statehood has the right to exercise the power of eminent domain." *Loomis v Hartz*, 165 Mich 662, 665 (1911). The power is inherent. Justice Cooley described it as the power "to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience and welfare may demand." *People ex rel Trombley v Humphrey*, 23 Mich 471, 474 (1871). But if the government uses its power to take private property and put it to a public use, it must pay "just compensation" to the owner of the private property "in a manner prescribed by law." Const 1963, art 10, § 2.

The "manner prescribed by law" that regulates the government's use of its power of eminent domain is the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 et seq. *Michigan Dep't of Transp v Frankenlust Lutheran Congregation*, 269 Mich App 570, 576 (2006) (the "ultimate purpose" of the UCPA "is to ensure the guarantee of just compensation found in" the Constitution). The UCPA requires that if "property is to be acquired by an agency through the exercise of its power of eminent domain, the agency shall commence a condemnation action for that purpose." MCL 213.52(2). An "inverse condemnation" claim is for those instances when the government has put private property to a public use without first filing a condemnation action. To make a claim, a plaintiff must show that "the governmental entity abused its exercise of legitimate eminent domain power to

plaintiff's detriment," and did so "in affirmative actions directly aimed at the plaintiff's property." *Heinrich v City of Detroit*, 90 Mich App 692, 698–700 (1979) (citations omitted).

A tort claim for property damages is "distinct" from an inverse condemnation claim, and the two "should not be confused" with one another. *Peterman*, 446 Mich at 206–207. The Michigan Supreme Court has observed that "Michigan is a 'taking' state rather than a 'taking or damaging' state." *Hart v City of Detroit*, 416 Mich 488, 500 (1982). That is, just because property is damaged does not mean it has been taken for a public use. In *Hart*, the trial court and Court of Appeals had erroneously held that the three-year statute of limitations for "injury to . . . property" applied to inverse condemnation actions. *Id*. at 492. The Michigan Supreme Court reversed because in "an inverse condemnation action, it is not enough for the owner to prove injury to his property by the defendant with resultant damages. Rather, plaintiff must prove that the condemner's actions were of such a degree that a taking occurred." *Id*. at 501.

It used to be that persons *could* pursue tort claims against the government for ordinary "trespassory invasions" onto their property, even if the trespasses "stopped short of being 'takings' of property." *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 155 (1988), overruled by *Pohutski v City of Allen Park*, 465 Mich 675 (2002). But that is no longer true, and the Court of Claims properly dismissed Plaintiffs' trespass-nuisance claims against State Defendants based on State Defendants' immunity to tort claims. (App p 22.)

Where the Court of Claims erred below was to rule that Plaintiffs could avoid State Defendants' immunity simply by calling their allegations that the government had negligently damaged their property "inverse condemnation" claims instead of tort claims. But if the government has a "compensatory obligation" under the Takings Clause, it "arises under the constitution and not in tort." *Tamulion v Michigan State Waterways Comm*, 50 Mich App 60, 66 (1973). And for that obligation to arise, there must be "a taking of private property for a public use without the commencement of condemnation proceedings." *Id*. Just because it is alleged that the government damaged property does not mean the government has put the property to public use without first commencing a condemnation proceeding. *Hart*, 416 Mich at 501.

Plainly, if Plaintiffs wish to obtain just compensation, they must be able to show that their properties have been taken for a public use. But as discussed below, Plaintiffs cannot show that State Defendants abused their eminent domain power by putting Plaintiffs' property to a public use without first filing condemnation proceedings. And they certainly cannot show that State Defendants did so with "affirmative actions directly aimed at [Plaintiffs'] property." *Heinrich*, 90 Mich App at 700. Plaintiffs' inability to satisfy the requirements of the Takings Clause should have resulted in the dismissal of Plaintiffs' "inverse condemnation" claims.

1. Plaintiffs' property was not put to a public use.

Historically, "public use" under the Takings Clause has always come as the result of the government implementing a government project.[4] But in this case, the Court of Claims allowed Plaintiffs to pursue just compensation *from the government* based on damage arising from the way *a private person operated their private property*. There is no precedent in Michigan for a court allowing such a claim under the Takings Clause. Litigants have attempted to assert such a claim, but Michigan courts have rejected it each time.

To be sure, water escaping from an artificial reservoir can potentially form the basis of an inverse condemnation claim in Michigan. But only when the government puts the damaged property to a public use. In *Ashley v City of Port Huron*, 35 Mich 296 (1877), the Michigan Supreme Court allowed a claim to proceed against the city because it was the *city's* sewer construction project that caused water to pool, and then to escape in "large quantities" onto the plaintiff's land. More recently, in *Herro v Bd of County Rd Comm'rs for Chippewa County*, 368 Mich 263 (1962), the Michigan Supreme Court allowed a claim to proceed against the county road commission because it was the *commission* that constructed an impoundment which failed and released a massive gush of water that destroyed the plaintiff's residence. *Id.* at 267. Even if the government originally builds a

[4] This case involves real property. It is also possible to assert an inverse condemnation claim for other types of property. *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 455 (2020). But the circumstances of this case do not require a discussion of that type of claim.

structure that channels water onto private land, if the government has transferred the structure to private owners, water channeled through the now private structure cannot form the basis of an inverse condemnation claim. *Wiggins v City of Burton*, 291 Mich App 532, 572–573 (2011). That is because it "is elementary that an inverse condemnation action . . . requires state action" and water moving through a privately owned structure is not state action. *Id.* at 572 (citations omitted). In this case, the Edenville Dam has always been privately owned. So, under *Wiggins*, water flowing through it cannot form the basis of an inverse condemnation claim.

There are also numerous federal cases in which an inverse condemnation claim arose either from the operation of a dam or the dam's failure. But they all arose out of the *government's* operation of a *government* dam. See, e.g., *In re Downstream Addicks*, 147 Fed Cl 566 (2020) (operation of a government dam); *Pumpelly v Green Bay & Mississippi Canal Co*, 80 US 166 (1871) (government dam); *United States v Cress*, 243 US 316 (1917) (government dam); *United States v Dickinson*, 331 US 745 (1947) (government dam); and *Arkansas Game & Fish Comm'n v United States*, 568 US 23 (2012) (government dam).

For their part, Plaintiffs cited nine cases below in support of their attempt to assert an inverse condemnation claim against the government based on the private operation of a private dam. (App pp 25–30.) Yet every one of those cases arise from the government's implementation of a government project:

Mays v Snyder, 323 Mich App 1, 82 (2018), affirmed by *Mays v Governor of Michigan*, 506 Mich 157 (2020).	Alleged property damage based on "toxic water being delivered through Flint's own water delivery system directly into plaintiffs'" homes. *Id*. at 82.
Peterman v State Dep't of Nat Res, 446 Mich 177, 188 (1994).	The DNR's "construction of a boat launch and jetties" destroyed a neighboring parcel. *Id*. at 188.
Pearsall v Bd of Sup'rs of Eaton Co, 74 Mich 558 (1889).	Township's rerouting of a public road allegedly caused property damage.
Thom v State, 376 Mich 608 (1965).	State's construction of a highway allegedly caused property damage.
Blue Harvest, Inc v Dep't of Transp, 288 Mich App 267 (2010).	County road commission's road-deicing operation allegedly caused property damage.
Spiek v Michigan Dep't of Transp, 456 Mich 331 (1998).	State's construction of an expressway and service drive allegedly caused property damage.
Gottleber v Co of Saginaw, unpublished opinion of the Court of Appeals, issued June, 12, 2018 (Docket No. 336011), 2018 WL 2944211.	County intentionally created a wetland on its property by turning off its water pumps and removing a drain, causing plaintiff's adjacent land to flood.
Wiggins v City of Burton, 291 Mich App 532 (2011).	City constructed and installed a drain project on private land, but then transferred it to private owners. Inverse condemnation claim could arise for the original construction of the drain by the city, but not for the flow of water coming through the private owners' drain.
Arkansas Game & Fish Comm'n v United States, 568 US 23 (2012).	U.S. Army Corps of Engineers constructed a dam and used it to inundate upstream land.

It would not have helped Plaintiffs to expand their research. As far as Defendants can ascertain, every Michigan case that has allowed an inverse condemnation claim to proceed based on property damage arises from the government's implementation of a government project. See, e.g., *Vanderlip v City of*

Grand Rapids, 73 Mich 522 (1889) (construction of a road); *Grand Rapids Booming Co v Jarvis*, 30 Mich 308 (1874) (installation of logging boom on river); *Ranson v City of Sault Ste Marie*, 143 Mich 661 (1906); (construction of a bridge); *City of Big Rapids v Big Rapids Furniture Mfg Co*, 210 Mich 158 (1920) (construction of a road); *Allen v City of Detroit*, 167 Mich 464 (1911) (construction of a fire station); *Herro v Bd of Co Rd Comm'rs for Chippewa Co*, 368 Mich 263 (1962) (construction of road); *In re Elmwood Park Project Section 1, Group B*, 376 Mich 311 (1965) (urban renewal project); *Ligon v City of Detroit*, 276 Mich App 120 (2007) (blight control project); *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116 (2004) (expansion of city-owned airport); *Bd of Ed, City of Detroit v Clarke*, 89 Mich App 504 (1979) (construction of a school).

In this case, there is no dispute that the Edenville Dam was privately owned and operated. No state agency was performing any type of construction or other project that damaged Plaintiffs' property. Like all inverse condemnation claims, Plaintiffs' inverse condemnation claim is based on the premise that Defendants condemned their property without first filing a lawsuit under the UCPA to condemn it. But if no state project of any kind was underway, what would have been the basis of a UCPA lawsuit? Plaintiffs do not explain.

Plaintiffs' only reference regarding "public use" is the conclusory allegation in their complaints that the "state exercised control over the dam to such an extent that the use of the dam by Boyce, the Task Force, and the state was a public use for which Defendant is responsible." (App p 31, ¶ 103; App p 60, ¶ 103; App p 81, ¶ 96;

App p 114, ¶ 96; App p 139, ¶ 85). Plaintiffs allege that State Defendants put the dam to a public use because they "exercised control" in the following ways:

- a visual inspection of the dam (Complaints in App p 31, ¶ 105; App p 60, ¶ 105; App p 81, ¶ 98; App p 114, ¶ 98; App p 139, ¶ 79);
- they did not to object to the circuit court's lake level order (Complaints in App p 31, ¶¶ 73, 78; App p 60, ¶¶ 73, 78; App p 81, ¶¶ 57, 62; App p 114, ¶ 61; App p 139, ¶¶ 48–52);
- they denied requested permits (Complaints in App p 31, ¶¶ 66–67, 105; App p 60, ¶¶ 66–67, 105; App p 81, ¶¶ 50–51, 98; App p 114, ¶¶ 53–54, 98; App p 139, ¶¶ 54–55, 79);
- they took enforcement actions (Complaints in App p 31, ¶¶ 66, 70, 105; App p 60, ¶¶ 66, 70, 105; App p 81, ¶¶ 50, 54, 98; App p 114, ¶¶ 53, 56, 98; App p 139, ¶¶ 54–55, 64, 79); and
- they granted requested permits (Complaints in App p 31, ¶¶ 66, 71–72, 105; App p 60, ¶¶ 66, 71–72, 105; App p 81, ¶¶ 50, 55–56, 98; App p 114, ¶¶ 53, 57–58, 98; App p 139, ¶¶ 54, 64, 79).

As explained above in the Statement of Facts section, publicly available government documents flatly contradict Plaintiffs' characterization of State Defendants' regulatory actions. Regardless, Plaintiffs' apparent theory—that State Defendants' regulation of the *dam* put it to a public use which in turn put *Plaintiffs'* land to a public use—has been soundly rejected by this Court. In a well-established line of cases, this Court held that the government's regulation of private property—

even regulation that is allegedly negligent—does not take property for a public use just because the regulated private party injures the property of another private party.

In *Disappearing Lakes Association v Dep't of Nat Res*, 121 Mich App 61 (1984), over the course of ten years, the DNR regularly granted dredging permits for a company to dredge canals near two lakes. The regular dredging of the canals "caused a lowering of the water level in plaintiffs' two lakes." *Id*. at 63. Plaintiffs did not allege "that the state owned the land, owned the dredging equipment, operated the dredging equipment or in any way controlled the actual dredging except as it exercised the discretionary power to grant or refuse to grant permits to dredge." *Id*. at 71. The plaintiffs alleged that the DNR's regulatory "control" was enough for it to be liable for the alleged nuisance arising from the dredging. This Court acknowledged that "if the permits had not been granted, no dredging would have resulted and, with no dredging, no loss of lake level to the plaintiffs." *Id*. at 69. But it held that that was not the type of "control" that could give rise to tort liability. After all, "[n]early every permit made by a government agent in the exercise of statutory discretion results in some affirmative action being taken." *Id*. at 69–70. This Court held that permitting or licensing cannot make the government liable in tort if the holder of the permit or license injures another. *Id*. at 70–71. Michigan law means "more by control than that." *Id*. at 69. The government issues so many licenses and permits authorizing private third parties to act, that the government would constantly be exposed to liability for doing what

it is statutorily required to do if issuing or denying a permit was sufficient to establish the type of "control" needed to establish liability. *Id*. at 70–71.[5]

A few years after deciding *Disappearing Lakes*, this Court extended its holding from the tort context into the Takings Clause context. In *Attorney General v Ankersen*, 148 Mich App 524 (1986), the DNR had issued a license to a company that claimed it could safely dispose of hazardous waste. *Id*. at 534. Over the course of several years, the company failed to comply with licenses and enforcement notices from the DNR. The DNR repeatedly inspected the property and found that the number of barrels of untreated hazardous waste increased from hundreds to thousands as the company failed to dispose of them properly. *Id*. at 534–535. Based on assurances from the company, the DNR renewed the company's license "in spite of the repeated violations." *Id*. at 535. The DNR escalated enforcement action when the company failed to comply with its license and required the company to appear before its water resources commission, but still issued a permit to the company. *Id*. at 535–536. After "thousands of gallons of waste laced with cyanide were discharged into the Pontiac sewer system" that "ultimately resulted in a large fish kill in the Clinton River," the company was seized by the IRS. *Id*. at 536. A new company took over, and the cycle began again. The DNR issued a permit to the new company, the new company did not comply, so the DNR took escalated

[5] Indeed, one division of one state department, EGLE's Water Resources Division, issues nearly 10,000 permits a year. "EGLE Issues Thousands of Permits Each Year and Proactively Partners with Environmental Permit Review Commission" (May 2, 2019) <https://rb.gy/t3bngj>

enforcement action until the new company also abandoned the enterprise. *Id.* at 537–541. By that point, the property was deeply polluted and the DNR finally turned its enforcement attention to the owners of the property. *Id.* at 542. The owners failed to clean up their property, and the DNR filed a lawsuit against the property owners and many others to force the remediation of the site. *Id.*

The property owners, however, filed a counterclaim against the DNR, alleging that the DNR had inversely condemned the property in violation of the Takings Clause by allowing the noncompliant operator to continue operating for so long. *Ankersen*, 148 Mich App at 532. The property owners alleged that a "situation was allowed to begin, fostered by, acceded to, complied with and generally approved by the Department of Natural Resources to the extent that it in effect [became] a party to the entire incident." *Id.* at 543. Like Plaintiffs' allegations in this case, the plaintiffs in that case alleged "that the granting of licenses and subsequent failures to supervise and regulate the disposal operations at [the property] proximately caused a loss of use and value in the property and constituted a 'taking.'" *Id.* at 560–561.

This Court rejected the theory that alleged negligent regulation of private property could put that property to a "public use" under the Takings Clause. It noted that "the evidence may show that the DNR was negligent in licensing [the company] in the first place and in not moving sooner to compel compliance." *Id.* at 545. But the Court, citing *Disappearing Lakes*, concluded "that 'control' of the property means more than issuing a permit or regulating an activity on the

property." *Id*. at 560. The DNR had not put the private property to a "public use" simply by regulating it, even if it regulated negligently, so it could not have been "taken" in the constitutional sense. *Id*. at 561–562. Specifically, this Court held that the property owners' public-use-by-regulation argument must fail "as a matter of law," reasoning as follows:

> [T]he granting of a license to a private citizen or a private corporation for the purpose of allowing that person or corporation to conduct a private business *cannot be regarded as a taking of private property by the government for public use*. Although licensing provides some assurances that a business will operate in accordance with lawful standards, and the public presumably derives a benefit therefrom, the issuance of a license *does not in any way grant the public a right of use in the property*. Similarly, the alleged failure of the DNR to properly supervise and regulate the disposal operation *cannot be regarded as a taking of private property by the government for public use*. [*Ankersen*, 148 Mich App at 561–562, emphasis added].

Because the property owners' claim that their property had been taken for a public use was really just a tort claim for negligence, this Court agreed with the trial court that the inverse condemnation claim continued to be barred by governmental immunity. *Id*. at 558.

This Court has relied on *Ankersen* for more than 30 years to consistently reject regulation-as-public-use allegations in property damage cases. In *Hinojosa v Dep't of Nat Res*, 263 Mich App 537 (2004), the State acquired a building not to implement some project, but simply because "no one redeemed it following a tax sale." *Id*. at 539. By the next year, the building had become a nuisance and the City of Detroit announced its plan to demolish the building "as an unsafe structure." *Id*. Before the city could do so, the building caught fire and damaged the plaintiffs' homes. *Id*. The plaintiffs filed suit, alleging an inverse condemnation claim against

the DNR. But both the trial court and this Court dismissed the claim. This Court held that even though the claim was styled as inverse condemnation, the plaintiff had, "at most, alleged negligent failure to abate a nuisance." *Id*. at 548. So, the claim was still "barred by governmental immunity." *Id*. The Court cited *Ankerson*, reaffirming that "the state's action of licensing a person or corporation to conduct a private business 'cannot be regarded as a taking of private property by the government for public use.'" *Id*. at 549–550. The Court concluded that the DNR's alleged failure to act to protect neighboring property owners "cannot be found to constitute a 'taking.'" *Id*. at 550.

In *Marilyn Froling Revocable Living Tr v Bloomfield Hills Country Club*, 283 Mich App 264 (2009), the city of Bloomfield Hills approved a private person's home construction plan that was meant to allow water to drain away from their neighbor's property. *Id*. at 267–268. During construction, the person did not follow the plan, the result being that water was channeled *onto* their neighbors' property. But the city still issued the person a permit to occupy their newly constructed home "[d]espite this alleged deviation from the approved plan." *Id*. at 268. The neighbor filed an inverse condemnation claim against the city, both because the city had permitted the person to deviate from their construction plan, and because the city refused to "construct a drainage system" at the neighbors' request. *Id*. at 296. But this Court rejected the claim, citing both *Ankersen* and *Hinojosa*. *Id*. at 295. The Court again reaffirmed "that the state's licensing of a person or corporation to conduct a private business could not be regarded as a taking of private property for

public use," and that "the state's alleged misfeasance in licensing and supervising" of a private party cannot be the basis of a taking claim. *Id.*

This Court again endorsed the *Ankersen* holding in *Long v Liquor Control Commission*, 322 Mich App 60 (2017). In *Long*, the government had given a liquor license to a competitor nearby the plaintiff's liquor business, and the plaintiff sued alleging that the value of its license had been reduced by business redirected to its competitor. *Id.* at 64. This Court affirmed the dismissal of the plaintiff's taking claim for several reasons, including the fact that regulation does not put property to a public use. The Court, citing *Ankersen* and *Marilyn Froling Revocable Living Trust*, noted that "as previously recognized by this Court," if "the government grants a license to a third party, this 'granting of a license to a private citizen or a private corporation for the purpose of allowing that person or corporation to conduct a private business cannot be regarded as a taking of private property by the government for public use.'" *Id.* at 74.

The Plaintiffs in this case have never explained how State Defendants' regulation of the private Edenville Dam even put that *dam* to a public use, let alone put the *Plaintiffs' properties* to a public use. The Court of Claims similarly did not even discuss, let alone find, that Defendants had put the Plaintiffs' properties to a public use. Plaintiffs cannot satisfy the most basic element of their attempt to obtain "just compensation," which is to show that their property was taken for "a public use." Const 1963, art 10, § 2. The Court of Claims' opinion was clear error

considering the plain language of the Takings Clause and the *Ankersen* line of cases and should be reversed.

2. State Defendants did not abuse their eminent domain power in actions specifically directed at Plaintiffs' property.

Even if Plaintiffs *could* show that their property was put to a public use, the Court of Claims' opinion would still be erroneous because Plaintiffs cannot show that their damaged property was "taken" by the government. *Hart*, 416 Mich at 501 (it is not enough to show that property was "damaged," one must show that it was "taken" by the government). That requires, at a minimum, a showing that the government abused its eminent domain power in a way that took "affirmative actions directly aimed at the property." *Mays*, 506 Mich at 174 (citation omitted). Regulation of *someone else's* property is not "directly aimed" at the party's property.

Disregarding the requirement that property must be put to a public use for it to be taken, the Court of Claims held that Plaintiffs' "allegations set forth affirmative actions directed at plaintiffs' properties," and had therefore stated an inverse condemnation claim. (App p 17.) That holding highlights the fundamental error made by the Court of Claims: it assumed that an inverse condemnation claim is no different than a tort claim. It assumed that Plaintiffs could state an inverse condemnation claim if they could "prove injury to [their] property by the defendant with resultant damages." *Hart*, 416 Mich at 501. Yet the Michigan Supreme Court has held precisely the *opposite* of that conclusion. Simply alleging injury to property by the defendant is *not* an inverse condemnation claim. *Id.*

Plaintiffs have not alleged any actions by State Defendants aimed at Plaintiffs' property. Instead, Plaintiffs allege that their property was damaged because the dam's private owner used its private dam to set Wixom Lake to its normal pool elevation in the spring of 2020 and that the reason the private owner did that was because State Defendants' negligent regulatory actions (inspection, permitting, and enforcement activities) "pressured" the dam owner to do so. (App pp 16–21.) Putting aside the fact that these allegations are contradicted by public knowledge, Plaintiffs ignore that the Edenville Dam's owner (not State Defendants) had authority to take any "action necessary to mitigate emergency conditions if imminent danger of failure exists." MCL 324.31512(1). In other words, if the dam owner thought lowering the level below its normal level was necessary to mitigate danger, it did not need approval from State Defendants or any other government entity to do so.

Nevertheless, Plaintiffs allege that State Defendants' regulatory actions regarding the *dam* amount to the type of affirmative act directly aimed at *their* properties that amount to a "taking" of their property. (App pp 16–21.) But this Court's *Ankersen* line of cases also rejected that argument. In *Ankersen*, citing *Heinrich*, this Court held that "the state's alleged misfeasance in licensing and supervising the operation does not constitute 'affirmative actions directly aimed at the property,'" and thus "cannot be found to constitute a 'taking.'" *Ankersen*, 148 Mich App at 562, citing *Heinrich*, 90 Mich App at 700. Similarly, this Court held in *Hinojosa* that the allegation that DNR knew about the fire danger its building

posed to the neighbors but allowed the building to continue to exist was *not* sufficient to show "that the state took affirmative action directed at *plaintiffs'* properties." *Hinojosa*, 263 Mich App at 550 (emphasis added), citing *Ankersen*, 148 Mich App at 562. Again, in *Marilyn Froling Revocable Trust*, this Court held that the city's refusal to construct a drainage system and approval of a person's construction plans that caused flooding was not the type of "affirmative action by the city directly aimed at the Frolings' property" that could constitute an inverse condemnation claim. *Marilyn Froling Revocable Living Tr*, 283 Mich App at 296, citing *Ankersen*, 148 Mich App at 562 and *Hinojosa*, 263 Mich App at 550. And in *Long*, this Court rejected the argument that issuing a license to a nearby property owner was an "affirmative action by the [government] aimed directly at [plaintiff's] property." *Long*, 322 Mich App at 73, citing, *Marilyn Froling Revocable Living Tr*, 283 Mich App at 295.

In short, even if Plaintiffs *could* show that State Defendants' regulatory actions against the private dam had somehow put their properties to a "public use," their claims still fail as a matter of law because those regulatory actions against the *dam property* cannot constitute "affirmative acts aimed directly" at *Plaintiffs' properties*. At most, Plaintiffs allege a negligence claim against State Defendants, which is precisely the type of claim to which State Defendants are immune. MCL 691.1407(1).

3. *Mays* did not change Michigan's inverse condemnation jurisprudence.

Both Plaintiffs and the Court of Claims seemed to believe that the *Mays* case arising out of the Flint Water Crisis altered Michigan's inverse condemnation jurisprudence to allow Plaintiffs' claim to proceed even though it otherwise would have failed prior to *Mays*. Both Plaintiffs (App pp 25–30) and the Court of Claims (App pp 18–20) discuss the case extensively. But the Michigan Supreme Court in *Mays* did not overrule any precedent, or even suggest that it was considering doing so. *Mays v Governor of Michigan*, 506 Mich 157 (2020). This Court even *reaffirmed Ankersen*, noting "that 'alleged misfeasance in licensing and supervising' does not constitute an affirmative action to support a claim for inverse condemnation." *Mays*, 323 Mich App at 81. The reason the inverse condemnation claim in *Mays* could proceed is because it was fundamentally different from the claim in this case.

First, as noted above, the water delivery system in *Mays* was not a privately owned operation that was one of hundreds regulated by the government, such as the Edenville Dam in this case. Instead, the water delivery system belonged to the government; it was the government's use of its "own water delivery system" connected to the plaintiffs' properties that caused the damage. *Mays*, 323 Mich App at 82. So, there was no question about whether the plaintiffs' property had been put to a public use.

And second, a private third party did not select Flint's water source and privately operate the water system—it was the government *itself* that selected the water source and operated its *own* system. As this Court explained, "plaintiffs have

not alleged any failure to regulate or supervise; instead, plaintiffs have alleged an affirmative act of switching the water source with knowledge that such a decision could result in substantial harm." *Id*. at 81; see also *Mays,* 506 Mich at 168–169. So, the "affirmative act" allegedly taken by the government in *Mays* was not the regulation of a private third party like in this case. It was the government itself acting and operating its own system.

State Defendants did not own and operate the Edenville Dam the way the government owned and operated Flint's water system. And State Defendants did not order the very act that allegedly damaged Plaintiffs' properties (the breaching of the Edenville Dam) the way the government ordered the very act in *Mays* that allegedly damaged property (the switch of Flint's water source). The *Mays* case simply does not apply to this one.

II. The Court of Claims erroneously applied Michigan's dispositive motion standards.

The Court of Claims erred not only in its application of Michigan's inverse condemnation jurisprudence, but in its application of Michigan's dispositive motion standards. The Court of Claims should have used the standard under MCR 2.116(C)(7) to adjudicate State Defendants' motion, rather than the standard under MCR 2.116(C)(8). But even under MCR 2.116(C)(8), the court should have considered the publicly available government documents Plaintiffs made the basis of their claim against State Defendants.

A. Government defendants appropriately rely on the MCR 2.116(C)(7) standard to challenge inverse condemnation claims.

State Defendants moved to dismiss Plaintiffs' claims under MCR 2.116(C)(7) because Plaintiffs' "inverse condemnation" claims are really negligence claims to which State Defendants are immune. State Defendants do not dispute that properly pleaded inverse condemnation claims are an exception to State Defendants' immunity. But just as it is appropriate to move under MCR 2.116(C)(7) to dismiss a person's attempt to plead some other exception to the State's immunity—such as the "public buildings" exception under MCL 691.1407—it is appropriate to use the same rule to move to dismiss a person's attempt to invoke the inverse condemnation exception to immunity.

This Court has endorsed the use of MCR 2.116(C)(7) to attack inverse condemnation claims. In *Hinojosa*, the government moved to dismiss an inverse condemnation claim under (C)(7). 263 Mich App at 540. This Court held that even though the claim was styled as a taking, the plaintiff had, "at most, alleged negligent failure to abate a nuisance," so the claim was still "barred by governmental immunity." *Id*. at 548. Similarly, in *Ankersen*, this Court held that the property owners' claim that their property had been taken for a public use was just a claim for negligence and agreed with the trial court that their takings claim continued to be "barred by governmental immunity." 148 Mich App at 558.

When reviewing motions under MCR 2.116(C)(7), this Court considers documentation provided by the movant—not just the complaint—and accepts as true only well-pleaded allegations that are not contradicted by the documentation.

Maiden, 461 Mich at 119 (1999); MCR 2.116(G)(5). That is precisely what this Court does when a government party moves to dismiss an inverse condemnation claim under MCR 2.116(C)(7). In *Marilyn Froling Revocable Living Trust*, the government moved to dismiss an inverse condemnation claim under (C)(7), and this Court considered an affidavit the government attached to its motion that contradicted the plaintiff's allegations. 283 Mich App at 274. Like in *Hinojosa* and *Ankersen*, this Court agreed with the trial court that "the doctrine of governmental immunity barred" the plaintiff's so-called inverse condemnation claim. *Marilyn Froling Revocable Living Tr*, 283 Mich App at 274, 295–296.

In the Statement of Facts section, State Defendants identified the documents that contradict Plaintiffs' allegations that are most relevant to this Court's analysis. The documents are all publicly available government documents. This Court "must" consider those documents in an MCR 2.116(C)(7) analysis. *Maiden*, 461 Mich at 119; MCR 2.116(G)(5). The Court of Claims erred below by declining to do so.

B. Courts properly consider documents that are the basis of a claim or of which they can take judicial notice, even under the MCR 2.116(C)(8) standard.

Notwithstanding this Court's precedent, the Court of Claims did not adjudicate State Defendants' motion under MCR 2.116(C)(7). Instead, the Court of Claims recast Defendants' motion as one filed under MCR 2.116(C)(8) and declined to review the government documents State Defendants provided that contradicted Plaintiffs' allegations. (App pp 11–14.) State Defendants challenged the Court of

Claims' application of MCR 2.116(C)(8) in a motion for reconsideration, which the court denied. (App p 23.)

Even under the MCR 2.116(C)(8) standard, when a complaint references a document as the basis of its claim, that document becomes "a part of the pleading for all purposes" under MCR 2.113(C)(2). That certainly includes something like the contract at the basis of a person's contractual claim. *Bodnar v St John Providence, Inc*, 327 Mich App 203, 212 (2019). But the Michigan Supreme Court has also applied the rule to emails, holding that it was appropriate to consider emails even under MCR 2.116(C)(8) when the plaintiff referred to them in their complaint. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 163 (2019) (holding that this Court had not erred by considering the emails, but by assuming the truth of their contents when the plaintiff had not done so). Indeed, if information is so widely and publicly known to "not [be] subject to reasonable dispute," this Court can take judicial notice of that information "at any stage of the proceeding." MRE 201(b) and (e). That, of course, would include the pleading stage. See, e.g., *Ponte v Estate of Ponte ex rel Reinhardt*, unpublished opinion of the Court of Appeals, issued April 24, 2012 (Docket No. 300789), 2012 WL 1415136, p *1, note 1 (MCR 2.113(C)(2) applies to court records and other government documents of which the Court can take judicial notice under MRE 201) (attached at App vol 2, p 361.)[6]

[6] Defendants cite this unpublished opinion to further illustrate why it makes sense for courts to consider matters of public record at the pleadings stage of legal proceedings.

Michigan courts' application of MCR 2.113(C)(2) at the pleading stage accords with federal practice. When reviewing a motion under FR Civ P 12(b)(6) (the federal equivalent of MCR 2.116(C)(8)), federal courts consider "the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc v Makor Issues & Rights, Ltd,* 551 US 308, 322 (2007). This includes documents "referred to in the pleadings and . . . integral to the claims" even if they are not attached to the complaint, along with "matters of public record." *Commercial Money Ctr, Inc v Illinois Union Ins Co,* 508 F3d 327, 335–336 (CA 6, 2007). If the allegations in a complaint contradict "verifiable facts" in the public record, then "even at the motion to dismiss stage," the Court deems those allegations "implausible" and does not assume their truth. *Bailey v City of Ann Arbor*, 860 F3d 382, 387 (CA 6, 2017).

Similarly, as explained above, Michigan courts are not required to assume the truth of an allegation that contradicts the public record relied on for the allegation just because the allegation is in a complaint. Nor are Michigan courts required to assume that a plaintiff's allegation *about* a document is true without considering the actual document. Here, the documents cited in the Statement of Facts are the very tools Plaintiffs allege Defendants used to "pressure" the dam owner and cause their injuries. They are the *bases* of Plaintiffs' allegations and are widely and publicly available. Even if this Court chooses to review this case under MCR 2.116(C)(8), it cannot correctly ignore those documents.

CONCLUSION AND RELIEF REQUESTED

A person's damaged property is not "taken for a public use" by the government simply because the private entity that damaged the person's property is regulated by the government. Plaintiffs' "inverse condemnation" claims are just tort claims to which State Defendants are immune. This Court should rely on the MCR 2.116(C)(7) standard and reverse the Court of Claims' erroneous denial of State Defendants' motion for summary disposition. State Defendants also request any other relief the Court considers appropriate.

Respectfully submitted,

Dana Nessel
Attorney General

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

/s/ *Nathan A. Gambill*
Nathan A. Gambill (P75506)
Assistant Attorney General
Attorneys for Defendants-Appellants
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
gambilln@michigan.gov

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