STATE OF MICHIGAN

COURT OF APPEALS

DORIS L. GASKIN and CORETTA J. SISSON, Plaintiff-Appellees,	UNPUBLISHED July 12, 2012
v	No. 303245 Jackson Circuit Court
CITY OF JACKSON, Defendant-Appellant.	LC No. 10-001531-CZ

Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

In this case involving plaintiffs Doris L. Gaskin and Coretta J. Sisson's claims of unreasonable use of groundwater, interference with the right to lateral and subjacent support, and an unconstitutional taking of private property, defendant City of Jackson appeals as of right the trial court's order denying defendant's motion for summary disposition under MCR 2.116(C)(7), (8), and (10). We affirm in part, reverse in part, and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case involves damage to homes owned by Gaskin ("the Gaskin property") and Sisson ("the Sisson property") in Jackson, Michigan, which plaintiffs allege was caused by defendant's operation of four water-utility wells in Sharp Park. The Gaskin and Sisson properties are approximately 1,161 feet and 950 feet from the closest well in Sharp Park, respectively.

Defendant owns and operates a water utility system that provides water services to portions of Blackman, Summit, and Leoni Townships. The system is comprised of various wells at different locations, including the four wells at Sharp Park. Defendant initiated the installation of the four wells at Sharp Park in 1991. Defendant hired Layne-Northern Company and C.J. Linck and Associates to determine whether Sharp Park was an appropriate place for the wells. An investigation conducted by C.J. Linck and Associates provided that the proposed pumping area would create an "area of influence" or "capture zone" extending approximately 11,000 feet to the northwest and 11,000 feet to the southwest. Furthermore, it projected interference by the pumpage "for other wells within a radius of 10,000 feet"; a "very conservative" plot indicated a 35 to 45 foot drawdown in groundwater elevation in the vicinity of plaintiffs' homes. After an investigation, C.J. Linck and Associates recommended that defendant proceed with the installation of the wells at Sharp Park. The wells were installed in 1992.

Sisson purchased the Sisson property in July 1995. Before the purchase, there were repairs made to the home's north wall. After the purchase, Sisson had to remove garbage and water "up to the knee" in the basement. Later, the home's north wall began caving in and had to be replaced. Sisson also noticed the following: foundation problems; holes forming in the basement floor and yard; and cracks in the basement floor, dining-room ceiling, household walls, kitchen counter tops, ceramic floor, and the driveway.

Also in the summer of 1995, the Millbens, who owned the Gaskin property at the time, began to notice cracks in the brick work and basement floor of their home. The cracks became worse in 1996. Steve Maranowski, president of Spartan Specialties LTD (Pressure Grouting Services), visited the Gaskin property and wrote a letter on December 6, 1996, to Karl Schelling of Schelling Construction Inc. Maranowski observed "cracks at the north and west walls as well as the basement floor." Maranowski opined, "The cracks and settlement are of a recent nature which concludes that the soil beneath the foundation has under gone a change allowing the subsoil to consolidate causing the building damage." Moreover, Maranowksi wrote, "This consolidation of the subsoil could have been due to the recent dry period and/or lowering of the water table through community wells." On May 2, 1997, Schelling wrote the Millbens a letter stating that, after "a recent reinspection" of their property, "it is apparent that the problem is getting continually worse." Schelling opined, "This again reinforces my belief that the City of Jackson well field is the originating cause of the problem and that the soil in the area of settlement is continuing to dry out." In May 1997, the Millbens made a claim to defendant to repair the damages to the Gaskin property and included correspondence from Spartan Specialties LTD and Schelling Construction Inc. with their claim. Defendant rejected the Millbens' claim, emphasizing both the absence of an analysis by an "engineer or other qualified person" to demonstrate a causal relationship and protection by "sovereign immunity."

The Millbens sold the Gaskin property to Gaskin in November 1998 after disclosing to Gaskin that the corner of the home was "settling." Gaskin talked to a contractor, Matt Marian, who told her that other houses in the area had similar problems with "settling." After her purchase, Gaskin made repairs to the home's foundation. In May 2007, defendant's city officials inspected additional damages at the Gaskin property, including the following: foundation problems, sinking of the basement floor, off track doors and windows, detached floor baseboards, cracked bricks and walls, and sink holes in the ground. Gaskin received "no results" in getting defendant to accept responsibility. Gaskin engaged Robert Hayes, a certified professional geologist with GeoForensics, Inc, who conducted soil borings and told Gaskin that the damage to her home "was from the water being drawn by the city wells." On October 16, 2008, Gaskin sent a letter to defendant for a claim for damages to the Gaskin property. In June 2009, Gaskin submitted to defendant an analysis conducted by Robert Hayes, wherein Hayes concluded "that the damage to the Gaskin residence more likely than not is due to subsidence caused by pumping activities at Ella Sharp Park Well Field, which reduce the aquifer's potentiometric surface, causing the earth materials to consolidate and the foundation to subside." Later that month, defendant denied Gaskin's claim, opining that the claim was both meritless and barred by governmental immunity.

Plaintiffs sued defendant, alleging three counts: (I) Groundwater Claim; (II) Subjacent/Lateral Support Claim; and (III) Taking Claim. With respect to the groundwater claim, plaintiffs alleged that defendant interfered with their reasonable use of groundwater for "stability to their soils and structures thereon" by continuously, excessively, and unreasonably operating their wells. For their lateral- and subjacent-support claim, plaintiffs alleged that defendant "breached a common law and statutory duty to furnish sufficient lateral and subjacent support to Plaintiffs' lands and structures thereon" by excavating the four wells at Sharp Park. With respect to count III, plaintiffs alleged that their taking claim was on the basis of (1) defendant's conversion of groundwater to its own use without paying for it and (2) injury to private property where defendant abused its legitimate powers and the value of plaintiffs' property substantially declined. For each claim, plaintiffs requested declaratory relief, a writ of mandamus to compel defendant to initiate condemnation proceedings under the Uniform Condemnation Procedures Act ("UCPA"), MCL 213.51 *et seq.*, an injunction enjoining defendant from well-pumping activities that interfere with plaintiffs' reasonable use of the groundwater, and damages.

Defendant moved for summary disposition under MCR 2.116(C)(7), (8), and (10), arguing, among other things, that all of plaintiffs' claims were tort claims and, with respect to the taking claim, that plaintiffs had not established either a property right in groundwater to demonstrate a taking or the elements of inverse condemnation. Plaintiffs answered defendant's motion for summary disposition and also moved for partial summary disposition with respect to the taking claim under MCR 2.116(I)(2) and MCR 2.116(C)(10). After hearing oral arguments on defendant's motion, the trial court denied the motion in a written order, opining that summary disposition was inappropriate under MCR 2.116(C)(7), (8), and (10). The court did not address plaintiffs' motion.

II. JURISDICTION

As an initial matter, plaintiffs contend that this Court does not have jurisdiction under MCR 7.203(A)(1) because the trial court's order denying defendant's motion for summary disposition is not a final order under MCR 7.202(6)(a)(v). We disagree.

This Court's jurisdiction is governed by statute and court rule; therefore, "whether this Court has jurisdiction is a question of law that this Court reviews de novo." *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009). Under MCR 7.203(A)(1), this "[C]ourt has jurisdiction of an appeal of right filed by an aggrieved party from . . . [a] final judgment or final order of the circuit court . . . as defined in MCR 7.202(6) . . . ." Under MCR 7.202(6)(a), a "final judgment" or "final order" in a civil case includes the following:

> (i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order,
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> * * *
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> (v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order

> denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity. [MCR 7.202(6)(a)(i), (v).]

In its order denying defendant's motion for summary disposition, the trial court correctly noted that defendant moved for summary disposition under MCR 2.116(C)(7), (8), and (10). The court properly articulated the standard of review for all three summary-disposition grounds. The court then analyzed defendant's motion in three separate sections: (1) Failure to State a Claim, (2) Governmental Immunity, and (3) Reasonable Use Balance Test. The court denied summary disposition on each ground.

We conclude that the trial court's order is not a "final order" under MCR 7.202(6)(a)(i) because it is not "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." Rather, the order is properly viewed as denying governmental immunity to a governmental party under MCR 2.116(C)(7). See MCR 7202(6)(a)(v). Given the structure of the trial court's order, the trial court did not deny summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity as it did not address immunity in the final section of its order. The trial court obviously committed a clerical error when—after appropriately articulating the correct standards for summary disposition under MCR 2.116(C)(7) and (C)(8)—it denied defendant's motion for failure to state a claim under (C)(7) and for governmental immunity under (C)(8). Under MCR 7.216(A)(1) and (4), we amend the trial court's order to correctly state that defendant's motion for summary disposition on the basis of governmental immunity is denied under MCR 2.116(C)(7) (and that the motion for failure to state a claim is denied under MCR 2.116(C)(8)). Furthermore, we emphasize that

> regardless of the specific basis of the trial court's ruling on a motion for summary disposition, whenever the effect is to deny a defendant's claim of immunity, the trial court's decision is, in fact, 'an order denying governmental immunity.' Logic dictates that such a determination be reviewable under MCR 7.203(A). [*Walsh v Taylor*, 263 Mich App 618, 625; 689 NW2d 506, 512 (2004), quoting MCR 7.202(6)(a)(v).]

Accordingly, the trial court's order denying defendant's motion for summary disposition is a final order under MCR 7.202(6)(a)(v) because it denies governmental immunity under MCR 2.116(C)(7). This Court has jurisdiction under MCR 7.203(A)(1).

III. GOVERNMENTAL IMMUNITY

Defendant argues that plaintiffs' claims are tort claims barred by governmental immunity and, therefore, the trial court should have granted summary disposition in its favor. We agree in part.

We review de novo both the applicability of governmental immunity and a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Roby v Mount Clemens*, 274 Mich App 26, 28; 731 NW2d 494 (2006). "Under MCR 2.116(C)(7), the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party." *Id.* "A trial court may also consider the parties'

pleadings, affidavits, depositions, admissions, and other documentary evidence filed to determine whether the defendant is entitled to immunity." *Id.*

"Under the [GTLA], a governmental agency is shielded from tort liability if it is engaged in the exercise or discharge of a governmental function." *Id.*; see also *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001) ("Under M.C.L. § 691.1407(1), a government agency is generally immune from suit for actions undertaken in the performance of its governmental functions."). In this case, the parties do not dispute that defendant is a "governmental agency." And the parties agree that defendant is authorized by statute, city charter, and city ordinance to own and operate a water utility system and, thus, is engaging in a governmental function. Moreover, the parties do not dispute the inapplicability of exceptions to governmental immunity; rather, the parties disagree over whether plaintiffs' claims are tort claims under the GTLA.

Plaintiffs argue that governmental immunity does not apply to their claims because they request equitable relief for each individual claim. In *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 152 n 5; 422 NW2d 205 (1988), overruled on other grounds *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), our Supreme Court stated that, "[g]enerally, we do not view actions seeking only equitable relief, such as abatement or injunction, as falling within the purview of governmental immunity." The decision in *Hadfield*, however, was a plurality opinion that is not binding on this Court. *Jackson Co Drain Comm'r v Village of Stockbridge*, 270 Mich App 273, 285; 717 NW2d 391 (2006); see also *Hadfield*, 465 Mich at 144, 204.

Later, in *Jackson Co*, this Court held that "[t]he plain language of [MCL 691.1407(1)] does not limit the immunity from tort liability to liability for damages." *Jackson Co*, 270 Mich App at 284. The *Jackson Co* Court explained that

> governmental immunity is to be broadly construed, while exceptions to immunity are to be narrowly construed. To construe the statute as plaintiffs urge in the instant case [, i.e., that governmental immunity does not apply where plaintiffs' trespass-nuisance action seeks only equitable relief,] would be to construe governmental immunity narrowly. Moreover, such a construction would judicially impose a term into the statute that the Legislature did not provide, which is not permitted. [*Id.*]

However, after this Court's decision in *Jackson Co*, the Supreme Court in *Lash v Traverse City*, 479 Mich 180, 204-205; 735 NW2d 628 (2007), indicated that governmental immunity does not apply to claims seeking declaratory or injunctive relief. The plaintiff in *Lash* sued the defendant Traverse City for monetary damages, alleging that the city denied him employment because he did not meet the city's residency requirement and that the residency requirement violated MCL 15.602(2). *Lash*, 479 Mich at 182-183. The Supreme Court held that the city's residency requirement violated MCL 15.602(2); however, the Court also held that nothing in MCL 15.602(2) permitted the plaintiff to maintain a private cause of action for

damages against the city.[1] *Id.* at 183. In response to the plaintiff's contention that a private cause of action for damages was the only mechanism to enforce MCL 15.602(2), the Court opined that the plaintiff could have enforced the statute by seeking injunctive relief under MCR 3.310 or declaratory relief under MCR 2.605(A)(1). *Id.* at 196.

The Supreme Court's decision in *Lash*, particularly its emphasis on the plaintiff's ability to enforce MCL 15.602 through declaratory or injunctive relief, demonstrates that governmental immunity does not apply to claims that request declaratory or injunctive relief. While the Court's discussion of enforcing MCL 15.602 through equitable relief was not necessary to its decision that the plaintiff could not maintain a private cause of action for monetary damages against the city, its equitable-relief discussion was not dicta and is binding on this Court; "when a court of last resort intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision." *Carr v City of Lansing*, 259 Mich App 376, 384; 674 NW2d 168 (2003). Here, the *Lash* Court intentionally took up the equitable-relief issue, and the issue was germane to the controversy in *Lash* because the Court addressed the issue in response to the plaintiff's contention that a private cause of action for monetary damages was the only mechanism to enforce MCL 15.602(2). Therefore, *Lash* must be read as implicitly overruling *Jackson Co*, and this Court must follow *Lash*. See *id.*; *Felsner v McDonald Rent-A-Car, Inc*, 193 Mich App 565, 569; 484 NW2d 408 (1992) ("Stare decisis dictates that a decision of the majority of the justices of our Supreme Court is binding upon lower courts."). Moreover, it is clear that an action for mandamus is an equitable action, not a tort action, and, thus, falls outside the provisions of governmental tort immunity. See *Mercer v City of Lansing*, 274 Mich App 329, 332-334; 733 NW2d 89 (2007); *Wayne Co Sheriff v Wayne Co Bd of Comm'rs*, 196 Mich App 498, 510; 494 NW2d 14 (1992).

Therefore, plaintiffs' claims are not barred by governmental immunity to the extent that they seek equitable relief, i.e., a declaratory judgment, injunction, or writ of mandamus.

In all three claims, plaintiffs request damages in addition to equitable relief. To the extent that these claims are tort claims seeking damages within the meaning of the GTLA, they are barred. See *Lee v Macomb Co Bd of Comm'rs*, 235 Mich App 323, 334-336; 597 NW2d 545 (1999) (concluding that trial court properly dismissed tort claims seeking damages for negligence but improperly dismissed counts seeking mandamus), rev'd on other grounds *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 741; 629 NW2d 900 (2001) (reversing on the basis of lack of standing to seek mandamus); see also *Mercer*, 274 Mich App at 331-332 & n 4.

A common-law lateral- and subjacent-support claim is considered an allegation on the basis of negligence or trespass. See *Tillson v Consumers Power Co*, 269 Mich 53, 56; 256 NW2d 801 (1934) ("[Plaintiff] asserts a right of recovery . . . by reason of defendants' common-

[1] While the Court recognized that a private cause of action for damages may be inferred from statutes that do not expressly provide for such a cause of action, the Court emphasized that a private cause of action cannot be implied against a governmental entity in contravention of the broad scope of governmental immunity. *Lash*, 479 Mich at 194.

law liability arising from alleged negligence . . . ."); *Aristos v Detroit & Canada Tunnel Co*, 258 Mich 579, 581-582, 587; 242 NW 757 (1932) (explaining that the theory of common-law liability for withdrawal of lateral support sounds in negligence); *Gildersleeve v Hammond*, 109 Mich 431, 438-439; 67 NW 519 (1896) (holding that a landowner who has the right to excavate close to a boundary line must take "reasonable precautions" to prevent his neighbor's soil from falling); *Buskirk v Strickland*, 47 Mich 389, 390-392; 11 NW 210 (1882) (action for damages on the basis of removal of lateral support is an action "on the case" or for trespass). And the statutory claim arises from the imposition of a duty by statute:

> It shall be the duty of every person, partnership or corporation who excavate upon land owned or occupied by them to a depth exceeding 12 feet below the established grade of a street or highway upon which such land abuts or, if there is no such established grade, below the surface of the adjoining land, to furnish sufficient lateral and subjacent support to the adjoining land to protect said land and all structures thereon from injury due to the removed material in its natural state, or due to the disturbance of other existing conditions caused by such excavation. [MCL 554.251.]

Therefore, our Supreme Court has categorized a common-law and statutory lateral- and subjacent-support claim as a "tort action." *Tillson*, 269 Mich at 56.

With respect to groundwater-interference claims, this Court has traditionally looked to groundwater-rights principles expressed in the Restatement of Torts. See, e.g., *Mich Citizens for Water Conservation v Nestle Waters North America, Inc*, 269 Mich App 25, 68-74 & n 46; 709 NW2d 174 (2005) (looking to 4 Restatement Torts, 2d, § 850A for guidance in a groundwater claim), rev'd in part on other grounds *Mich Citizens for Water Conservation v Nestle Waters North America, Inc*, 479 Mich 280, 284-285; 737 NW2d 447 (2007); *Maerz v United States Steel Corp*, 116 Mich App 710, 720; 323 NW2d 524 (1982) (holding that Restatement Torts, 2d, § 858, p 258, which addresses liability for use of groundwater, should be followed in Michigan); *Hart v D'Agostini*, 7 Mich App 319, 322; 151 NW2d 826 (1967) ("The liability for interference with the subterranean water supply of a neighbor has been expressed, depending upon whether the causative activity (1) if intentional, was unreasonable, or (2) if unintentional, was negligent. See Restatement, Torts s 822, at p. 226 . . . ."). In applying a reasonable-use balancing test to a groundwater claim, this Court has looked to Restatement Torts, 2d, § 850A as an aid to understanding the role of the factors to be balanced. See *Nestle*, 269 Mich App at 68-74 & n 46. Chapter 41 of the Second Restatement of Torts addresses interference with the use of water. The Second Restatement of Torts states the following as an introductory note to Chapter 41:

> Although the interests protected by the rules stated in this Chapter are property rights arising out of the ownership and possession of land, an interference with a right to the use of water logically and analytically belongs in the field of tort liability. An unprivileged interference is a tort, although, like a trespass or nuisance, it is a tort directed at an interest in property. [4 Restatement Torts, 2d, introductory note to §§ 841 to 863, p 182.]

"A 'tort' is broadly defined as 'a civil wrong for which a remedy may be obtained.'" *Tate v Grand Rapids*, 256 Mich App 656, 660; 671 NW2d 84 (2003) (citation omitted). "The GTLA

unambiguously grants immunity from *all* tort liability, i.e., all civil wrongs for which legal responsibility is recognized, regardless of how the legal responsibility is determined, except as otherwise provided in the GTLA." *Id.* (emphasis in original). Plaintiffs' claim for groundwater interference is a tort claim because it is a claim for a civil wrong—interference with plaintiffs' right to reasonably use groundwater—for which legal responsibility is determined through the reasonable-use balancing test to the end of obtaining a remedy. Therefore, we conclude that plaintiffs' groundwater-interference claim is a tort claim.

Accordingly, to the extent that plaintiffs' groundwater-interference claim and common-law and statutory lateral- and subjacent-support claim seek compensatory damages (as opposed to equitable relief), we conclude that they are barred by the GTLA. The trial court erred when it did not grant summary disposition in favor of defendant on this basis.

With respect to plaintiffs' taking claim, plaintiffs assert two theories: (1) defendant's conversion of groundwater and (2) injury to plaintiffs' property caused by public improvement or public activity. Defendant concedes that "[g]overnmental immunity is not applicable to a takings claim." See generally *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 91 n 38; 445 NW2d 61 (1989) (stating that the immunity doctrine does not insulate the government from immunity in taking claims). Defendant, however, insists that plaintiffs' taking claim is actually a tort claim disguised as a taking claim. We disagree.

First, under their groundwater-conversion theory, plaintiffs allege that defendant unreasonably interfered with their groundwater rights to serve a public use by removing groundwater beneath their properties for distribution through the water utility system. Plaintiffs allege that defendant conducted a feasibility study that showed that the wells would adversely impact neighboring properties but, nonetheless, constructed the wells and put them into operation. Plaintiffs also allege that defendant failed to conduct a study on how its wells would affect the stability of surrounding soils and that defendant continued its operation of the wells even after Gaskin presented evidence to defendant that the wells caused the damage to her property.

Plaintiffs frame this theory of a taking in reliance on *Jones v East Lansing-Meridian Water & Sewer Auth*, 98 Mich App 104; 296 NW2d 202 (1980). In *Jones*, the plaintiffs began to experience loss of water, lower water pressure, and other well problems after the defendant Water and Sewer Authority constructed and placed wells into operation in the vicinity of the plaintiffs' properties. *Jones*, 98 Mich App at 105-106. Before the construction, "[n]o inquiry was conducted into the extent [the] Authority wells would interfere with private wells in the area because of the apparent belief that some interference would be caused no matter where the Authority wells were located." *Id.* at 106. After the plaintiffs reported their concerns in an attempt to alleviate the wells' impact on their property, the defendant contracted to have a study completed; the study showed that "certain of the Authority's wells created an excessive drawdown (depletion) when operated together and that the problems with the private wells in the area were directly caused by the Authority's well operation." *Id.* at 106-107. Notwithstanding the study, the defendant continued to pump the wells identified as creating the greatest interference, and the plaintiffs sued the defendant, alleging a nuisance, a taking, and an unreasonable interference with groundwater rights. *Id.* at 107. On appeal, this Court determined that the defendant unreasonably interfered with the plaintiffs' subterranean water rights. *Id.* at

109. This Court emphasized that the defendant was on notice before putting its wells into operation that its wells would cause interference with private wells. *Id.* Moreover, the Court emphasized that there were alternatives to drilling the wells, but the defendant failed to study the alternatives. *Id.* Finally, this Court concluded that the plaintiffs were entitled to recover just compensation for a taking under the United States and Michigan Constitutions. *Id.* at 110-111. The Court noted that to establish a taking "it is sufficient that . . . private property has been impressed into serving a public use." *Id.* The Court concluded, "Defendants did impress plaintiffs' private property into serving a public use by unreasonably interfering with plaintiffs' subterranean water rights." *Id.* Given the substantial similarity between *Jones* and plaintiffs' factual allegations, plaintiffs' allegation of a taking on this basis is not a mislabeled tort claim.

Second, plaintiffs allege a taking on the basis of damage to private property for which plaintiffs must show the following: (1) defendant's actions substantially contributed to the decline in value of plaintiffs' property and (2) defendant abused its legitimate powers through affirmative actions directly aimed at plaintiffs' property. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). Here, plaintiffs allege that defendant's "well pumping activities lowered the groundwater elevation beneath Plaintiffs' lands, [which] significantly and negatively impacted the stability of the soil which caused or substantially contributed to permanent, serious damages, diminution in value, and loss of use and enjoyment of the property." Moreover, plaintiffs allege that defendant abused both its legitimate powers and eminent domain powers when it (1) failed to conduct studies to determine the wells' effect on the stability of the surrounding soils after receiving notice that the wells would have adverse effects on property in the vicinity, (2) failed to take corrective action when placed on notice by Gaskin that its wells were causing serious damage, (3) excessively and unreasonably conducted its well pumping activities, (4) knowingly took large quantities of groundwater from beneath plaintiffs' lands in complete disregard of their property rights, (5) failed to disclose relevant information concerning the negative effects of its well pumping, (6) refused to respond to documents attributing the damage to plaintiffs' property to defendant's well pumping, and (7) engaged in deceptive and dilatory conduct intended to discourage plaintiffs from further pursuing defendants. Given these factual allegations, plaintiffs' taking claim on this basis is not a mislabeled tort claim.

Accordingly, we conclude that plaintiffs' taking claim is not a tort claim in disguise. The claim is not barred by the GTLA.[2] See *Electro-Tech*, 433 Mich at 91 n 38.

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[2] We note and reject defendant's reliance on *Faulknor v Dalton Twp*, unpublished opinion per curiam of the Court of Appeals, issued May 21, 2009 (Docket No. 284340), for the proposition that plaintiffs' taking claim is a disguised tort claim. First, *Faulknor* is not binding on this Court. See *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). Second, we do not find *Faulknor* persuasive as the present case is distinguishable. In *Faulknor*, the plaintiff's tavern was allegedly accidently damaged by sewer-line installation under a road after the township decided not to install the sewer line underneath the plaintiff's property. *Faulknor*, unpub op at 2. The *Faulknor* Court opined that there was no evidence that defendant abused its legitimate powers through affirmative action directly aimed at plaintiffs'

IV. ISSUES NOT PROPERLY BEFORE THIS COURT

Defendant's final contention is that there is no evidence to establish a taking, i.e., that defendant abused its legitimate powers in actions directly aimed at plaintiffs' properties that substantially caused a decline in value of the property. However, whether there is sufficient evidence of a taking to withstand summary disposition is beyond the scope of this Court's review; "in an appeal by right from an order denying a defendant's claim of governmental immunity, . . . this Court does not have the authority to consider issues beyond the portion of the trial court's order denying the defendant's claim of governmental immunity." *Pierce v City of Lansing*, 265 Mich App 174, 182; 694 NW2d 65 (2005); see also MCR 7.203(A) ("An appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right."). Therefore, we do not consider this issue.

Finally, plaintiffs argue that they are entitled to partial summary disposition on their taking-by-damage claim because defendant did not meet its burden of production under MCR 2.116(G)(4) as it "failed to submit documents to show the City wells did not cause the damage." This issue is also not appropriately before this Court. Our Supreme Court has made clear:

> In the absence of a cross appeal, errors claimed to be prejudicial to appellee cannot be considered nor may appellee have an enlargement of relief. However, an appellee, who has taken no cross appeal, may, nevertheless, urge in support of the judgment in his favor reasons rejected by the trial court. A correct result reached by the trial court will be affirmed on error, even though arrived at by that court on reasoning which we deem erroneous. [*Pontiac Twp v Featherstone*, 319 Mich 382, 390-91; 29 NW2d 898 (1947) (internal citations omitted); see also *McCardel v Smolen*, 404 Mich 89, 94-95 & n 6; 273 NW2d 3 (1978).]

Here, plaintiffs are not merely seeking either to have the trial court's decision affirmed or alternative grounds for affirmation; rather, they seek to obtain a decision more favorable to them than what the trial court rendered without doing so in a cross-appeal. This is improper. See *Featherstone*, 319 Mich at 390-391; *Vanslembrouck v Halperin*, 277 Mich App 558, 566; 747 NW2d 311 (2008) ("Accordingly, defendants, who raised this issue below and are seeking only to have the trial court's decision affirmed (rather than to obtain a decision more favorable than

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property, emphasizing the township's efforts to obtain an easement and install the sewer line underneath the roadway instead of the plaintiff's property and the record evidence demonstrating that the damage to the tavern had "very likely" existed "for many years" before the sewer-line installation. *Id.* at 2-4. The same cannot be said in the present case. Plaintiffs allege and the documentary evidence indicates that defendant had notice of the negative impact of operating the wells before the wells were constructed but, nevertheless, went forward with the well construction at Sharp Park. There is evidence documenting the damage to plaintiffs' properties, the properties' close proximity to the wells, and the damages' temporal proximity to defendant's initiation of well pumping at Sharp Park. There is also documentary evidence that the Millbens, plaintiffs, Maranowski, Schelling, and Hayes were of the opinion that the wells were damaging plaintiffs' properties and that defendant was aware of these opinions but, nonetheless, continued to operate the wells.

was rendered by the lower court), were not required to file a cross-appeal in order to have this issue properly before the Court."). The trial court did not address or decide plaintiffs' motion for summary disposition; nor will this Court.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens