STATE OF MICHIGAN
IN THE COURT OF APPEALS

DAVID KRIEGER, et al.,

Plaintiffs-Appellees,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES & ENERGY, and MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Defendants-Appellants.

COA 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; 20-000257-MM; 20-000246-MM; 20-000260-MM; 20-000262-MM

Filed under AO 2019-6

Plaintiffs' Response to Defendants' Brief on Appeal

-Oral Argument Requested-

September 20, 2022

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STATEMENT OF JURISDICTION

Plaintiffs concur in Defendants' Statement of Jurisdiction. After this Court dismissed Defendants' prior Claim of Appeal in this matter, Defendants proceeded to file their Delayed Application for Leave to Appeal, which was subsequently granted. This Court thus has jurisdiction over this appeal.

STATEMENT OF THE QUESTIONS INVOLVED[1]

First Question:

Did the Court of Claims err in analyzing Defendants' motion under the applicable standard for a motion for summary disposition pursuant to MCR 2.116(C)(8)?

Plaintiffs-Appellees answer:	No.
Defendants-Appellants answer:	Yes.
Court of Claims answered:	No.

Second Question:

Did the Court of Claims err in holding that Plaintiffs adequately stated claims for inverse condemnation for which relief could be granted?

Plaintiffs-Appellees answer:	No.
Defendants-Appellants answer:	Yes.
Court of Claims answered:	No.

[1] Ordinarily Plaintiffs' counsel would utilize the same Questions Presented by the appellant. However, in this instance the Defendants' Statement of Questions Presented differs from the actual questions analyzed in the body of their brief on appeal. Plaintiffs believe the above statement more closely aligns with Defendants' actual arguments.

INTRODUCTION

This case arises out of the Edenville Dam disaster that occurred on May 19, 2020, causing devastating floods, massive damage and destruction of property, and forced evacuations of more than ten thousand Michigan residents.[2] Unfortunately, for many months before the failure of the Edenville Dam, State officials knew that the Dam desperately required repairs yet nonetheless took numerous, affirmative actions to cause dangerously increased water levels abutting the Dam.

Plaintiffs' homes and other property (collectively "property") were damaged or destroyed by the resulting flood. Plaintiffs allege an unconstitutional taking through inverse condemnation pursuant to Article 10, § 2 of the Michigan Constitution. Defendants elected to immediately move for summary disposition based on governmental immunity despite it being well-established that the State is not immune from takings claims brought under Article 10, § 2 because a takings claim is a constitutional claim, not a tort claim. *Thom v State Highway Comm'r*, 376 Mich 608, 628; 138 NW2d 322, 331 (1965); *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 91; 445 NW2d 61, 77 (1989). That motion was properly denied when the Court of Claims determined that Plaintiffs' Complaints successfully pleaded the necessary elements of inverse condemnation claims. Having no appeal as of right from that order, and following their properly-dismissed attempt to appeal as of right, Defendants filed their Delayed Application for Leave to Appeal, which was granted. For the reasons set forth below, the denial of Defendants' motion for summary disposition must be affirmed in all regards, as Defendants fail to demonstrate that any error occurred below.

As an initial note, the standard of review in this matter requires that this Court limit its review to the contents of Plaintiffs' pleadings, that it must accept those pleadings as true, and that it must view them

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[2] (Borchard Compl., ¶¶1-2, 7; Bruneau Compl., ¶¶4-5; Fagan Compl., ¶¶102-113; Forbes Compl., ¶¶2, 9; Holley Compl., ¶1; Krieger Compl., ¶¶1-2; Pleasant Beach Compl. ¶12; Swarthout Compl., ¶¶1-2; Woods Compl., ¶¶1-6; Wortley Compl., ¶¶1-2, 7; Zelenak Compl., ¶6).

in the light most favorable to Plaintiffs. However, because Defendants actively disregard that requirement and invite the Court to examine evidence outside of the pleadings, Plaintiffs are left in a position where they, in turn, feel compelled to reference such evidence outside of the pleadings as well. These references are in no way an acknowledgment that it is proper to go beyond the Plaintiffs' pleadings, but rather demonstrate that there is ample evidence of Defendants' liability here despite the fact that Plaintiffs have been deprived of any opportunity for discovery.

The Plaintiffs on whose behalf this brief is being filed fully concur with the briefing on behalf of the Plaintiffs in the docket numbers, who submit a brief that does not address any of the evidence outside of the pleadings. In combination, the undersigned counsel submit that the two different briefs filed by groups of Plaintiffs in this case demonstrate that regardless of which evidence is considered at this stage, Defendants' motion for summary disposition was devoid of merit and was properly denied.

STATEMENT OF FACTS

The actions of the State – through Defendants Department of Environment, Great Lakes and Energy (EGLE) and the Michigan Department of Natural Resources (MDNR) – substantially caused the Edenville Dam disaster. But for the State's affirmative, wrongful conduct, this unfortunate, but predictable, disaster would have been averted. As the complaints filed in this matter show, the State knew for years of the dangers posed by the Edenville Dam to Plaintiffs' property and took numerous affirmative actions which directly led to and caused the failure of the Edenville Dam on May 19, 2020, and the resulting damage to and the foreseeable destruction of Plaintiffs' property.

Boyce's Neglect and the Dangerous Condition of the Dam Were Well-Known by the State Defendants

In 2004, Boyce Hydro Power LLC purchased four dams in mid-Michigan, including the Edenville and Sanford Dams, and acquired a federal license from the Federal Energy Regulatory Commission ("FERC") to operate the Edenville Dam for hydroelectric power

generation.[3] Over the course of a number of years, Boyce Hydro Power LLC and associated entities (hereinafter "Boyce") failed to make repairs and take other necessary actions to ensure the safety of the Edenville Dam.[4] On June 15, 2017, FERC issued a Compliance Order detailing Boyce's many regulatory violations, in particular its failure to increase the dam's spillway capacity. (App Vol III, pp 481a-532a, FERC Compliance Order.)[5] In February 2018, FERC issued an order proposing to revoke Boyce's license, again raising the failure to address spillway capacity as its primary concern and warning that, "[f]ailure of the Edenville dam could result in the loss of human life and the destruction of property and infrastructure." (App Vol III, pp 533a-541a, Order Proposing Revocation of License.)[6]

The State was fully aware of the reasons for revocation because it moved to intervene in FERC proceedings to delay revocation of Boyce's license. (App Vol IV, p 550a, Pt. 307 Hearing Tr; App Vol VII, pp 1390a-1392a, 2018 Mich. AG's Letters Re FERC License). On August 21, 2018, an independent inspector hired by Boyce (under federal requirements) determined that the Edenville Dam had a "high hazard potential" and that it was in "poor condition." (App Vol IV, pp 690a-693a, *Midland*

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[3] (Borchard Compl., ¶¶39-40; Bruneau Compl., ¶¶30, 33; Fagan Compl., ¶¶23-28; Forbes Compl., ¶33; Pleasant Beach Compl. ¶103; Swarthout Compl., ¶32; Woods Compl., ¶¶97, 100; Wortley Compl., ¶¶36-37; Zelenak Compl., ¶41).

[4] (Borchard Compl., ¶¶43-53; Bruneau Compl., ¶¶31-33; Fagan Compl., ¶¶36-41; Forbes Compl., ¶35; Holley Compl., ¶52; Krieger Compl., ¶50; Pleasant Beach Compl. ¶¶104-111; Swarthout Compl., ¶¶34-37; Woods Compl., ¶¶110-116; Wortley Compl., ¶¶40-50; Zelenak Compl., ¶¶42-48.)

[5] (Cited in Borchard Compl., ¶¶54-61; Bruneau Compl., ¶¶34-37; Fagan Compl., ¶¶38, 44-46; Forbes Compl., ¶¶36-40; Pleasant Beach Compl. ¶¶112-117; Swarthout Compl., ¶38; Woods Compl., ¶¶117-119; Wortley Compl., ¶¶51-58; Zelenak Compl., ¶¶49-51.

[6] (Cited in Borchard Compl., ¶¶71-73; Bruneau Compl., ¶41; Fagan Compl., ¶49; Forbes Compl., ¶41; Pleasant Beach Compl. ¶131; Woods Compl., ¶120; Wortley Compl., ¶¶68-70; Zelenak Compl., ¶¶52-53).

Daily News, June 5, 2020); (see also App Vol IV, pp 697a, Spicer Group Inspection Report.) On September 10, 2018, FERC issued an order revoking Boyce's license, citing its "longstanding" failure to increase spillway capacity to safely pass floodwaters. (App Vol IV, pp 733a-761a, Revocation Order; see also App Vol V, pp 762a-780a, Order Denying Rehearing)[7] The revocation became effective on September 25, 2018. The Michigan Attorney General, in another effort to delay the revocation, filed a letter with FERC in support of Boyce's motion for an emergency stay. (App Vol V, pp 784a, Mot. for Stay of Revocation Order.) Boyce moved for an emergency stay and submitted an affidavit by an engineering consultant, Richard Purkeypile, stating that revoking the Edenville Project license will: "(1) accelerate existing damage to the spillway concrete by requiring all flows to be released over the spillways at all times and (2) increase the danger of flood flows overtopping the dam by eliminating the turbines as a means of passing those flows through the Project . . . ." (App Vol V, pp 795a, Att. A to Mot. for Stay). Because the powerhouse was shut down by revocation of the license, the Dam's already deficient capacity was diminished by an additional 2,000 cubic feet per second (cfs) from prior FERC-regulated operations, "further increasing the potential for overtopping of the dam." (App Vol V, pp 793a, Att. A, ¶75, 129.) FERC denied the motion to stay.

The State Takes Jurisdiction Over the Edenville Dam in September 2018

The State assumed jurisdiction over the Edenville Dam after FERC revoked Boyce's license.[8] When the State took jurisdiction over

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[7] (Cited in Borchard Compl., ¶¶74-77; Bruneau Compl., ¶42; Fagan Compl., ¶50; Forbes Compl., ¶41; Holley Compl., ¶¶53-58; Krieger Compl., ¶¶55-56; Pleasant Beach Compl. ¶¶125-126; Swarthout Compl., ¶¶38-39; Woods Compl., ¶123; Wortley Compl., ¶¶71-74; Zelenak Compl., ¶54).

[8] (Borchard Compl., ¶79; Bruneau Compl., ¶44; Fagan Compl., ¶¶51-53; Forbes Compl., ¶¶42-57; Holley Compl., ¶59; Krieger Compl., ¶57; Pleasant Beach Compl. ¶139; Swarthout Compl., ¶40; Woods Compl., ¶130; Wortley Compl., ¶76; Zelenak Compl., ¶55); see also MCL

the dam in September 2018, it was aware, through the extensive record established by FERC, that the owner of the dam:

> has, for more than a decade, knowingly and willfully refused to comply with major aspects of its license and the Commission's regulatory regime, with the result that public safety has been put at risk . . . . The record demonstrates that there is no reason to believe that [the owner] will come into compliance; rather, the licensee has displayed a history of obfuscation and outright disregard of its obligations. [App Vol IV, p 759a, Revocation Order, ¶ 58.][9]

In early October 2018, two weeks after the State took jurisdiction over the dam, a state safety engineer conducted a cursory inspection and reported the dam to be in "fair structural condition." (App Vol V, pp 799a-822a, 10/8/18 DEQ Inspection Report.) The inspection noted that the spillways "showed signs of moderate deterioration (spalling, exposed reinforcing steel, minor cracking and efflorescense)," but concluded the spillways "appeared to be stable and functioning normally" and "[a]ll spillway gates appeared to be operational." (App Vol V, pp 799a-822a, 10/8/18 DEQ Inspection Report.) But, as FERC had already concluded, "[t]hirteen years after acquiring the license . . . the licensee has still not increased spillway capacity, leaving the project in danger."[10] "The spillway capacity deficiencies must be remedied in order to protect life, limb and property." Thus, there is no doubt that the inadequate

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324.31506 (giving EGLE [formerly the Michigan Department of Environmental Quality] regulatory authority over dams and impoundments in the state).

[9] (see also Borchard Compl., ¶86; Bruneau Compl., ¶¶2-3, 52, 55; Fagan Compl., ¶¶66,71; Forbes Compl., ¶50; Holley Compl., ¶66; Krieger Compl., ¶64; Pleasant Beach Compl. ¶137; Swarthout Compl., ¶44; Woods Compl., ¶¶131-133; Wortley Compl., ¶83; Zelenak Compl., ¶61).

[10] https://www.detroitnews.com/story/news/local/michigan/2020/05/20/edenville-dam-power-license-revoked-failure-reinforce-structure/5226539002/

spillway capacity posed serious risks to the integrity of the dam, and that the State knew of that issue when it assumed jurisdiction in September 2018. Even though FERC had just revoked the owner's license because of its dangerously "inadequate spillway capacity," the State's inspection report indicated that it had merely conducted a "cursory" inspection that did not address the subject of spillway capacity, despite the State's public admission that it had "strong concerns that the dam did not have enough spillway capacity . . . to meet state requirements." (App Vol V, pp 823a-824a, EGLE Website re Midland Area Dam Failure.) And, while it was well-known as of Fall 2018 that the dam was in poor condition (per Boyce's own most recent inspection) and that its spillway capacity was "inadequate" (per multiple FERC records), the State did nothing to reconcile the discrepancy between its knowledge of the dam's underlying condition and its own public statements regarding the "fair condition" of the dam.

The State Definitively Confirms the Dire and Dangerous Condition of the Dam

Further evidence of the dangerous state of the dam was revealed throughout 2019. A new entity known as the Four Lakes Task Force (the "Task Force" or "FLTF") petitioned the Midland and Gladwin County Circuit Courts to establish a legal lake level for Wixom Lake. The Task Force brought these proceedings under Part 307 of the Michigan Natural Resources and Environmental Protection Act, MCL 324.307 *et seq*. During these proceedings, which counsel for the State not just attended but also participated in and supported, the petitioners asserted:

> The Counties' consulting engineers (the "Spicer Group") in dialogue with representatives from the . . . MDEQ has concluded the repairs disclosed in the FERC safety inspection report for all four dams are typical of requirements to comply with the state regulatory requirements for dam safety . . . and that a lake level special assessment district would be required to complete. [App Vol V, pp 829a, Part 307 Petition, ¶17.]

The petition further acknowledged that the revocation by FERC was based on the "primary need to address a long-standing requirement to upgrade the spillway capacity of the Edenville Dam to handle FERC's Probable Maximum Flood ("PMF") standard." (App Vol V, pp 829a, Part 307 Petition, ¶18).

The State appeared and supported the Part 307 Order, following substantial coordination with the Task Force, its legal counsel, and Spicer Group, Inc. ("Spicer Group"), a civil engineering firm contracted with the Task Force.[11] Prior to the Part 307 hearing, Daniel Bock, counsel for EGLE, set preconditions to its support for the Lake Level Order. (App. Vol IV, pp 579a-580a, Part 307 Tr.) EGLE agreed to endorse the petition only if the proposed lake levels tracked the prior FERC license, and the Order stated that "flow would pass through the dams during the spring fill up." (*Id.*). The preconditions set by EGLE were incorporated into the Final Order, as demanded by the State. (App Vol V, pp 861a-863a, Lake Level Order.)

The Spicer Group Lake Level Study (the "Study") and the Part 307 Petition, in coordination with the State, omitted and obscured any reference to the specific deficiencies and repairs required to safely operate the Edenville Dam and downplayed the necessary repairs as merely "typical" of any other dam. (App Vol VI, pp 1016a-1025a, Lake Level Study; App Vol V, p 829a, Part 307 Petition and Exhibits, ¶17.) The Study, with the State's tacit support, inaccurately stated that "the establishment of State of Michigan normal lake levels that match the FERC normal lake levels licenses ***would not introduce detrimental impacts to private property*** . . . [and] ***detrimental impacts [to] the environment***, including currently established hydrology, drainage, riparian impacts, and natural resources, ***would not be introduced***." (App Vol VI, p 1024a, Lake Level Study) (emphasis added).[12] The Part

[11] (Woods Compl., ¶198-201; see also, e.g., Pleasant Beach Compl., ¶152).

[12] During the Part 307 proceeding, the Petitioners also inaccurately conveyed to the Court that establishing a Lake Level Order would create "no change" to the water levels on Wixom Lake. (App Vol VI, p 1024a, Lake Level Study; App Vol IV, p 565a, Part 307 H'rg. Tr.).

307 Petition omitted the FERC record and inspection reports. (App Vol V, pp 825a-853a, Part 307 Petition and Exhibits.)

In June 2019, the Midland County Circuit Court, with Judge Carras presiding, granted the petition to establish a legal lake level for Wixom Lake. (App Vol V, pp 854a-865a, Lake Level Order.) The Task Force, with the assistance of $5 million in funding from the State, undertook negotiations to acquire the dam from Boyce. (App Vol VII, pp 1336a-1343a, MEDC Grant Summary.)[13] As part of the due diligence for the acquisition, Spicer Group provided multiple reports—financed by the State—to both the Task Force and the State regarding the dam's poor condition and inadequate spillway capacity.

Through these reports, by the fall of 2019, at the latest, EGLE confirmed that the Dam was not safe. On September 18, 2019, Spicer Group reported to the State that the Edenville Dam cannot "be operated to meet the EGLE dam safety requirement to pass the ½ PMF without certain repairs and improvements." (App Vol VII, p 1388a, 6/8/20 FLTF Press Release.) The report recommended: (1) a lake level draw down in winter 2019/2020; (2) installation of a new gate hoist system; (3) updated PMF study to verify ½ PMF design flow rates; (4) a comprehensive repair plan to "provide adequate spill capacity;" and (5) completion of repairs by 2024.[14]

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[13] The Grant allocations from the State unequivocally demonstrate that the State had signed off on the plan to raise lake levels first and conduct necessary repairs years into the future, as $1.5 Million was provided to support the Lake Level Petition and consultants, while only $500,000 was provided for minor repairs and improvements.

[14] The State financed Spicer Group's Study. Spicer Group's Study stated that "[t]he FLTF is not aware of any objections or violations from MDEQ or MDNR. Boyce Hydro and the FLTF have an agreement that water level will be restored for the summer of 2019, with the understanding that the MDEQ will permit this provided that a normal legal lake level is established and repairs to the Edenville Dam are implemented by 2024." (App Vol VI, p 1007a, Four Lakes Level Study). In other words,

Despite Numerous Reports that the Dam Posed a Dire Risk to Life and Property, the State Took Repeated Affirmative Actions to Effectuate Dangerously Increased Water Levels

After receiving and confirming numerous reports that the Dam posed a dire risk to downstream life and property, the State took numerous affirmative actions over the course of more than a year to cause lake levels to be increased to dangerous levels.[15]

In October 2018 and November 2019, Boyce lowered the level of Wixom Lake, with the stated purpose of performing critical inspections and repairs.[16] Boyce also submitted a formal request for EGLE to approve the drawdown. On November 25, 2019, EGLE rejected the lake level drawdown to perform necessary repairs and prevent further deterioration of the Edenville Dam. The State threatened legal action against Boyce, asserting that Boyce illegally drew down Wixom Lake.[17]

On November 27, 2019, counsel for the Task Force sent a letter to EGLE stating that its consulting engineers had "confirmed what was outlined in the [FERC Reports] that the Edenville Dam is deteriorated and in need of repair, including repairs to the gates, hoists, spillways, wingwall and other items." (App Vol VII, pp 1337a-1339a, Task Force Letter.) The Task Force further informed EGLE that its "consulting team [had] also confirmed the hazardous operating conditions (during

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while knowing that the dam was in poor condition with inadequate spillway capacity, the State authorized a plan for raising lake levels in the short term while postponing necessary repairs until 2024. It was knowledgeable of the risks and acted to raise water levels anyway.

[15] (Woods Compl., ¶146, 163, 165-166, 170, 211, 253, 255, 258); (App Vol VII, pp 1395a-1397a, Timeline of Events).

[16]https://www.bridgemi.com/michigan-environment-watch/feds-revoked-dams-license-over-safety-issues-then-michigan-deemed-it-safe

[17] (Borchard Compl., ¶104; Bruneau Compl., ¶54; Forbes Compl., ¶51; Holley Compl., ¶67; Krieger Compl., ¶65; Pleasant Beach Compl., ¶156; Swarthout Compl., ¶54; Woods Compl., ¶162; Wortley Compl., ¶103; Zelenak Compl., ¶81.)

the winter months), based on current dam conditions, a history of safety concerns due to ice accumulations on the dam, and the fact that the dam is not fully equipped or designed for safe winter operations at its normal lake level (especially now that the Edenville Dam no longer produces power)." (App Vol VII, pp 1337a-1339a, Task Force Letter.)

The Task Force supported Boyce's request for a drawdown, stating, "the drawdown of the lake is the only feasible and prudent alternative that comprehensively minimizes these safety risks." (App Vol VII, pp 1337a-1339a, Task Force Letter.) Given the dam's condition, "EGLE's denial of the drawdown permit substantially adds safety risk that can and should be avoided." (App Vol VII, pp 1337a-1339a, Task Force Letter.) The Task Force provided EGLE with documentation in support of a drawdown, and had "come to the same conclusion that the drawdown requested is necessary to ensure the structural integrity of the dam during the winter months until the requisite improvements to the dam can be made." (App Vol VII, pp 1337a-1339a, Task Force Letter.) It emphasized: "Simply put, at this time the drawdown of the lake is the only feasible and prudent alternative for winter operations." (App Vol VII, pp 1337a-1339a, Task Force Letter.) The Task Force acknowledged the prospect of environmental impacts from the proposed drawdown, but informed the State that those "impacts, while important, are outweighed by the harm to the structural integrity of the dam and its operations, and most importantly to the personnel that operate the dam, and the persons and properties in proximity to the dam." (App Vol VII, pp 1337a-1339a, Task Force Letter.)

The Task Force warned that, because the State was requiring dangerously increased water levels given the condition of the dam, "***the Michigan Department of Environment, Great Lakes, and Energy (EGLE) has elevated the potential risk to the health, safety and welfare of 'Littoral substrate and aquatic vegetation rhizomes/stems', Fish assemblages', and the 'Rainbow mussel' over the risk to health, safety and welfare of human beings and property***." (App Vol VII, pp 1337a-1339a, Task Force Letter.)

As noted in its November 27, 2019 letter, the Task Force had previously proposed to EGLE a "mussel recovery plan" to "protect, recover and relocate mussels in Wixom Lake." (App Vol VII, pp 1337a-

1339a, Task Force Letter.) In response, EGLE "purposely rescheduled" required public hearings "to prevent [the Task Force] from undertaking a more effective mussel recovery plan." (App Vol VII, pp 1337a-1339a, Task Force Letter.) Thus, the Task Force believed "that EGLE representatives purposely created a bureaucratic situation where the outcome was all [but] certain, namely, to deny the drawdown permit." (App Vol VII, pp 1337a-1339a, Task Force Letter.)

While the State opposed and denied requests for drawdowns (which were needed to address structural integrity, spillway, and other issues), its own representatives were quietly acknowledging, in writing, that the dam's spillway capacity was not sufficient. On November 13, 2019, Teresa Seidel, director of EGLE's water resources division, admitted in an email that the State knew as of fall 2018 that even the most generous evaluations of the dam's spillway capacity could not meet the State's lower safety standard of ½ PMF:

> When the dam was regulated by FERC, it was required to pass the full probabl[e] maximum flood (PMF), which is estimated somewhere around 60,000 cubic feet per second (cfs). According to information provided to us at the time of the license revocation (Fall 2018), the dam had a maximum spillway capacity of approximately 28,000 cfs. So, it was very clear that the dam did not meet the FERC spillway capacity requirements which ultimately led to the revocation of the license by FERC and jurisdiction over the dam to revert to the state under Part 315. [App VII, pp 1340a-1343a, November 2019 Seidel Emails.]

In her November 13, 2019 email, Seidel confirmed that Spicer Group analyzed and reported the Edenville Dam's deficient spillway capacity far earlier than EGLE has publicly admitted, specifically, in June/July of 2019. Seidel reported that "communications with Spicer indicate that ***the capacity of the dam was previously over estimated, and that the true capacity (in its current condition) does not meet the state requirement to safely pass ½ PMF***." (App VII, pp 1340a-1343a, November 2019 Seidel Emails.) Again, even with this information, the State took repeated acts to effectuate increased water levels.

Driving the point home, Seidel's email concluded: "It is likely that the dam does not, in its current condition, meet state requirement to be able to pass ½ PMF and will require modifications to meet this standard." Seidel also acknowledged that EGLE had confirmed the alarming spillway capacity data much earlier than Defendants have publicly admitted, in June/July of 2019 at the latest. (App VII, pp 1340a-1343a, November 2019 Seidel Emails.)

On January 31, 2020, EGLE's dam safety inspector, Luke Trumble, again reported that the dam did not meet the state's minimum flood capacity requirements. Trumble reported his findings to Spicer Group. Recognizing the danger posed by the dam's poor condition, on February 7, 2020, Ron Hansen from Spicer Group asked the State to notify the dam's owner and the Task Force of the dam's deficient spillway capacity. Hansen told Trumble: "In the spirit of trying to implement dam safety improvements as quickly as possible, please notify the FLTF and Boyce of the ½ PMF deficiencies at your earliest convenience." (App VII, pp 1344a-1349a, 5/22/20 Detroit News Article.)

In March 2020, despite knowing that the dam did not meet state safety standards, and having concealed the deficiency in spillway capacity (which did not even meet the State's lower PMF standards), EGLE authorized Boyce Hydro to raise water levels in Wixom Lake.[18] Ultimately, in the spring of 2020, the State filed suit against the Boyce entities and sought an order preventing Boyce from lowering the water levels. (App Vol VII, pp 1350a-1385a, State Complaint v Boyce.)[19] In addition, the State imposed strict conditions intended to ensure Boyce would keep the water levels high and not undertake further

[18] https://www.bridgemi.com/michigan-environment-watch/michigan-regulators-moved-fast-dangerous-dam-protect-mussels

[19] (Borchard Compl., ¶¶105-106; Bruneau Compl., ¶57; Fagan Compl., ¶91; Forbes Compl., ¶53; Holley Compl., ¶¶70-71; Krieger Compl., ¶¶67-68; Swarthout Compl., ¶59; Woods Compl., ¶163-166, 170; Wortley Compl., ¶¶103-104; Zelenak Compl., ¶¶83-84).

drawdowns.[20] Because of the State's affirmative actions, by early May 2020 the water levels were raised to unreasonably dangerous levels under the circumstances.

The State's Affirmative Actions in Effectuating Dangerously Increased Water Levels Causes a Catastrophic Dam Failure

The Edenville Dam failed on May 19, 2020, following a spring rainstorm because the spillways, long known to be inadequate, could not adequately pass required water flows. After the dam failed, the State openly acknowledged the long-standing concerns regarding the safety and structural integrity of the dam. A state agency spokesperson stated that EGLE "had strong concerns the dam did not have enough spillway capacity" in the event of heavy rains and "expressed those concerns[.]"[21] While touring the ruins, the Governor of Michigan, Gretchen Whitmer, stated: "The initial readout is that this was a known problem for a while." (App Vol V, pp 823a-824a, EGLE Website re Midland Area Dam Failure.)

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[20] (Borchard Compl., ¶¶106-107; Bruneau Compl., ¶57; Forbes Compl., ¶¶55-56; Holley Compl., ¶72; Krieger Compl., ¶¶69-70; Pleasant Beach Compl., ¶159; Swarthout Compl., ¶57; Woods Compl., ¶211-213; Wortley Compl., ¶¶103-104; Zelenak Compl., ¶¶85-87.) According to Ryan Jarvi, a spokesman for the Michigan Attorney General (in an article titled "*Did state pressure to keep Wixom Lake level high contribute to Edenville Dam's failure?*"), the State's approval came with "several conditions," because the company "was hesitant to promise that it wouldn't just drop the level again in winter 2020, thus further damaging the State's natural resources."
https://www.detroitnews.com/story/news/local/michigan/2020/05/21/state-says-didnt-pressure-boyce-hydro-raise-water-levels-before-dam-failure/5236290002/

[21] https://www.bridgemi.com/michigan-environment-watch/feds-revoked-dams-license-over-safety-issues-then-michigan-deemed-it-safe; (App Vol V, pp 823a-824a, EGLE Website re Midland Area Dam Failure).

On June 5, 2020, Spicer Group issued its report verifying what EGLE knew all along, specifically, that the dam did not meet state spillway safety standards and that these deficiencies had to be corrected. Although Spicer Group published its final report after the dam failed, the record shows that the State was clearly alerted to the findings prior to March 2020 – before it authorized Boyce to raise the lake levels.

After the dam failed, EGLE issued a statement that it had inspected the Dam in October 2018 and had found it to be structurally sound.[22] This public statement from EGLE was part of a long pattern of misleading statements, dating back to 2018, designed to conceal and obscure the dangerous condition of the dam. For example, in its own lawsuit against Boyce, the state asserts that its mischaracterization of the dam's integrity was based on the limited nature of the original inspection, which it described as a "visual inspection . . . intended to be a preliminary inspection for major structural issues and was not meant to determine whether the dam's spillway has sufficient capacity to satisfy Michigan dam safety laws." (App Vol VII, pp 1350a-1385a, State Complaint v Boyce, ¶ 72)

In addition, in multiple public statements and various court papers (including the State's motion at p 4) EGLE inaccurately asserts it did not have timely access to FERC safety records. This assertion is misleading and is asserted to excuse the State's role in authorizing the operation of a dam it knew posed an imminent threat to public safety. In fact, the Task Force confirmed that "[t]he State received the FERC Safety Reports. Moreover, the knowledge that FLTF's engineers obtained through their diligence was shared with EGLE's Dam Safety Unit." (App Vol VII, pp 1387a, FLTF 6/8/20 Press Release.)

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[22] Erin Ailworth; John D. Stoll (May 20, 2020). "Failed Michigan Dam Lost License in 2018." The Wall Street Journal. Retrieved May 21, 2020. (After its license was revoked by FERC, regulation of the Edenville dam was taken over by the Michigan Department of Environment, Great Lakes and Energy in 2018. Spokesman Nick Assendelft said the agency inspected the dam in October 2018 and found it structurally sound.)

Pursuant to the State's authorization and direction, Spicer Group conducted multiple inspections between June 2019 and March 2020, which revealed deficiencies of the Edenville Dam. (App Vol IV, pp 694a-732a, Spicer Group Inspection Report.) According to Spicer Group's Report, a "gate test in June [2019] demonstrated that the current method to operate the gates was not an adequate or safe method. Gate test reports have previously been provided to EGLE." (App Vol IV, p 698a, Spicer Report.) The report further stated, "[c]urrently, there are deficiencies which need to be corrected. The dam does not provide adequate capacity to pass the ½ Probable Maximum Flood (PMF) event sufficiently to meet EGLE Dam Safety requirements. This has been previously identified during review of the rating curves by EGLE Dam Safety Engineers and confirmed by the FLTF engineering team." (App Vol IV, p 697a, Spicer Report.) Again, the State was aware of this information and acted to raise the water levels anyway.

The Task Force "provided verbal and written statements to EGLE in September 2019 sharing its conclusion that the dam could not meet the State's Probable Maximum Flood (PMF) requirements." In September 2019, the Task Force's engineers confirmed "'[a]t this point in time, based on documents reviewed, the [Task Force] does not believe that the Edenville Dam can be operated to meet the EGLE dam safety requirement to pass the ½ PMF without certain repairs and improvements.'" (App Vol VII, pp 1388a, FLTF 6/8/20 Press Release.)

The United States House of Representatives Committee on Energy and Commerce, Subcommittee on Energy also asked FERC whether "FERC consult[ed] Michigan regarding the significant public safety concerns stemming from the longstanding non-compliance pattern by Boyce Hydro and the implications for the state?" FERC responded:

> Yes. For a number of years, Commission staff worked with Michigan state authorities, who were aware of, and occasionally reported to the Commission, improper activities by Boyce Hydro. Following the issuance of the Commission's Order Proposing Revocation on February 15, 2018, staff contacted the Michigan Department of Environmental Quality [now known as EGLE] to discuss

> that the result of the Commission's possible revocation of the license would remove the facility from federal jurisdiction.

FERC further stated: "Multiple Michigan agencies intervened or commented during the years of non-compliance or in the revocation proceedings for the Edenville Project."

Most recently, the Task Force summarized the State's misleading positions regarding the failure of the Edenville Dam as follows: "[T]he State Attorney General's office and EGLE are creating their own narrative on the blame for the Edenville Dam's failure." (App Vol VII, p 1389a, FLTF 6/8/20 Press Release.) Ultimately, the State's affirmative actions brought about the dangerously increased water levels that caused the catastrophic dam failure.

Procedural History

As a result of the events described above, these 25 actions were filed in the Court of Claims, each of which presented claims of inverse condemnation. Before any discovery had been begun, the Defendants filed motions for summary disposition in each case, which they labeled as being brought pursuant to MCR 2.116(C)(7) (App Vol II, pp 405a-437a). As is explored in detail below, MCR 2.116(C)(7) applies where summary disposition is appropriate because the moving party is entitled to immunity. Defendants curiously asserted (as they have unsuccessfully maintained to this date) that they were entitled to governmental immunity relative to the claims of inverse condemnation despite it being well-settled that immunity is not a defense to such a claim. The Court of Claims thereafter asked the Plaintiffs in these separate actions to file one consolidated response to those motions.

Defendants' brief contains little to no description of what was actually argued and decided below, which is of course necessary when ascertaining whether any given argument on appeal is properly before this court. Defendants' motions each then argued that none of the Plaintiffs could establish a claim for inverse condemnation because any allegations regarding the elements of such a claim were not supported by the publicly available evidence upon which Defendants relied in their

motion. In other words, Defendants were asking the Court of Claims to analyze the motion under the wrong court rule so that they could rely on handpicked evidence outside the pleadings despite the Plaintiffs having zero access to discovery. Notably, in making that argument, Defendants focused on whether 1) they had taken any affirmative acts, that were 2) directly aimed at the Plaintiffs' properties, and that 3) were a substantial cause of the claimed injuries. As this Court will see, that argument differs from the argument now offered in support of this appeal, where Defendants now include substantial argument regarding whether Plaintiffs' property was taken for public use. (App Vol II, pp 405a-437a.)

The Plaintiffs in these separate actions proceeded to file one omnibus response to Defendants' motion for summary disposition pursuant to the request of the Court. In that response, Plaintiffs asserted that governmental immunity was not an available defense to a constitutional claim for inverse condemnation because immunity only applies to tort actions. Plaintiffs thus argued that, contrary to the label affixed to the motion, MCR 2.116(C)(7) was wholly inapplicable and the motion should have been filed pursuant to MCR 2.116(C)(8), and should be analyzed as such. Plaintiffs argued that, when viewed through the lens of MCR 2.116(C)(8), the motion was entirely without merit because Defendants were asking the Court to ignore the well pled allegations and instead look to record evidence – evidence that was almost exclusively under the control of the Defendants and that had not been developed or tested through discovery. The Plaintiffs argued that, nonetheless, both the complaints and the limited record demonstrated that Defendants took affirmative actions that specifically targeted their properties and that were substantial causes of the injuries alleged in the complaint. (App Vol III, pp 438a-480a.)

The parties proceeded to oral argument regarding the motion for summary disposition on November 13, 2020 (App Vol VIII, pp 1398a-1430a). During that argument, Defendants almost exclusively focused on arguing that Plaintiffs could not show that Defendants had taken any affirmative action relative to the dam and, consequently, could not satisfy an essential element of a constitutional claim for inverse condemnation. Plaintiffs, in contrast, maintained their argument that

governmental immunity was not an available defense to an inverse condemnation claim and that Plaintiffs had adequately stated claims for such a cause of action such that summary disposition was not proper when analyzing the motion under MCR 2.116(C)(8). Additionally, Plaintiffs argued that the available facts (prior to any discovery) established that the Defendants took affirmative action relative to the dam that caused the claimed damages in these cases.

The Court of Claims issued its Opinion denying the motions for summary disposition on May 21, 2021. (App Vol VIII, pp 1431a-1447a.) The Court held that summary disposition was denied "with respect to plaintiffs' inverse-condemnation claims because defendant is not immune from those claims and because plaintiffs have adequately pled inverse condemnation." Regarding the dispute over the applicable summary disposition standard, the Court explained that Defendants improperly labeled their motions as being brought pursuant to MCR 2.116(C)(7). The Court held that "[t]he alleged constitutional violation takes this matter outside the realm of governmental immunity. As a result, defendant's assertions about the inadequacy of plaintiffs' pleadings sound more in the nature of an argument that plaintiffs failed to state a claim which relief can be granted under MCR 2.116(C)(8)." The Court stated that "[u]nder such a review, examination of documentary evidence is not permitted. See *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 163-164; 934 NW2d 665 (2019)."

Upon concluding that the motion should be analyzed pursuant to MCR 2.116(C)(8), the Court turned to the contents of Plaintiffs' pleadings. Recognizing that "[o]ne of the primary arguments defendant advances is that plaintiffs in these consolidated matters have failed to allege affirmative actions directed at plaintiffs' properties," the Court discussed the specific affirmative acts that the Plaintiffs have alleged:

> In particular, they allege that defendant knew about the need for repairs at the Edenville Dam, particularly the need for repairs to the spillways. The complaints also allege that, despite knowing about the risks of flooding to the surrounding area and the inadequate spillways, defendant nevertheless took actions that were designed to force Boyce to increase water levels in Wixom Lake. For

> instance, ¶¶ 56-57 of the complaint in Docket No. 20-000112-MZ allege that defendant threatened Boyce with enforcement action if Boyce lowered lake levels and that defendant pressured Boyce to raise water levels and to keep them high. This pressure culminated, allege plaintiffs, in a lawsuit filed in early May 2020, before the flooding occurred, regarding lake levels and damage[] purportedly caused when Boyce lowered the lake levels in late 2019. Thus, plaintiffs have alleged that defendant mandated and was responsible for high lake levels at Wixom Lake in the spring of 2020, prior to the May 2020 flooding event. The high lake levels were tied to defendant's alleged focus on aquatic wildlife over and at the expense of the surrounding properties. The various complaints also allege that defendant was aware of and even concealed the dangers posed by the safety failures at the Edenville Dam. Stated otherwise, plaintiffs allege that defendant was aware of the danger, disregarded it, and took affirmative actions that exacerbated the risk of flooding and ultimately led to the flooding of plaintiffs' properties. These allegations set forth affirmative actions directed at plaintiffs' properties. [(Opinion and Order of May 21, 2021, at 11-12) (footnotes omitted).]

After determining that Plaintiffs sufficiently pleaded that Defendants took affirmative actions that led to the subject flooding, the Court briefly turned to the topic of causation. The Court stated that "[t]he various complaints allege that defendant's actions resulted in the failure of the Edenville Dam and the resultant flooding. These allegations include defendant's alleged imposition of pressure on Boyce to maintain high dam levels, despite knowledge that the spillways were inadequate." The Court recognized that Defendants contested those allegations, but observed that such efforts failed to recognize that the Court had to accept Plaintiffs' pleadings as true. The Court further stated that Defendants' evidentiary arguments were tantamount to arguing that summary disposition was proper under MCR 2.116(C)(10), despite the fact that no discovery had yet occurred.

Following the denial of the motion for summary disposition, Defendants filed a motion for reconsideration that the Court of Claims denied by way of its August 2, 2021 order. Defendants then filed Claims of Appeal in this Court on August 6, 2021, which were subsequently administratively consolidated. *Krieger, et al v Department of Environment, Great Lakes and Energy, et al*, unpublished order of the Court of Appeals, entered August 6, 2021 (Docket No. 358076). By choosing to file Claims of Appeal, as opposed to Applications for Leave to Appeal, Defendants were again falsely maintaining that the denial of summary disposition in this case was a denial of an assertion of governmental immunity. As a result, Plaintiffs filed a motion to dismiss the Claims of Appeal on October 8, 2021. That motion was granted by this Court on November 8, 2021, which stated:

> As the trial court recognized, the gravamen of defendants' motion for summary disposition with regard to plaintiffs' inverse condemnation claims was not a claim of immunity from such constitutional claims but rather an assertion that plaintiffs did not adequately plead the inverse condemnation claims. Accordingly, in relevant part, the trial court's order constitutes an order denying a motion for summary disposition under MCR 2.116(C)(8) premised on failure to state a claim, not an order denying governmental immunity under MCR 2.116(C)(7). [App Vol VIII, pp 1448a-1449a.]

After their Claim of Appeal was dismissed for lack of jurisdiction, Defendants proceeded to file a motion for reconsideration of that dismissal, which was denied (App Vol VIII, p 1450a). Defendants ultimately filed an application for leave to appeal with the Michigan Supreme Court on January 31, 2022, arising from that dismissal. That application was limited to the issue of whether Defendants had an appeal as of right and was likewise denied. While that application was pending, however, Defendants filed their Delayed Application for Leave to Appeal, which this Court granted. Now, for the reasons set forth below, Plaintiffs respectfully request that this Honorable Court affirm the denial of summary disposition in all regards.

Further facts necessary to the resolution of the issues may be included in the discussion section below.

LEGAL STANDARD

Defendant argues that Summary Disposition is proper pursuant to MCR 2.116(C)(7). The basis for summary disposition under MCR 2.116(C)(7) is that the moving party is entitled to entry of judgment, dismissal of the action, or other relief because of the immunity granted by law (among other reasons). A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence; if such material is submitted and the substance or content of the supporting proofs are admissible in evidence, then it must be considered. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817, 823 (1999). However, unlike a motion under subsection (C)(10), neither movant nor the responding party is required to file supportive material, and the opposing party need not reply with supportive material. Rather, the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Id.*, citing *Patterson v Kleiman*, 447 Mich 429, 434, n 6; 526 NW2d 879 (1994).

While Defendants argue that summary disposition should have been granted under MCR 2.116(C)(7), both the Court of Claims and this Court have determined that the motion was properly characterized as being pursuant to MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. *El-Khalil v Oakwood Healthcare, Inc,* 504 Mich 152, 159-160 (2019). When considering such a motion, the court must decide the motion on the pleadings alone and the motion can only be granted if a claim is so clearly unenforceable that no factual development could justify recovery. *Id.*

ARGUMENT

I. The Court of Claims correctly determined that Defendants' motion for summary disposition was brought pursuant to MCR 2.116(C)(8), regardless of the label Defendants applied

Plaintiffs will begin their argument by addressing Issue II from Defendants' brief on appeal, as the resolution of that issue impacts the way in which the remainder of this appeal is analyzed. Defendants contend that the Court of Claims erred in concluding that the motion for summary disposition was properly classified as a (C)(8) motion, as opposed to a (C)(7) motion. In addressing that argument, the Court of Claims stated:

> Defendant acknowledges, as it must, that an inverse condemnation claim is a constitutional claim to which immunity does not apply. *Buckeye Union Fire Ins Co v State*, 383 Mich 630, 641; 178 NW2d 476 (1970). As explained by our Supreme Court, because "the obligation to pay just compensation arises under the constitution and not in tort, the immunity doctrine does not insulate the government from liability" in an inverse condemnation claim. *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 91 n 38; 445 NW2d 61 (1989). And despite defendant's assertions that plaintiffs have brought a tort claim, caselaw is clear that "[i]nverse condemnation is a constitutional claim that does not truly sound in tort." *Elia Cos, LLC v Univ of Mich Regents*, __ Mich App __, __; __ NW2d __ (2021) (Docket No. 351064), slip op at p 7, citing *Tamulion v Mich State Waterways Comm*, 50 Mich App 60, 66-67; 212 NW2d 828 (1973). This is because the right to recover just compensation for a governmental taking is implied in this state's constitution, such that "[t]o permit the State to assert the defense of governmental immunity in such circumstances would be utterly to vitiate the constitutional provision providing for just compensation for the taking of private property for public use, for it would mean that the owner of property alleged to have been taken

> without compensation would be left without judicial recourse." *Thom v State Highway Comm'r*, 376 Mich 608, 628; 138 NW2d 322 (1965). In short, immunity does not apply to the inverse-condemnation claims asserted by plaintiffs, and defendant's motion and claim of immunity under subrule (C)(7) are without merit." [Opinion and Order, May 21, 2021, pp 7-8.]

Notably, this Court has *already determined* that the Court of Claims was correct in that conclusion. Specifically, when this Court granted Plaintiffs' motion to dismiss the claims of appeal, it stated as follows:

> As the trial court recognized, the gravamen of defendants' motion for summary disposition with regard to plaintiffs' inverse condemnation claims was not a claim of immunity from such constitutional claims but rather an assertion that plaintiffs did not adequately plead the inverse condemnation claims. Accordingly, in relevant part, the trial court's order constitutes an order denying a motion for summary disposition under MCR 2.116(C)(8) premised on failure to state a claim, not an order denying governmental immunity under MCR 2.116(C)(7). [*Krieger, et al v Department of Environment, Great Lakes and Energy, et al*, unpublished order of the Court of Appeals, entered November 8, 2021 (Docket No. 358076).]

Defendants filed a motion for reconsideration of that order, which was denied. Thus, the argument within this appeal regarding the applicable standard is Defendants' attempt at taking a third bite of the apple in this Court alone (to say nothing of the fact that the Supreme Court likewise denied Defendants' Application for Leave to Appeal). Defendants make no attempt to explain why they are not bound by this Court's November 8, 2021, order. On that basis alone this Court should refuse to entertain Defendants' argument. For the sake of completeness, however, Plaintiffs will address the substance of Defendants' position.

MCR 2.116(C)(7) provides that a party may pursue dismissal of an action "because of release, payment, prior judgment, **immunity**

granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action" (emphasis added). In contrast, MCR 2.116(C)(8) provides that dismissal can be sought where "[t]he opposing party has failed to state a claim on which relief can be granted."

Below, Defendants labeled their motion as being brought pursuant to MCR 2.116(C)(7). That label, however, is not controlling. The law is clear that if a party bringing a motion for summary disposition mislabels the motion by incorrectly stating the subrule of MCR 2.116 on which it relies, the Court can address the motion under the more appropriate subrule. See *Ellsworth v Highland Lakes Dev Assocs*, 198 Mich App 55, 57–58; 498 NW2d 5 (1993), citing *Wilson v Thomas L McNamara, Inc,* 173 Mich App 372, 376; 433 NW2d 851 (1988); see also *Detroit News, Inc v Policemen & Firemen Ret Sys of City of Detroit*, 252 Mich App 59, 66; 651 NW2d 127 (2002).

Here, it was always apparent that Defendants could not be granted summary disposition on the basis of MCR 2.116(C)(7), as governmental immunity is not an available defense to claims of inverse condemnation. The GTLA provides that "a governmental agency is immune ***from tort liability*** if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL § 691.1407(1) (emphasis added). GTLA immunity does not apply here because it provides immunity protection only for "tort liability" and "[a]n inverse condemnation action is not a tort action." *Allen v City of Laingsburg*, unpublished per curiam opinion of the Court of Appeals, issued February 16, 2010 (Docket No. 286031); see *Thom*, 376 Mich at 628.

Under well-established precedent, and by the admission of the State, governmental defendants are not entitled to an immunity defense to inverse condemnation claims alleging takings claims under Article 10, § 2 of the Michigan Constitution. This specific issue was resolved long ago by the Michigan Supreme Court in 1965 in *Thom*, 376 Mich at 628, following an appeal that originated from the Michigan Court of Claims. The *Thom* Court held that:

> [t]o permit the State to assert the defense of governmental immunity in such circumstances would be utterly to vitiate the constitutional provision providing for just compensation for the taking of private property for public use, for it would mean that the owner of property alleged to have been taken without compensation would be left without judicial recourse. It is the general rule that even the State may not intrude upon a citizen's lawful possession of his property (*Ashley v City of Port Huron* (1877), 35 Mich 296, 300; *Herro v Chippewa County Road Commissioners* (1962), 368 Mich 263, 272; 118 NW2d 271). While the citizen's possession is subject to the power of eminent domain, ***it would be absurd and contrary to the explicit guarantee of the Constitution to say that if the State takes property without giving the required compensation, it thereby becomes immune from any suit to obtain that compensation.*** [*Thom,* 376 Mich at 628 (emphasis added).]

No governmental immunity statute can overturn the express language of the Michigan Constitution, which guarantees "just compensation" for governmental takings of private property. Const 1963, art 10, § 2. This well-established legal principle has been repeatedly reaffirmed, without exception, through numerous published, precedential opinions. See *Electro-Tech,* 433 Mich at 91 n 38; see also *Wiggins v City of Burton*, 291 Mich App 532, 574 n 9; 805 NW2d 517 (2011); see also *Armstrong v Ross Twp*, 82 Mich App 77, 82-83; 266 NW2d 674 (1978).

By its plain language, the GTLA only applies to "tort liability," which does not include constitutional taking claims. "Since the obligation to pay just compensation arises under the constitution and not in tort, the immunity doctrine does not insulate the government from liability." *Electro-Tech,* 433 Mich at 91 n 38 (citations omitted). In *Wiggins*, the Court once again held unequivocally that governmental entities are "not entitled to governmental immunity with respect to . . . inverse-condemnation claim[s]." *Wiggins*, 291 Mich App at 574 n 9. It is so well-established that governmental entities are not entitled to an immunity defense to inverse condemnation claims that litigants

generally avoid raising this losing argument. See *Dextrom*, 287 Mich App at 413, n 4; see also *Gottleber v Cty of Saginaw*, unpublished per curiam opinion of the Court of Appeals, issued June 12, 2018 (Docket No. 336011), remanded in part, appeal denied in part, 503 Mich 1034 (2019).

Contrary to the State's assertion below, Plaintiffs are under no burden to allege or prove that their claims fall under an "exception" to the GLTA because the immunity statute is entirely inapplicable to claims against governmental entities that are expressly guaranteed by the Michigan Constitution. See *Taxpayers Allied for Constitutional Taxation v Wayne County*, 450 Mich 119, 131; 537 NW2d 596 (Mich 1995) (Weaver, J., concurring in the result only) (noting the Legislature cannot amend the constitution by enacting a statute). GTLA immunity does not apply to takings claims brought under the Michigan Constitution, and it cannot serve as the basis for dismissal in a motion under MCR 2.116(C)(7).

It remains unclear *why* Defendants chose to classify their motion below as being pursuant to MCR 2.116(C)(7), though it may very well have been motivated by a desire to 1) have a right to an appeal upon the denial of the motion, or 2) be able to go beyond the four corners of the pleadings despite the lack of any discovery in these cases. In either instance, both the Court of Claims and this Court properly concluded that MCR 2.116(C)(7) cannot serve as a basis for summary disposition due to the inapplicability of governmental immunity to a claim of inverse condemnation. Defendant has not shown that any error occurred regarding this point, let alone an error that justifies yet another review by this Court.

Lastly, Defendants vaguely and inaccurately contend that even if this matter is analyzed under MCR 2.116(C)(8), the Court of Claims should have gone beyond the pleadings and apparently should have considered any publicly available documents or any materials referenced by the complaint. That is simply not so and (again) is likely the precise reason why Defendants did not want this motion analyzed under that subrule. "When deciding a motion under(C)(8), this Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the nonmoving party. A party may not

support a motion under (C)(8) with documentary evidence such as affidavits, depositions, or admissions." *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 304-305; 788 NW2d 679 (2010) (internal citations omitted). This is binding, blackletter law. Defendants cannot avoid that reality simply because they wish to. And, to be clear, Defendants' apparent disagreement with the state of the law is troubling in itself. When the government is accused of taking action that destroyed the properties of thousands of its citizens, it should not be permitted to simultaneously prevent discovery from occurring while also asking the Court to only consider handpicked evidence that creates an incomplete and unreliable picture of the events in question.

II. The Court of Claims properly determined that Plaintiffs stated claims for inverse condemnation

Turning to Defendants' substantive arguments, Plaintiffs must first briefly address the concept of preservation. As this Court has previously stated, "[i]n general, an issue is preserved if it was raised in, and addressed and decided by, the trial court." *Elahham v Al-Jabban*, 319 Mich App 112, 119; 899 NW2d 768 (2017). Where arguments presented on appeal are unpreserved, this Court reviews for plain error. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Id.*

When this Court reviews Defendants' motion in the Court of Claims (App Vol II, pp 405a-437a) as well the transcript of the summary disposition hearing (App Vol VIII, pp 1398a-1430a), it will surely see that the primary focus below was on whether Defendants had engaged in the type of affirmative action necessary to support a claim for inverse condemnation. On appeal, Defendants' argument bears little resemblance to their arguments below, with the focus now becoming whether Plaintiffs' properties were taken for a public use. Because that argument was not made or decided below, it is unpreserved and subject to a plain error review. Despite that, Defendants rather disingenuously accuse the Court of Claims on page 32 of their brief on appeal of "disregarding the requirement that property must be put to a public use for it to be taken . . . ."

With the unpreserved nature of at least a portion of this application noted, Defendants argue that Plaintiffs have failed to plead the requisites of an action alleging inverse condemnation as a result of the flooding resulting from the collapse of the Edenville Dam. Defendants then seemingly argue that flooding which has the effect of depriving a particular person or group of persons of the right to enjoyment of their property has NEVER been viewed as allowing for an action in inverse condemnation. Yet, the Court of Claims correctly held that neither of the above arguments are valid, ruling instead that Plaintiffs had stated a cause of inverse condemnation under the binding authority of *Mays v Governor*, 506 Mich 157; 954 NW2d 139 (2020).

A. The Trial Court properly determined that inverse condemnation had been appropriately pleaded.

The elements of an action in inverse condemnation were set out by Justice Bernstein in the lead opinion in *Mays, supra*, at 173-174:

> The Fifth Amendment of the United States Constitution and Article 10, § 2 of Michigan's 1963 Constitution prohibit the taking of private property without just compensation. US Const Am V; Const 1963, art 10, §2. A claim of inverse condemnation is "a cause of action against a governmental defendant to recover the value of property which has been taken . . . even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Merkur Steel Supply Inc v Detroit,* 261 Mich App 116, 129; 680 NW2d 485 (2004) (quotation marks and citation omitted). "Inverse condemnation can occur without a physical taking of the property; a diminution in the value of the property or a partial destruction can constitute a 'taking.' " *Id* at 125; 680 NW2d 485.
>
> "[A] plaintiff alleging inverse condemnation must prove a causal connection between the government's action and the alleged damages." *Hinojosa v Dept of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). Government actions directed at a plaintiff's property must have "the effect of limiting the use of the property."

> *Charles Murphy MD PC v Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993). "[A]ll of the [defendants'] actions in the aggregate, as opposed to just one incident, must be analyzed to determine the extent of the taking." *Merkur Steel Supply Inc* 261 Mich App at 125; 680 NW2d 485. A plaintiff "must establish (1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property." *Blue Harvest Inc v Dept of Trans*, 288 Mich App 267, 277; 792 NW2d 798 (2010).

In reviewing the Plaintiffs' complaints, the Court of Claims found that the Plaintiffs properly alleged that the failure of the Edenville dam and the ensuing flood had caused them damage. (Opinion and Order, May 21, 2021, at 2-3). It further noted that Plaintiffs properly alleged affirmative acts, often of concealment, sufficiently to show actions on the part of Defendants. (*Id.* at 3-5). The Court noted that Plaintiffs pleaded that the Defendants' actions constituted an abuse of power, which were directly aimed at the downriver properties. (*Id.* at 11-12). Accordingly, the Court of Claims held that Plaintiffs had pleaded a cause of action alleging all the elements of inverse condemnation, and that they had adequately alleged facts showing a causal connection between the Defendants' actions and the damages suffered by the Plaintiffs' (*Id.* at 15).

Defendants, in seeking appellate review of this decision, rely on the same arguments they unsuccessfully made before the Court of Claims, again placing principal reliance on older Court of Appeals cases such as *Attorney General v Ankerson*, 148 Mich App 524; 385 NW2d 658 (1986) and *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club,* 283 Mich App 264; 769 NW2d 234 (2008). Defendants go so far as to insist that these cases control a Court's determination on inverse condemnation issues, and that the more recent Supreme Court authority of *Mays* is to be disregarded. (Def Brf, pp 39-40).

Defendants, however, cannot abolish the rule of precedent. The *Mays* Court unquestionably set forth the parameters of an inverse condemnation claim, which Defendants and all lower courts are

constrained to follow. Specifically, the *Mays* Court then applied this standard to the claims of the Flint water Plaintiffs and found that those Plaintiffs had stated a prima facie claim. *Mays* at 174-180. The fact that Defendants did not so much as cite to *Mays* in their Motion for Summary Disposition speaks volumes- they were silent on *Mays* not because it wasn't relevant, but because it was fatal to their motion.

The Court of Claims addressed Defendants' arguments that older Court of Appeals cases remained the law, and that the holding of *Mays* was not to be applied to the instant matter. The Court noted the difference between the facts of the instant matter and that of these prior cases, noting that "the allegations in this case are of a different character than those in the cases cited by defendant and that plaintiffs have alleged affirmative acts taken by defendant that were directed at their properties." (Opinion and Order of May 21, 2021 at 11). The Court, bound by the holding of *Mays*, ruled that the facts herein fell squarely within the application of the rule regarding inverse condemnation claims. (*Id.* at 13-14).

Lastly, while *Mays* (like Defendants below) did not discuss whether the taking at issue in that case was for a "public use," Defendants are not entitled to any relief based on that unpreserved argument. Defendants' own brief on appeal at pages 24-25 acknowledges that Plaintiffs *did* allege that their properties were taken for a public use. Defendants then unpersuasively ask this Court to disregard those allegations because, in Defendants' view, they are either conclusory or will not be supported by the evidence. Again though, such arguments have no place at this stage. Plaintiffs' allegations must be accepted as true, must be viewed in the light most favorable to Plaintiffs and cannot be challenged through the introduction of outside evidence because this is not a (C)(7) or a (C)(10) motion. Plaintiffs, like Defendants appear to be, are also eager to show the ways in which their pleadings are supported by the evidence. The best way for all parties to accomplish that goal is to proceed forward with discovery in the Court of Claims.

B. Property owners historically have been permitted to plead an action in inverse condemnation when a governmental entity takes actions which result in their property being flooded.

The Court of Claims correctly determined that the Plaintiffs herein have pleaded a cause of action in inverse condemnation. The Defendants, in challenging that determination, make the argument that plaintiffs have never been permitted to proceed in inverse condemnation for flooding brought about by actions of a government entity. This argument is likewise incorrect.

The right of a property owner to bring a Constitutional action against the state for flooding damage caused by state action was established in *Vanderlip v City of Grand Rapids*, 73 Mich 522; 41 NW 677 (1889). Since *Vanderlip*, plaintiffs alleging flooding damage have asserted constitutional claims. Where these claims have been properly asserted, they have been permitted to proceed.

The cases relied on by the Defendants do not negate the above truth. For instance, the Defendants cite *Disappearing Lakes Ass'n v Department of Natural Resources,* 121 Mich App 61; 328 NW2d 570 (1982) for a variety of propositions. But as it relates to the inverse condemnation issue, *Disappearing Lakes* can provide no guidance, because Plaintiffs *did not preserve the issue for appeal. Id.* at 71.

Defendants place even greater reliance on *Attorney General v Ankersen*, 148 Mich App 524; 385 NW2d 658 (1986). As seen from the caption, *Ankersen* was an action brought by the Attorney General seeking abatement of a nuisance caused by improper storage of hazardous waste. The property owners brought a counterclaim alleging that the State, by granting a license to a private business, had taken their property unconstitutionally. Even though the circuit court did not rule either way as to this counterclaim, the Court of Appeals took up the issue, and held that, under the facts alleged by the property owners, no unconstitutional taking had occurred. The Court found, with essentially no explanation, that the grant of a license in that case could not amount to a taking and that there were no sufficient affirmative acts by the Defendant to support such a claim.

The facts of *Ankersen* are far different from those of the instant case, as the present case involves allegations of distinct and far more significant state action, including the threatened use of litigation to compel the very conditions that resulted in this catastrophic flood event. Defendants' reliance on *Ankersen* is likewise improper because it is not precedentially binding. Pursuant to MCR 7.215(J)(1), a published opinion of the Court of Appeals is only binding if it was decided on or after November 1, 1990. *Ankersen*, being decided in 1986, thus does not amount to binding precedent—and is not analogous. Finally, it should be noted that while Defendants wish to rely on *Ankersen* for certain notions, they ignore other portions. For example, Defendants' brief states numerous times that damage to property does not rise to the level of a taking, seemingly missing *Ankersen's* statement that a "taking may occur without absolute conversion of the property and may occur when serious injury is inflicted to the property itself." *Id.* at 561 (internal quotations and citations omitted).

Cases alleging that a governmental entity has taken actions which have led to property being flooded routinely allow for an injured Plaintiff to bring an action in inverse condemnation. The Defendants, in their chart on p 23 of their brief, acknowledge that the Plaintiffs in *Wiggins v City of Burton,* 291 Mich App 532, 571-572; 805 NW2d 517 (2011), were permitted to proceed in inverse condemnation by virtue of their allegations that a governmental entity had taken an action which resulted in flooding to their property. The same is true of *Gottleber v County of Saginaw*, unpublished opinion per curiam of the Court of Appeals, issued June 22, 2018 (Docket No. 345698).

All the inverse condemnation cases have emphasized the diverse factual nature of flooding cases, and how the totality of the government's actions and omissions led to the flooding. The Court of Claims, viewing the facts in a light most favorable to the Plaintiffs herein, was able to differentiate the line of cases relied on by Defendants from those in which the Plaintiffs were permitted to proceed under a theory of inverse condemnation.

> The Court concludes that the allegations in this case are of a different character than those in the cases cited by defendant and that plaintiffs have alleged affirmative acts

> taken by defendant that were directed at their properties. In particular, they allege that defendant knew about the need for repairs at the Edenville Dam, particularly the need for repairs to the spillways. The complaints also allege that, despite knowing about the risks of flooding to the surrounding area and the inadequate spillways, defendant nevertheless took actions that were designed to force Boyce to increase water levels in Wixom Lake. For instance, ¶¶ 56-57 of the complaint in Docket No. 20-000112-MZ allege that defendant threatened Boyce with enforcement action if Boyce lowered lake levels and that defendant pressured Boyce to raise water levels and to keep them high. This pressure culminated, allege plaintiffs, in a lawsuit filed in early May 2020, before the flooding occurred, regarding lake levels and damage[] purportedly caused when Boyce lowered the lake levels in late 2019. Thus, plaintiffs have alleged that defendant mandated and was responsible for high lake levels at Wixom Lake in the spring of 2020, prior to the May 2020 flooding event. The high lake levels were tied to defendant's alleged focus on aquatic wildlife over and at the expense of the surrounding properties. The various complaints also allege that defendant was aware of and even concealed the dangers posed by the safety failures at the Edenville Dam. Stated otherwise, plaintiffs allege that defendant was aware of the danger, disregarded it, and took affirmative actions that exacerbated the risk of flooding and ultimately led to the flooding of plaintiffs' properties. These allegations set forth affirmative actions directed at plaintiffs' properties. [(Opinion and Order of May 21, 2021, at 11-12) (footnotes omitted).]

In short, the Court of Claims reviewed the claims made by Plaintiffs and found that the facts as set forth in their Complaints properly stated a claim in inverse condemnation based on all the controlling precedents. Defendants have not shown that finding to be in error and likewise have not shown any basis for appellate relief. The

denial of the motion for summary disposition should be affirmed in all regards.

CONCLUSION AND RELIEF REQUESTED

As the Court of Claims properly concluded, Plaintiffs have properly stated claims for inverse condemnation. Any arguments regarding immunity were properly rejected as being inapplicable and any arguments regarding whether Plaintiffs' claims are supported by record evidence were properly rejected for being premature and outside the scope of review. This appeal is devoid of merit and, respectfully, this Court should affirm the denial of Defendants' motion for summary disposition.

Date: September 20, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 12,102 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

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