

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001339-MR

CAROLYN MOORE,
Executrix of THE ESTATE
OF DOROTHY BROWN, Deceased

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 16-CI-003019

LOUISVILLE/JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: KRAMER, CHIEF JUDGE; DIXON AND NICKELL, JUDGES.

KRAMER, CHIEF JUDGE: Carolyn Moore, Executrix of the Estate of Dorothy Brown (the “Estate”), appeals an order of the Jefferson Circuit Court dismissing a wrongful death claim the Estate asserted against the appellee, Louisville/Jefferson

County Metropolitan Sewer District (“MSD”) for failure to state a claim. Upon review, we reverse and remand.

One of MSD’s initiatives has been to extend its sanitary sewer lines to more properties in Louisville and Jefferson County to enable properties to disconnect from privately owned septic tanks, which can pose significant health hazards. In 1999, MSD hired an independent contractor, Team Contracting, LLC (“Team”), to extend its sanitary sewer lines to Dorothy Brown’s home and other homes in the vicinity. As part of the work on this project, Team extended one of MSD’s sanitary sewer lines through Brown’s backyard.

MSD acknowledges that once homeowners connect to a sewer and discontinue the use of a concrete septic tank (such as the one that was in Brown’s backyard), the solids in the septic tank deteriorate at a fast rate. If the septic tank is not drained and backfilled with sand, the septic tank can collapse and create an open cavity. According to the Estate’s complaint, however, Team failed to drain and backfill Brown’s septic tank after connecting MSD’s sewers to her home.¹ And, because it was not backfilled, Brown’s septic tank eventually collapsed on or about March 17, 2015, creating an approximately twenty-foot-deep sinkhole. Unfortunately, while working in her backyard on or about that day, Brown fell into the sinkhole and died from her resulting injuries.

¹ Whether MSD or Team had a duty to backfill Brown’s private septic tank, as part of its overall duty to use ordinary care in constructing its sewers, is not an issue presented in this appeal.

Brown's Estate filed a wrongful death action against MSD and Team in Jefferson Circuit Court based upon what has been discussed. However, MSD immediately moved to dismiss for failure to state a claim.

As an aside, MSD is a distinct municipal corporation that is not entitled to sovereign tort immunity. *See Calvert Invs., Inc. v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 805 S.W.2d 133, 138 (Ky. 1991). Nor is MSD entitled to governmental immunity for torts resulting from its construction, repair, or maintenance of sewage disposal and storm water management systems. *Id.*; *see also Coppage Constr. Co., Inc. v. Sanitation Dist. No. 1*, 459 S.W.3d 855, 864 (Ky. 2015) (explaining these activities are ministerial, proprietary in nature, and subject MSD and related entities to tort liability).

Nevertheless, in moving to dismiss the Estate's tort claims against it, MSD argued it was "immune" for a different reason—namely, because *it* did not construct the sanitary sewer lines underneath Brown's backyard. Rather, as MSD pointed out, it had hired an independent contractor to perform that work. MSD thus characterized the Estate's claims against it as alleging it was negligent by either *hiring* an independent contractor to construct the sewer lines, or by failing to *inspect* the independent contractor's construction of the sewer lines. But, MSD argued, the employer of an independent contractor is generally not liable for the torts of an independent contractor. Moreover, MSD argued, "hiring" and "inspecting" are discretionary acts that fall within the purview of the municipal tort immunity provided by the Claims Against Local Governments Act, KRS 65.200 *et*

seq. (“CALGA”).² Aside from that, MSD also argued that even if the Estate could have sued it for negligence under the circumstances, its claim was barred by the applicable statute of limitations.

Upon consideration, the circuit court agreed with each of MSD’s arguments and granted MSD’s motion. This appeal followed.

The subject of our analysis is the trial court’s decision to dismiss the Estate’s action pursuant to Civil Rule (CR) 12.02(f), *i.e.*, failure to state a claim. In that respect,

[i]t is well established that a court should not dismiss an action for failure to state a claim unless the pleading party appears not to be entitled to relief under any set of facts which could be proven in support of his claim. In

² KRS 65.2003 provides:

Notwithstanding KRS 65.2001, a local government shall not be liable for injuries or losses resulting from:

- (1) Any claim by an employee of the local government which is covered by the Kentucky workers’ compensation law;
- (2) Any claim in connection with the assessment or collection of taxes;
- (3) Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include by example, but not be limited to:
 - (a) The adoption or failure to adopt any ordinance, resolution, order, regulation, or rule;
 - (b) The failure to enforce any law;
 - (c) The issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization;
 - (d) The exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources; or
 - (e) Failure to make an inspection.

Nothing contained in this subsection shall be construed to exempt a local government from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.

ruling on a motion to dismiss, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. Therefore, the question is purely a matter of law. Accordingly, the trial court's decision will be reviewed *de novo*.

Morgan v. Bird, 289 S.W.3d 222, 226 (Ky. App. 2009) (internal citations and quotations omitted).

On appeal, the Estate begins by arguing the circuit court erred by dismissing its claims against MSD on the bases of either MSD's use of an independent contractor or CALGA. We agree. Generally, an employer of an independent contractor is not liable for its independent contractor's tortious conduct. *Miles Farm Supply v. Ellis*, 878 S.W.2d 803, 804 (1994). Like any other general rule, however, there are exceptions. *Id.* This, in turn, leads to why neither MSD's use of an independent contractor, nor CALGA, excused MSD from liability for the Estate's claims.

Despite MSD's characterization of the Estate's claims against it as the negligent *hiring* of an independent contractor to construct the sanitary sewer lines underneath Brown's backyard, or the negligent *inspection* the independent contractor's construction of the sanitary sewer lines underneath Brown's backyard, the overarching premise of the Estate's claims against MSD was simply the negligent *construction* of the sanitary sewer lines underneath Brown's backyard.

The statutory duty to *construct* the sanitary sewer lines, and to do so in a non-negligent manner to prevent wrongful injury to property owners and to

protect their rights, rested with MSD. *See* KRS 76.100;³ *see also* *City of Frankfort v. Byrns*, 817 S.W.2d 462, 464 (1991). And, “one who delegates the performance of a statutory duty to an independent contractor is not relieved of liability for injuries arising from the contractor’s failure to comply with the duty.” *Saint Joseph Healthcare, Inc. v. Thomas*, 487 S.W.3d 864, 877 (Ky. 2016).

In other words, while MSD can (and indeed must) delegate to others the *performance* of its statutory duty to construct sanitary sewer lines in a non-negligent manner, it is not vested with discretion to delegate to others its responsibility under the law of torts; it remains directly (whether or not vicariously) liable for injury-causing breaches of that duty notwithstanding that the breach resulted from its agent’s or contractor’s negligence. *See Grubb v. Smith*, 523 S.W.3d 409, 422 (Ky. 2017); *see also* KRS 65.2003(3) (predicating the non-

³ KRS 76.100 specifies MSD’s duty, as well as MSD’s right to delegate its performance: It shall be the duty of the district as promptly as possible, to rehabilitate, construct, improve, and extend, any sewer and drainage system taken over and controlled by it, which shall include, but is not limited to, disconnection of storm water drains and constructing outlets therefor, where such work is necessary to relieve existing sanitary sewers of storm water loads, in order to permit the efficient operation of such sanitary sewers. The district may make rules and regulations for the submission of bids and the construction of such additions, betterments, and extensions, or any part thereof. No contract shall be entered into for construction work or for the purchase of materials, unless the contractor shall give an undertaking with corporate surety in an amount approved by the board for the faithful performance of the contract. As to contracts entered into for construction, such undertaking shall provide, among other things, that the person or corporation entering into such contract with the district will pay for all materials furnished and services rendered in the performance of the contract, and that any person or corporation furnishing such materials or rendering such services, may maintain an action thereon to recover for the same against the obligor in the undertaking and the surety, as though such person or corporation was named therein.

liability of a covered entity for injuries and losses upon the “exercise of judgment or discretion *vested*” in the entity.) (Emphasis added.)

The Estate also argues the circuit court erred in dismissing its claims against MSD as untimely. We likewise agree.

MSD argued, and the circuit court found, that the statute of limitations applicable to the Estate’s claims was either KRS 413.120(6) or (13). Even if the former of these two subsections applied, however, it could not have barred the Estate’s suit. KRS 413.120(6) provides a five-year limitations period for an “action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated.” Here, the Estate filed its action against MSD on June 28, 2016, a date well within five years of when the injury at issue in its claims accrued; as noted, Brown’s death occurred on or about March 17, 2015. *See Saylor v. Hall*, 497 S.W.2d 218, 225 (Ky. 1973) (explaining “[a] cause of action does not exist until the conduct causes injury that produces loss or damage.”)⁴

As to KRS 413.120(13), that subsection provides a five-year limitations period for:

An action for personal injuries suffered by any person against the builder of a home or other improvements. This cause of action shall be deemed to accrue at the time of original occupancy of the improvements which the builder caused to be erected.

Even if MSD could properly classify itself as a “builder” in the context of this subsection, and its construction of a sewer across Brown’s property

⁴ When *Saylor* was rendered, KRS 413.120(6) and (13) were respectively enumerated KRS 413.120(7) and (14).

as an “improvement,” its reliance upon this statute to support that the Estate’s claims expired five years after MSD constructed the sewer (and *before* any injury accrued to Brown or her Estate) is misplaced. KRS 413.120(13) has been declared unconstitutional when applied in such a manner. *See Saylor*, 497 S.W.2d at 225.

In any event, the statute of limitations that applied to the Estate’s wrongful death claims against MSD was KRS 413.140(1), which, taken in conjunction with KRS 413.180(2), allowed the Estate one year after Moore was appointed its executrix to file suit. *See, e.g., Conner v. George W. Whitesides Co.*, 834 S.W.2d 652, 654-55 (Ky. 1992) (applying these statutes to the accrual date of a wrongful death claim). Moore was appointed August 4, 2015; the Estate filed suit less than a year later, on June 28, 2016; therefore, the Estate’s suit was timely.

In short, the Jefferson Circuit Court erred in dismissing the Estate’s claims against MSD on the bases discussed. Accordingly, we REVERSE and REMAND for further proceedings not inconsistent with this opinion.

ALL CONCUR

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