STATE OF MICHIGAN
IN THE SUPREME COURT

MOUNT CLEMENS RECREATIONAL BOWL, INC, a Michigan profit corporation, KMI, INC, a Michigan profit corporation, and MIRAGE CATERING, INC, a Michigan profit corporation, individually and on behalf of all others similarly situated,
Plaintiffs/Appellants,

v.

ELIZABETH HERTEL, in her official capacity as Director of the Michigan Department of Health and Human Services, PATRICK GAGLIARDI, in his official capacity as Chair of the Michigan Liquor Control Commission, and GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan,
Defendants/Appellees
_____/

Supreme Court Case No.: 165169

BRIEF OF *AMICUS CURIAE* ANTHONY BANASZAK IN SUPPORT OF APPELLANTS MOUNT CLEMENS RECREATIONAL BOWL, INC, KMI, INC, & MIRAGE CATERING, INC

OUTSIDE LEGAL COUNSEL PLC
PHILIP L. ELLISON (P74117)
PO Box 107
Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com

Counsel for Amicus Anthony Banaszak

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL AND CONSTITUTIONAL PROVISIONS

STATUTES

COURT RULES

SECONDARY SOURCES

BACKGROUND OF AMICUS' INTEREST[1]

Amicus Anthony Banaszak owns a private residence located at 212 Garfield Avenue in Bay City, Michigan (the "Garfield Avenue House") that he rents as a quad-plex. In October 2022, one of the tenants, a confused and wayward septuagenarian, refused to be evicted. The police were called after the tenant threatened the papers-serving court officer with a knife. After later incorrectly claiming to see a gun (which turned out to be a broomstick), officers from the Bay City Public Safety Department and the latter-arriving Michigan State Police Emergency Support Team (effectively a SWAT team) proceeded to storm Banaszak's house using highly destructive tactics. A BearCat (essentially a small tank) rammed a portion of the wall and windows on the southside of the Garfield Avenue House (https://youtu.be/Yf-OtCvv-2Y). The officers also fired dozens of rounds of highly noxious chemical irritants into the house breaking and poisoning the walls, windows, and the building itself. Cole Waterman, *Bay City Landlord Sues City, State After Police Damage Building During Standoff*, MLIVE/BAY CITY TIMES, July 10, 2023, *available at* https://bit.ly/48eYPUu (see photographs associated with news story). The dispersed tear gas and activated cannisters of chemical irritants remained as bio-hazards after law enforcement bolted from the scene following the effectuation of the arrest. Courts around the country have found such to be a type of taking. E.g. *Steele v City of Houston*, 603 SW2d 786 (Tex 1980).

Banaszak filed suit against both the State of Michigan and the City of Bay City on various takings theories in the Bay County Circuit Court. However, the State *sua sponte* self-transferred its portion of the case to the Michigan Court of Claims. The reason was

[1] No party's counsel authored this brief in whole or in part. No one, other than Amicus, contributed any money for this brief's preparation or submission. MCR 7.312(H)(4).

transparent—it was to deny the requested jury trial. Attempts to transfer the case back to the Bay County Circuit Court to hold a jury trial were denied by the assigned Court of Claims judge. The challenge to the constitutionality of the *Court of Claims Act* as denying the right to a jury trial was also denied. **Exhibit A**. The case remains pending.

Banaszak offers this amicus brief to confirm that the desire of suing citizens (like him) for a trial of their peers is not a theorical or academic exercise, or is otherwise limited to the unique facts of this *Mount Clemens* case. While admittedly having more than an idle curiosity in the outcome of this case as future precedent, Banaszak presents this brief to suggest that that a long legal history and tradition exists to require a jury trial on a citizen's civil claims against the government when a valid jury demand is proffered. The jurisprudence of this State has unfortunately strayed from the historical and well-understood obligation of the judiciary to empanel juries to adjudicated cases. This Court has the opportunity in this case to correct that error—and it should do so.

ARGUMENT

Today, the operative provision of the Michigan Constitution provides "[t]he right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." Const 1963, art I, § 14. Like other parts of our Constitution, our highest governing document is ***more*** protective[2] of the right to a jury than the Seventh Amendment as a counterpart. The Seventh Amendment's "right of trial by jury shall be preserved" but only "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." US Amend VII. The Michigan Constitution, on

[2] See *Rafaeli, LLC v Oakland Cnty*, 505 Mich 429, 454; 952 NW2d 434 (2020) (Michigan's Takings Clause… afford[s] property owners greater protection than its federal counterpart when it comes to the state's ability to take private property for a public use under the power of eminent domain.")

the other hand, does not make this right to a jury limited to only "suits at common law" or otherwise has a separate monetary threshold. Instead, our "legislature may authorize a trial by a jury of less than 12 jurors in ***civil*** cases," Const 1963, art IV, § 44, while not authorizing the Legislature to preclude civil jury trials against the State altogether—as that fundamental right must "remain."

The right to a jury trial is a fundamental one, with a long history that dates back to the founding of our country and beyond. See *Duncan v Louisiana*, 391 US 145, 148-154 (1968) (discussing the fundamental nature of the right and its long history). The jury trial also dates back to before the birth of Michigan's statehood. Our prior territorial "constitution" provided an unconditional right to a jury trial—

> The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, ***and of the trial by jury***; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law.

NORTHWEST ORDINANCE § 14, art 2 (1787). Pointedly, this particular right was not limited to common-law suits or valued at more than twenty dollars.

Thereafter, our state's original constitution, ordained against the above-referenced backdrop of the Northwest Ordinance, *Madugula v Taub*, 496 Mich 685, 704 fn46; 853 NW2d 75 (2014), mandated that "[t]he right of trial by jury shall ***remain inviolate***." Const 1835, art I, § 9.[3] Thereafter, the subsequently revised state constitutions provided that

[3] As this Court previously recounted in *Studier v Mich Pub Sch Employees Retirement Bd*, 472 Mich 642, 669; 698 NW2d 350 (2005)—

> Congress provided in the Northwest Ordinance that the constitutions and governments of the states to be formed in the territory, of which states Michigan is one, "shall be republican." NORTHWEST ORDINANCE OF 1787, art V. This requirement was carried forward by Congress when it severed Michigan from the Northwest Territory in 1800 and made it part of the Indiana Territory, 2 US Stat, Ch XLI, § 2, and again in 1805 when it likewise severed Michigan from the Indiana Territory and established the Michigan Territory, 2 US Stat, Ch V, § 2, by requiring both times that the

"the right of trial by jury ***shall remain***." Const 1850, art VI, § 27; Const 1908, art II, § 13; Const 1963, art I, § 14; see also *People v Kirby*, 440 Mich 485, 494; 487 NW2d 404 (1992). The intention of these post-original provisions was "to preserve to parties the right to have their controversies tried by jury, in all cases where the right then existed… and suitors cannot constitutionally be deprived of this right except where, in civil cases, they voluntarily waive it by failing to demand it in some mode which the legislature shall prescribe." *Tabor v Cook*, 15 Mich 322, 325 (1867); see also *Madugula*, 496 Mich at 704-705 ("a jury trial [is] 'preserved in all cases where it existed prior to adoption of the Constitution,' [and] the constitutional guarantee also applies 'to cases arising under statutes enacted subsequent to adoption of the Constitution which are similar in character to cases in which the right to jury trial existed before the Constitution was adopted.").

Given the language of the Northwest Ordinance (which set the yardstick by which all rights to a jury "shall remain" or "remain inviolate") all the way through Const 1963, art I, § 14 and art IV, § 44, the constitutional mandate is clear—the Legislature can dictate ***the mode*** by which a jury trial is demanded, not preclude a jury altogether. The teachings of *Tabor* and *Madugula* and the law in effect prior to statehood in the Michigan Territory confirms that such a right to a jury trial existed to be invoked for civil claims made against the government and its officials.

However, this right goes back even further as we have the known English history[4] of requiring a sued government and its officials to answer to a jury. The best example is

government established in those territories was to be "in all respects similar" to that provided in the Northwest Ordinance of 1787.

[4] Recently this Court reiterated that Michigan's "common law is adopted from England, and to identify such law this Court may consider original English cases and authorities." *Rafaeli,* 505 Mich at 463 (quoting *People v Woolfolk*, 497 Mich 23, 25; 857 NW2d 524 (2014)).

Wilkes. During the 1760s, a member of Parliament named John Wilkes engaged in a series of radical political actions, including publishing a broadsheet called the *North Briton*. Wilkes accused King George III of lying about ongoing peace negotiations with France. After criminal charges of seditious libel were dismissed, Wilkes commenced a damages (i.e. civil) action, ***through a jury trial***, for false arrest, trespass, and theft of personal papers. The *Wilkes* jury awarded him the extraordinary sum of £1000 as damages (approximate $325,000 in today's dollars) against a number of governmental officials including the head of the government at that time, Lord Halifax. See *Wilkes v Wood*, 98 Eng Rep 489 (CP 1763). *Wilkes* is recognized as a "celebrated" case "that profoundly influenced the Founders' view[s]…" *West Covina v Perkins*, 525 US 234, 237 (1999) (Thomas, J, concurring). After *Wilkes*, "the friends and adversaries of the plan of Convention, if they agree on nothing else, concur at least on the value they set upon trial by jury." Alexander Hamilton, FEDERALIST PAPER NO. 83. In fact, among the grievances against King George III listed in the Declaration of Independence was "depriving us, in many cases, the benefits of trial by jury." THE DECLARATION OF INDEPENDENCE (US 1776).

Michigan kept with that tradition following *Wilkes*.[5] The 1835 Constitution mandated that "the right of trial by jury shall ***remain inviolate***." Const 1835, art I, § 9. The strong word of "inviolate" is supposed to mean that it "cannot be annulled, obstructed,

[5] A common misunderstanding is that the Legislature has to ***first*** recognize the right to a jury trial against the State before such exists. That is untrue. When Michigan created its first constitution (and created the scope of the sovereign powers of the State of Michigan, the electorate mandated that the "right of trial by jury shall remain inviolate." Const 1835, art I, § 9. Because the People took away the State's ability to take away the jury trial, the Legislature cannot act in violation or in degradation of constitutional handcuffs. "The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon." *Wolverine Golf Club v Sec'y of State*, 384 Mich 461, 466; 185 NW2d 392 (1971). And when a statute is unconstitutional, it "is as inoperative as if it had never been passed." *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 144-145; 253 NW2d 114 (1977).

impaired, or restricted by [either] ***legislative*** or ***judicial*** action." *Steelvest, Inc v Scansteel Service Center, Inc*, 908 SW2d 104, 108 (Ky 1995) (emphasis added). In simple terms, the right is supposed to be "unassailable." *Id*.

Unfortunately, that constitutional right has come under direct assault and has been heavily battered and bruised (but hopefully not dead). When crafting the *Court of Claims Act*, our Legislature statutorily precluded the suing party's right to a jury trial when the suit is against the State. MCL 600.6443.[6] That was a direct failure to abide by the notion that the Legislature did not have discretion to assail the right to empanel a citizen-jury; it renders such course of action unconstitutional. The requirement of a jury trial remains bound by applicable and overriding provisions of our State Constitution. It is "settled" that the Legislature cannot take away the right of trial by jury as it existed and was adopted by the Constitution. *People v Bigge*, 288 Mich 417, 424; 285 NW 5 (1939). "[A]ny act which destroys or materially impairs the right of trial by jury according to the course of the common law, in cases proper for the cognizance of a jury, is unconstitutional." *Risser v Hoyt*, 53 Mich 185, 196; 18 NW 611 (1884). As such, the *Court of Claims Act*, to the extent that it precludes a civil jury trial in the Court of Claims (or prevents the transfer of the case back from to the original trial court that can hold a jury trial) for a case regarding money damages against the State and its officials for violating the takings provisions of the state and federal constitutions runs contrary to our Constitution's mandate for a required jury trial. Correction by this Court is needed.[7]

[6] As both this case and *Banaszak* establish, the Court of Claims is regularly refusing to transfer these cases with jury demands back to a general jurisdiction circuit court who can hold a jury trial.

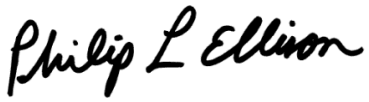
[7] As a final note, a common refrain from attorneys for the government as a counter-argument to amicus' position is the idea that the State cannot be sued as the sovereign unless the latter first consents and, by extension, may condition its consent on prerequisites of its own fiat or discretion. That is blatantly

CONCLUSION

By this pending case, the Court is requested to decree that all Michigan trial courts of appropriate jurisdiction must provide, when properly requested, a trial by jury for takings-based civil suits involving the government and its officials.[8]

Date: December 26, 2023

RESPECTFULLY SUBMITTED:



OUTSIDE LEGAL COUNSEL PLC
PHILIP L. ELLISON (P74117)
PO Box 107
Hemlock, MI 48626
(989) 642-0055
pellison@olcplc.com

Counsel for Amicus Anthony Banaszak

incorrect—*the People* are the sovereign with "all" the "political power"; the State of Michigan was merely "instituted" (i.e. created) by the People of the Territory of Michigan "for their equal benefit, security and protection." Const 1835, art I, §§ 1-2; see also Const 1963, art I, § 1. The Preamble of the 1835 Constitution confirms it—

> We, the PEOPLE of the territory of Michigan, as established by the Act of Congress of the Eleventh day of January, in the year one thousand eight hundred and five, in conformity to the fifth article of the ordinance providing for the government of the territory of the United States, North West of the River Ohio, believing that ***the time has arrived when our present political condition ought to cease, and the right of self-government be asserted***; and availing ourselves of that provision of the aforesaid ordinance of the congress of the United States of the thirteenth day of July, one thousand seven hundred and eighty-seven, and the acts of congress passed in accordance therewith, which entitle us to admission into the Union, upon a condition which has been fulfilled, do, by our delegates in convention assembled, ***mutually agree to form ourselves into a free and independent state, by the style and title of "The State of Michigan,"*** and ***do ordain and establish the following constitution for the government of the same***.

In short, the People have ***already*** and continuously ordained that a right to a trial by jury for suits against the government and its officials "shall remain" inviolate. NORTHWEST ORDINANCE § 14, art 2 (1787); Const 1850, art VI, § 27; Const 1908, art II, § 13; Const 1963, art I, § 14.

[8] Michigan jurisprudence lost its way starting in *Hill v State Highway Comm'n*, 382 Mich 398; 170 NW2d 18 (1969). There, the case involved a dispute over an alleged taking due to an installed roadway. This Court held, with no reference to the language, text, of history of the Michigan Constitution, that "neither the Constitution of 1908 nor 1963 provides a constitutional right to a jury in a condemnation hearing and since there is statutory authority for nonjury proceedings by the highway commission, the [] claim of a right to a determination of damages by a jury is without merit." *Id.* at 406. Respectfully, that misstatement of the law misframes the correct understanding of the constitutional right to a jury trial. The right to a jury trial is inviolate. For the Legislature to take away or water-down that right, it must point a ***different*** provision within the Constitution that authorizes such. To assert the obvious, it does not exist.

WORD COUNT STATEMENT

The body of the filing consists of 2,668 words as determined by the Word Count feature in the Microsoft Word computer program.

STATE OF MICHIGAN

COURT OF CLAIMS

ANTHONY BANASZAK,

Plaintiff,

v

STATE OF MICHIGAN,

Defendant.
_____/

OPINION AND ORDER

Case No. 23-000097-MM

Hon. James Robert Redford

OPINION & ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY DISPOSITION; AND DENYING DEFENDANT'S 10/20/2023 MOTION FOR STAY

Before the Court is defendant's motion for summary disposition filed under MCR 2.116(C)(7) and (C)(8). The motion is DENIED as to Counts III and IV, and GRANTED as to Count I.

I. BACKGROUND

This case arises out of property damage to a house plaintiff owns and which occurred on October 27, 2022. According to plaintiff's complaint, plaintiff owns a residence in Bay City, Michigan. Plaintiff rents out separate apartments in the home. When plaintiff decided to evict one renter, Harold Nielson, plaintiff hired a Bay County Court Officer, but Nielson refused to leave. Law enforcement officers responded, and Nielson barricaded himself in his apartment. Plaintiff agreed to pull down drywall from an adjoining apartment in order to assist officers in accessing Nielson's apartment. When the drywall was removed, officers saw Nielson holding a

knife. Officers ordered Nielson to put down the knife, and Nielson threw it away from himself, toward the officers.

An officer told Nielson he was under arrest, another officer sprayed tear gas into the apartment, and another officer announced Nielson had a gun. The officers retreated, and the Michigan State Police (MSP) Emergency Support Team responded to the scene.

The MSP ordered Nielson to surrender himself. When he did not, the MSP used a BearCat to ram the wall and windows of the home. Plaintiff asserts the officers did "extensive" damage to the property, including firing dozens of rounds of chemical irritants into the house. Plaintiff asserts some of the actions were taken against areas of the home that were not connected to Nielson's apartment. According to plaintiff, remediation is necessary in order to clean the house of the chemical irritants, and plaintiff's insurance did not cover the damages.

On June 23, 2023, plaintiff filed this matter in Bay Circuit Court, suing both Bay City and the State of Michigan. In Count I, plaintiff demanded a jury trial and requested the circuit court prevent the State of Michigan from transferring the case to the Court of Claims. Plaintiff alleges the "Court of Claims Act" is unconstitutional to the extent it does not permit jury trials. In Count II, plaintiff alleges defendant Bay City "committed a taking in violation of the Fifth Amendment to the United States due to the non-payment of just compensation." In Count III, plaintiff alleges "Inverse Condemnation" by both Bay City and the State of Michigan. Plaintiff argues defendants took plaintiff's property for public use without just compensation. Finally, in Count IV, plaintiff alleges a "Taking" pursuant to the state constitution against both defendants.

On June 26, 2023, plaintiff moved the circuit court for a temporary restraining order to preclude the State of Michigan from transferring the case to the Court of Claims. On July 10,

2023, defendant State of Michigan transferred the claims against the State, which includes plaintiff's counts I, III, and IV, to this Court, pursuant to MCL 600.6404(3).

On July 12, 2023, plaintiff moved this Court to return the case to Bay Circuit Court in order for plaintiff to have a jury trial. In response, defendant argued plaintiff had not met the burden to establish a preliminary injunction preventing the transfer should be issued. Defendant argued plaintiff did not have the right to a jury trial in this situation and the circuit court would not have subject-matter jurisdiction over the State.

On July 28, 2023, defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (8). Plaintiff has responded in opposition, and defendant replied to plaintiff's response.

II. ANALYSIS

MCR 2.116(C)(7) provides for summary disposition on the basis of "immunity granted by law." When determining whether a claim is barred under MCR 2.116(C)(7), this Court examines "all documentary evidence submitted by the parties, accept[s] all well-pleaded allegations as true, and construe[s] all evidence and pleadings in the light most favorable to the nonmoving party." *Dougherty v Detroit*, 340 Mich App 339, 345; 986 NW2d 467 (2021) (quotation marks and citation omitted).

MCR 2.116(C)(8) provides for summary disposition when a party "has failed to state a claim on which relief can be granted." A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). See also MCR 2.116(G)(5). In analyzing the claim, courts must accept as true all factual allegations in the complaint and only grant the motion "when a claim is so clearly unenforceable

that no factual development could possibly justify recovery." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019).

A. DEMAND FOR A JURY TRIAL

Plaintiff asserts in Count I, the Court of Claims Act, MCL 600.6401 *et seq.*, which provides this Court with jurisdiction over cases against the state, is unconstitutional because it deprives plaintiff of his right to a jury trial.

"A statute is presumed constitutional absent a clear showing to the contrary." *Caterpillar v Dep't of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992). Under MCL 600.6419(1)(a), this Court has exclusive jurisdiction over claims against the state, except as § § 6421 and 6440[1] provide. MCL 600.6421(1) provides:

> Nothing in this chapter eliminates or creates any right a party may have to a trial by jury, including any right that existed before November 12, 2013. Nothing in this chapter deprives the circuit, district, or probate court of jurisdiction to hear and determine a claim for which there is a right to a trial by jury as otherwise provided by law, including a claim against an individual employee of this state for which there is a right to a trial by jury as otherwise provided by law. Except as otherwise provided in this section, if a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue.

MCL 600.6443 provides cases in front of this Court "shall be heard by the judge without a jury." In *Lumley v Bd of Regents for Univ of Mich*, 215 Mich App 125, 133; 544 NW2d 692

[1] MCL 600.6440 provides:

> No claimant may be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts, but it is not necessary in the complaint filed to allege that claimant has no such adequate remedy, but the fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof.

(1996), the Court of Appeals stated it was the Legislature's clear intent when creating the Court of Claims "that parties to an action against the state will have their respective rights and liabilities determined by a judge and not a jury."

This Court has concurrent jurisdiction in certain situations in which a party has a right to a jury trial, including, for example, in cases brought under the Elliott Larsen Civil Rights Act. See *Doe v Dep't of Transp*, 324 Mich App 226, 238; 919 NW2d 670 (2018). In *Elias Cos v Univ of Mich Regents*, 335 Mich App 439, 457; 966 NW2d 755 (2021) (rev'd on other grounds, *Elia Cos, LLC v Univ of Mich Regents*, 511 Mich 66; 993 NW2d 392 (2023)), the Court of Appeals addressed a plaintiff's argument that its case should remain in the circuit court because of its right to trial by jury. The Court of Appeals stated the issue was "not whether there would ordinarily be a right to a jury trial as between private parties, but whether there is a specific right to a jury trial *against the state*." *Id.* (emphasis in original). Further, the Court explained certain statutes provided for a right to a jury trial, including the Whistleblowers' Protection Act, but, "[o]therwise, the Court of Claims has exclusive jurisdiction over claims against the state for money damages." *Id.* at 458. "If litigants against the state could avail themselves of jury trials merely because they have a right to a jury trial against any other kind of party, the exception would swallow the rule." *Id.* (citation omitted).

Moreover, the Court of Claims explained in *Lim v Mich Dep't of Transp*, 167 Mich App 751, 754; 423 NW2d 343 (1988), "[t]he Court of Claims is the proper forum in which to seek redress where a plaintiff alleges an already accomplished inverse condemnation by the State of Michigan." See also *Mount Clemens Recreational Bowl, Inc v Dir of Dep't of Health and Human Servs*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 358755) (concluding "there is no

basis to conclude that the holding of *Lim* is no longer good law" despite it being published before November 1, 1990)).

In this case, there is no right to a jury trial for plaintiff's claims against defendant. "A right to a jury trial can exist either statutorily or constitutionally." *Madugula v Taub*, 496 Mich 685; 853 NW2d 75 (2014). In *Hill v State*, 382 Mich 398, 405-406; 170 NW2d 18 (1969), the Michigan Supreme Court held there was no right to a jury trial in a case in which there was "no actual physical taking" of the plaintiffs' property, but, instead, the plaintiffs' ability to use their property was affected and a question remained whether a taking had occurred. Although plaintiff argues that *Hill*, 382 Mich at 406 only establishes the lack of a right to a trial by jury in *condemnation* cases, the Michigan Supreme Court based its holding on the Constitution not providing for a right to a jury and because there was statutory authority for nonjury proceedings. In cases involving takings and inverse condemnation claims, the Michigan Court of Appeals has affirmed this Court's jurisdiction. See *Mount Clemens Recreational Bowl, Inc*, ___ Mich App ___ (Docket No. 358755) (holding when the state did not acquire the plaintiffs' property, the Uniform Condemnation Procedures Act did not apply and the plaintiffs did not have the right to a trial by jury); *Lim*, 167 Mich App at 754 (holding this Court is the proper forum to hear claims involving inverse condemnation).

Further, the Michigan Supreme Court recently addressed a party's right to a jury trial in claims against the State in *Christie v Wayne State Univ*, 511 Mich 39, 60; 993 NW2d 203 (2023). The Supreme Court explained the Legislature amended MCL 600.6421 in 2013 in order to provide for concurrent jurisdiction in some claims against the state or its employees in order to preserve a party's right to a jury trial *when the law provides for that right*. *Id.* That right has not been provided for in this situation. Although the Supreme Court did not specifically address the

question of whether the Act was constitutional, it addressed the jury trial rights in claims against the State without any support for the premise that the lack of right to a jury trial is unconstitutional.

Plaintiff is not entitled to a jury trial. Further, the Court of Claims Act is constitutional. Accordingly, defendant's motion for summary disposition as to Count I is GRANTED.

B. INVERSE CONDEMNATION AND TAKINGS CLAIMS

Next, defendant argues plaintiff failed to properly plead a claim under which relief can be granted in Counts III and IV, and requests that this Court dismiss them under MCR 2.116(C)(8). Defendant additionally argues it has governmental immunity.

Regarding defendant's claim of governmental immunity, the Court finds defendant does not have immunity from these claims. Defendant argues the Court "must look beyond the procedural labels in the complaint and determine the exact nature of the claim," which defendant argues in this case is actually a claim of negligence or trespass to land, rather than a constitutional question. However, plaintiff has properly pleaded claims for inverse condemnation and takings, as further explained below. "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, Inc v HF Campbell Co*, 433 Mich 57, 91 n 38; 445 NW2d 61 (1989). "To 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). Therefore, defendant does not have immunity in this situation.

Turning to plaintiff's claims themselves, the Michigan Constitution provides "[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." Const 1963, art 10, § 2. The Michigan Supreme Court has explained:

> The term taking should not be used in an unreasonable or narrow sense. It should not be limited to the absolute conversion of property, and applied to land only; but it should include cases where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from its enjoyment, or from any of the appurtenances thereto. In either of these cases it is a taking within the meaning of the provision of the constitution.
>
> A partial destruction or diminution in value is a taking. [*Thom*, 376 Mich at 613 (quotation marks and citations omitted).]

"An inverse or reverse condemnation suit is one instituted by a landowner whose property has been taken for public use without the commencement of condemnation proceedings." *Electro-Tech, Inc*, 433 Mich at 88-89 (quotation marks and citation omitted). Although "there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property." *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006). A "plaintiff alleging a de facto taking or inverse condemnation 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 *Dep't of Transp,* 288 Mich App 267, 277; 792 NW2d 798 (2010).

Plaintiff has properly alleged a partial destruction or diminution of value in his property by the State in order to support his Takings Claim in Count IV. See *Thom*, 376 Mich at 613 (holding that a "partial destruction or diminution in value is a taking"); *Mays v Snyder*, 323 Mich App 1, 79; 916 NW2d 227 (2018) (quotation marks and citation omitted) ("[A] diminution in the value of

the property or a partial destruction can constitute a taking."). Plaintiff has asserted he owned the home where the incident occurred, that the police damaged or destroyed walls, windows, and other structures, and remediation was required to clean the home because of the officers' use of tear gas and chemical irritants. Plaintiff asserts the damages exceed $25,000.

In *Peterman v State Dep't of Natural Resources*, 446 Mich 177, 191; 521 NW2d 499 (1994), the Michigan Supreme Court held the DNR committed an unconstitutional taking when it built a boat launch and jetties, which caused the plaintiffs to lose their beachfront property by erosion, and did not comply with condemnation proceedings and compensate the plaintiffs for their losses. Although this case is factually distinct, the Michigan Supreme Court stated an injury to a person's property that deprives the owner of the use of that property is equivalent to a taking, and the party is entitled to compensation. *Id.* at 190. In this case, plaintiff has properly pleaded that the State deprived him of the use of his property without compensation. Although defendant argues that a taking is not compensable in cases of necessity, that defense does not warrant dismissal under MCR 2.116(C)(8) because it does not negate plaintiff's properly pleaded claims.

Likewise, regarding his inverse condemnation claim in Count III, plaintiff has properly alleged the government's actions, through the MSP, were a substantial cause of the decline of his property value and that the officers' actions were an abuse of their powers. See *Blue Harvest, Inc*, 288 Mich App at 277. The Michigan Court of Appeals, in *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 539; 688 NW2d 550 (2004), addressed a situation in which the State owned a house in Detroit that the State deemed a "dangerous building" and provided notice it would demolished. Before it was demolished, the house caught fire and damaged two neighboring homes. *Id.* The Court of Appeals held the plaintiffs failed to state a claim for an unconstitutional taking or inverse condemnation because the plaintiffs did not allege any affirmative action by the

State that was directed at the plaintiffs' properties. *Id.* at 548. The Court of Appeals explained the plaintiffs "at most" alleged negligence in failing to abate a nuisance. *Id.*

Here, defendant likewise argues plaintiff is truly pleading a claim of negligence. However, this situation is clearly distinguished from the situation in *Hinojosa* because the MSP purportedly took affirmative actions directed at plaintiff's home that resulted in damages and a reduction in value of the property. Therefore, plaintiff properly alleges affirmative actions taken by defendant specifically directed toward his property to support his claim of inverse condemnation. See *Blue Harvest, Inc*, 288 Mich App at 277. Any factual dispute defendant may raise regarding whether the officers abused their powers, see *id.*, is not a matter for the Court to consider under an MCR 2.116(C)(8) motion. See *El-Khalil*, 504 Mich at 160 (explaining this Court is to accept as true all factual allegations when deciding a motion under MCR 2.116(C)(8)).

Plaintiff has, therefore, properly pleaded a claim for which relief may be granted. Defendant's motion as to Counts III and IV is DENIED.

III. CONCLUSION

Accordingly, defendant's motion for summary disposition is DENIED as to Counts III and IV, and GRANTED as to Count I.

In light of this ruling, defendant's 10/20/2023 motion to stay discovery pending decision on dispositive motion is DENIED.

This is not a final order and does not close the case.

Date: December 11, 2023

James Robert Redford