STATE OF MICHIGAN

COURT OF APPEALS

BRIAN FAULKNOR and DORIS KITTLE,

Plaintiffs-Appellees,

v

DALTON TOWNSHIP,

Defendant-Appellant,

and

JACKSON-MERKEY CONTRACTORS, INC., and R/T BORING, INC.,

Defendants.

UNPUBLISHED
May 21, 2009

No. 284340
Muskegon Circuit Court
LC No. 07-045225-CH

Before: Saad, C.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant Dalton Township (defendant) appeals the circuit court's order[1] granting in part and denying in part its motion for summary disposition. Specifically, defendant argues that the circuit court erred by ruling that plaintiffs had properly pleaded and factually supported their

[1] Defendant filed both a claim of appeal and an application for leave to appeal in this case. This Court dismissed the application for leave in light of the claim of appeal. *Faulknor v Dalton Twp*, unpublished order of the Court of Appeals, issued May 19, 2008 (Docket No. 284316). We are not persuaded that the circuit court's partial denial of summary disposition was necessarily a final order appealable by right because it appears to have been based on a finding that plaintiffs had properly pleaded and factually supported their "taking" claim rather than on a denial of governmental immunity. See MCR 7.202(6)(a)(*v*). However, even if the order was not appealable by right, we would nonetheless treat defendant's claim of appeal as a granted application for leave to appeal under the particular facts of this case. *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582, 585; 584 NW2d 372 (1998); *Jackson Printing Co, Inc v Mitan*, 169 Mich App 334, 336 n 1; 425 NW2d 791 (1988).

"taking" claim and by allowing that claim to go forward. We agree, and therefore reverse and remand for entry of judgment in favor of defendant.

Plaintiffs owned a tavern at the southwest corner of Whitehall Road and Tyler Road in defendant Dalton Township. Defendant planned to install a sewer line along the south and west sides of plaintiffs' property, and offered plaintiffs $3,200 for a permanent utility easement and a temporary construction easement. Plaintiffs rejected the offer as too low and refused to convey the requested easements to defendant. Defendant consequently altered its plans and decided to install the sewer line in a different location, underneath Tyler Road.

Contractor Jackson-Merkey Contractors, Inc., and subcontractor R/T Boring, Inc., began work to install the proposed sewer line. In November 2006, the contractor and subcontractor were engaged in boring beneath Tyler Road when, according to the amended complaint, the area was shaken by "extremely heavy vibrations." Plaintiffs alleged that "the vibrations were causing substantial damage to the structure of the Tavern building." Plaintiffs therefore "requested that representatives of the Subcontractor, Contractor, and Township cease the work to prevent damage to the foundation, walls, and ceiling of the Tavern building."

The boring work was temporarily suspended, but later resumed. Plaintiffs alleged that the resumed boring operations "resulted in severe and irreparable damage to the tavern building." Plaintiffs specifically asserted that, as a result of the resumed boring operations, "[t]he north wall shifted off the foundation of the Tavern building, bowing the wall and rendering the structure unsafe" and that "[t]he center beam for the Tavern building shifted in a dangerous manner."[2]

Plaintiffs sued defendants Dalton Township, Jackson-Merkey Contractors, Inc., and R/T Boring, Inc., setting forth claims entitled "negligence" and "illegal taking." With respect to the

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[2] Paragraph 15 of the amended complaint alleged that "[a]fter the Tavern building was damaged, the tavern building was inspected by [defendant's] building inspector, who issued an order that the Tavern building cannot be occupied, which terminated the operation of the tavern business." But the report of the building inspector, which is contained in the lower court record, belies this allegation. The report states that the brick wall "was leaning at a severe outward angle and there was an extremely rotted wood beam resting partially on the brick. This situation confirms why the interior wall paneling is bending. The rotting wood is not capable of carrying the wall load so the wall studs and paneling are put in compression which causes the wall to deflect." The inspector concluded that "[t]his situation is historical and very likely has been in a state of failure for many years," and recommended to plaintiffs "that a stud wall be built to support the roof until the wall and foundation [can] be replaced." However, there is no evidence that the inspector ever informed plaintiffs that they were required to vacate the tavern building. Moreover, defendant requested during discovery that plaintiffs admit that "[c]ontrary to the assertions set forth in paragraph 15 of the Complaint, the building inspector did not issue an order 'that the tavern building cannot be occupied, which terminated the operation of the tavern business.'" As the circuit court properly noted, plaintiffs refused to respond to this request for admission, and the matter was therefore deemed admitted by plaintiffs. MCR 2.312(B)(1). As an aside, we note that the stud wall recommended by the building inspector was indeed constructed, and the tavern briefly reopened for business. Nonetheless, plaintiffs razed the tavern shortly thereafter.

negligence claim, the circuit court granted summary disposition in favor of defendant on the ground of governmental immunity. However, the circuit court denied summary disposition for defendant with respect to plaintiffs' "taking" claim. The court ruled that plaintiffs had properly pleaded their "taking" claim and that there was a genuine issue of material fact concerning whether defendant's actions had constituted a taking of plaintiffs' property. The circuit court ultimately stayed further proceedings against all three defendants pending resolution of this appeal.[3]

Defendant's sole argument on appeal is that the circuit court erred by failing to grant summary disposition in its favor with respect to plaintiffs' "taking" claim. We agree. We review de novo the circuit court's grant or denial of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Whether governmental immunity applies in a particular context is a question of law that we review de novo. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

As an initial matter, we note that an inverse condemnation claim, also known as a "taking" claim, arises directly under the Constitution. Const 1963, art 10, § 2. "[A]n action that establishes an unconstitutional taking may not be limited except as provided by the Constitution because of the preeminence of the Constitution." *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 546; 688 NW2d 550 (2004). Therefore, defendant was not entitled to governmental immunity with respect to plaintiffs' allegations of inverse condemnation. *Id*. at 546-547; see also *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 91 n 38; 445 NW2d 61 (1989).

However, we conclude that defendant was nonetheless entitled to a grant of summary disposition in its favor with respect to the "taking" claim. "Where private property has been damaged rather than taken by governmental actions, the owner may be able to recover therefor by way of an inverse or reverse condemnation action." *In re Acquisition of Virginia Park*, 121 Mich App 153, 158; 328 NW2d 602 (1982). "An inverse condemnation suit is one instituted by an owner of land whose property, while not having been formally taken for public use, has been damaged by a public improvement undertaking or other public activity." *Id*. Governmental actions can constitute a "taking" of private property even when the government has not physically appropriated or directly exercised control over the property. *Id*. at 159. Governmental action falling short of actual physical occupancy, acquisition, or appropriation still constitutes a taking "'"if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter . . . ."'" *Id*. at 160 (citations omitted).

To establish an inverse condemnation claim in such a case, a plaintiff must prove (1) that the government's actions were a substantial cause of the decline of the plaintiff's property, and (2) that the government abused its legitimate powers through affirmative actions directly aimed at the plaintiff's property. *Hinojosa*, 263 Mich App at 549; *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 130; 680 NW2d 485 (2004). "In an inverse condemnation action, it is not

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[3] Defendants Jackson-Merkey Contractors, Inc., and R/T Boring, Inc., are not parties to this appeal.

enough for the owner to prove injury to his property by the defendant with resultant damages. Rather, [the] plaintiff must prove that the condemnor's actions were of such a degree that a taking occurred." *Hart v Detroit*, 416 Mich 488, 501; 331 NW2d 438 (1982).

In this case, the evidence failed to establish that defendant abused its legitimate powers through affirmative actions that were directed at plaintiffs' property. A township is statutorily authorized to construct sewers. MCL 41.411(1)(a). After plaintiffs rejected defendant's offer of $3,200 for a permanent utility easement and a temporary construction easement, defendant completely changed the design and location of its proposed sewer line in an attempt to accommodate plaintiffs. Defendant relocated the proposed sewer line so that no easements would be required, ultimately deciding to build the sewer underneath a public roadway. There was simply no evidence that defendant in the instant case abused its legitimate powers through affirmative actions directly aimed at plaintiffs' property. *Hinojosa*, 263 Mich App at 549; *Merkur Steel Supply*, 261 Mich App at 130.

Moreover, an examination of the amended complaint reveals that plaintiffs' "taking" claim was in actuality a mislabeled common-law tort claim. It is well settled that we are not bound by a party's choice of labels for a cause of action because this would exalt form over substance. *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). To the extent that plaintiffs' "taking" claim was based on alleged damage to the walls, ceiling, and foundation of their tavern caused by defendant's boring operations beneath Tyler Road, we conclude that the claim sounded in tort rather than in inverse condemnation. See, e.g., *Deisher v Kansas Dep't of Transportation*, 264 Kan 762, 774-775; 958 P2d 656 (1998); *State v Donahoo*, 412 So 2d 400, 403 (Fla App, 1982); *McNeil v City of Montague*, 124 Cal App 2d 326, 328; 268 P2d 497 (1954). We agree with the United States Court of Federal Claims that "'[a]n accidental or negligent impairment of the value of property is not a taking, but, at most, a tort,'" and that "[a] claim for damages resulting from the government's faulty, negligent or improper implementation of an authorized project sounds in tort" rather than in inverse condemnation. *Thune v United States*, 41 Fed Cl 49, 52 (1998) (citation omitted). And to the extent that plaintiffs' claim was based on the actions of the township building inspector or the representations in his report, the claim still sounded in tort rather that in inverse condemnation. *Kethman v Oceola Twp*, 88 Mich App 94, 105-106; 276 NW2d 529 (1979); *Armstrong v Ross Twp*, 82 Mich App 77, 83; 266 NW2d 674 (1978). Because plaintiffs failed to plead in avoidance of governmental immunity, their "taking" claim—which actually sounded in tort—should have been dismissed along with their negligence claim. See *id*. We reverse the circuit court's denial of summary disposition with respect to plaintiff's "taking" claim and remand for entry of judgment in favor of defendant.[4]

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[4] Plaintiffs rely on certain unpublished decisions of this Court, several of which involved flooding or a release of water caused by governmental action. Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1). In any event, the issues presented in the flooding cases cited by plaintiffs are very different than the issues presented in the case at bar. Flooding cases involve, by definition, a physical intrusion of water onto the landowner's property. Accordingly, even temporary flooding or releases of water can constitute a taking. Indeed, "'it has been held consistently that an overflow of water resulting from

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Reversed and remanded for entry of judgment in favor of defendant Dalton Township. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

(…continued)

government construction projects which materially impairs the use and enjoyment of lands constitutes a constitutional taking of such lands despite the absence of appropriation of title or occupancy.'" *In re Acquisition of Virginia Park*, 121 Mich App at 160 (citation omitted); see also *Peterman v Dep't of Natural Resources*, 446 Mich 177, 204 n 40; 521 NW2d 499 (1994). In contrast, there was no physical intrusion onto plaintiffs' property in the present case. Therefore, the flooding cases cited by plaintiffs are inapplicable here.