RENDERED: MAY 24, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001339-MR

CAROLYN MOORE,
Executrix of THE ESTATE
OF DOROTHY BROWN, deceased — APPELLANT

ON REMAND FROM THE KENTUCKY SUPREME COURT
(FILE NO. 2018-SC-000164-DG)

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

LOUISVILLE/JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING PART, AND REMANDING

** ** ** ** **

BEFORE: DIXON, KRAMER AND NICKELL, JUDGES.

KRAMER, JUDGE: Carolyn Moore, Executrix of the Estate of Dorothy Brown (the "Estate"), appeals an order of the Jefferson Circuit Court dismissing, pursuant to Kentucky Rule of Civil Procedure (CR) 12.02(f), 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 affirm in part, reverse in part and remand for further proceedings not inconsistent with this opinion.

We have previously reviewed this matter, and it is before us again by order from the Kentucky Supreme Court. A dispositive issue presented is the *basis* of the wrongful death claim that the Estate asserted against MSD. We begin with the allegations of the Estate's complaint, which were in relevant part as follows:

> II.
>
> At all times material hereto, the Defendant, Team Contracting, L.L.C., was a foreign limited liability company active and in good standing doing business in the Commonwealth of Kentucky for contract with the Defendant, MSD.
>
> III.
>
> At all times material hereto, the Defendant, MSD, was the designated metropolitan sewer district for Louisville and Jefferson County and is located at 700 West Liberty Street, Louisville, Kentucky 40203.
>
> IV.
>
> At all times material hereto, the Unknown Defendant(s) were contractors hired by MSD to perform work at 7012 Sun Valley Drive, Louisville, Kentucky known as the Moorewick Way Collector Project.

V.

On or about March 17, 2015, the Plaintiff was injured and ultimately died as a result of the negligence of the Defendant, Team Contracting, L.L.C., by and through its agents and/or employees in the performance of work duties it had contracted with the Defendant, MSD, to perform at 7012 Sun Valley Drive, Louisville, Kentucky, known as the Moorewick Way Collector Project. Specifically, upon information and belief, the Defendant, by and through agents and/or employees negligently performed work on the sewers located on Decedent's property.

VI.

On or about March 17, 2015, the Plaintiff was injured and ultimately died as a result of the negligence of the Unknown Defendant(s), by and through its agents and/or employees in the performance of work duties it had contracted with the Defendant, MSD, to perform at 7012 Sun Valley Drive, Louisville, Kentucky, known as the Moorewick Way Collector Project. Specifically, upon information and belief, the Defendant, by and through agents and/or employees negligently performed work on the sewers located on Decedent's property.

VII.

The Defendant, MSD, negligently hired and/or supervised the Defendants, Team Contracting L.L.C. and the Unknown Defendants(s), performing work at 7012 Sun Valley Drive, Louisville, Kentucky 40272 known as the Moorewick Way Collector Project. Moreover, as part of the contract for this project, the Defendant, MSD became a contractual insured for any damages and therefore, are contractually indebted to the Plaintiff.

VIII.

> As a direct and proximate result of the negligence of the Defendants, by and through their agents and/or employees, the Plaintiff has sustained funeral and burial expense for her mother, Dorothy Brown and the Estate of Dorothy Brown has suffered the destruction of earning capacity. In addition, the Decedent, Dorothy Brown, suffered great pain and suffering, both physical and mental, until her death all of which are attributable to the negligence of the Defendants.

Accordingly, the Estate sued three categories of defendants: (1) MSD; (2) Team Contracting, LLC; and (3) "Unknown Defendants." The reason the Estate filed suit against these defendants involved the performance of "work on the sewers located on Decedent's property" as part of "the Moorewick Way Collector Project." And, to the extent that more needed to be said about the nature of that project, MSD itself acknowledged that it involved the *construction* of MSD's sewer lines. In the motion to dismiss that it filed shortly after the Estate filed its complaint, MSD explained:

> One of MSD's initiatives has been to extend its sanitary sewer lines to more properties in Louisville and Jefferson County and effectively take properties off of privately owned septic tanks, which can pose significant health hazards. Upon the request of a number of property owners in the area, MSD planned for the extension of the sanitary sewers in the Moorewick Way Collector Project (the "Project"). On June 24, 1996, MSD informed home owners who would benefit from the Project of the Project [sic]. The materials informed the homeowners, including Dorothy Brown, that "each property owner will have an opportunity to vote for or against the proposed sewers,"

> and that if *constructed* that "the Louisville and Jefferson County Department of Health requires all homeowners to connect to sanitary sewers as they become available." Homeowners were specifically informed that once connected to the public sewer system that they could not continue to use the private septic tank after the Project, and were advised "[the] solids [in the septic tank] will continue to deteriorate faster if left alone. . . It is recommended that you have the septic tank drained and backfilled with sand. This will prevent the possibility of an open cavity forming in your yard due to the future deterioration of the concrete septic tank."
>
> Once MSD decided to go through with the Project, it followed its procurement policies and solicited bids. Team Contracting, LLC ("Team") submitted its bid on September 21, 1998, and after bids were evaluated, Team was evaluated to be the lowest responsive, responsible bid. Accordingly, Team was awarded the contract, which was executed on January 15, 1999, and *construction* began shortly thereafter.

(Internal footnotes and citations to evidence omitted; emphasis added.)

Further underscoring the nature of the Moorewick Way Collector Project, MSD likewise attached to its motion: (1) "THE CONTRACT FOR CONSTRUCTION," the thirty-six-page contract MSD executed with Team Contracting in January 1999, which illustrates at length that the purpose of the project was the construction of sanitary sewers for MSD; and (2) a question-and-answer sheet MSD purported to have circulated in 1996 to residents who would be affected by the Moorewick Way Collector Project, which began with the following question and answer:

> 1. Q. **HOW MUCH WILL IT COST TO CONSTRUCT SEWERS IN THE MOOREWICK WAY AREA?**
>
> A. Based on engineering design studies, the total cost to construct sanitary sewers in the Moorwick Way area would be $2,344,000.

As to why the Estate sued MSD, MSD also acknowledged in its motion to dismiss that it related to Team Contracting's "completion of the improvements" that were part of the Moorewick Way Collector Project.[1] As summarized by the circuit court in its August 25, 2016 order:

> *Construction* was completed by 2000. On March 17, 2015, Brown was working in her yard when she fell into an 18 to 20 foot hole overlying a defunct septic tank that was not backfilled during the project.[2] As a result of the fall, Brown sustained multiple blunt force injuries and hypothermia due to prolonged exposure to low temperatures, ultimately resulting in her death. [The Estate] brought suit against MSD on Brown's behalf, alleging that MSD negligently hired and/or supervised Team in the work performed on Brown's property.

(Emphasis added).

[1] Motion to Dismiss, p. 8.

[2] On appeal, MSD emphasizes that here, the circuit court was summarizing statements made over the course of motion practice between MSD and the Estate and was not summarizing the precise allegations of the Estate's complaint or evidence of record. To that end, it points out that "the record only contains that decedent was found in a hole overlying a defunct septic tank, but it does not contain the cause of why or how the septic tank collapsed. . . . Further, it has not been established whether the septic tank was backfilled, or whether Team extended a sewer line in Brown's backyard."

As indicated, the Estate sued the three categories of defendants on theories of negligence. Regarding the overarching duty that was breached, the lynchpin of the Estate's theory was that, contrary to what MSD insinuated, it was *not* Brown's obligation to backfill her own septic tank. Rather, the Estate alleged that it was an obligation associated with the *construction* of MSD's sewer lines.[3] In that vein, the Estate represented in its response to MSD's motion to dismiss that it was suing Team Contracting and the Unknown Defendants for failing to backfill its decedent's septic tank as part of their alleged construction duties.

Similarly, the Estate sued MSD based on the premise that MSD had contributed to Brown's injuries and death by breaching two additional duties deriving from the Moorewick Way Collector Project that involved the proper *construction* of sewer lines: (1) an independent duty to *hire* contractors competent enough to construct the sewer lines in a non-negligent manner; and (2) an independent duty to *supervise* and thus ensure that the construction of the sewer lines was performed in a non-negligent manner. *See* Complaint at ¶ VII. Moreover, while acknowledging that Team Contracting and the Unknown Defendants were MSD's "contractors," the Estate nevertheless maintained that *every* defendant – including MSD – was directly liable for its decedent's injuries

[3] As MSD concedes in the second footnote of its appellate brief, whether MSD or Team had a duty to backfill Brown's septic tank is not an issue presented in this appeal.

and resulting death. *See* Complaint at ¶ VIII. In its response to MSD's motion to dismiss, the Estate further asserted: "The failure of MSD to adequately supervise the project and determine that the old septic systems had not been backfilled is sufficient to establish liability against it for purposes of this Motion to Dismiss such that the Motion must be denied."

As discussed, MSD never filed an answer, and instead moved to dismiss based on CR 12.02(f). 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 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).

This in turn leads to what this Court, in its prior review of this matter, concluded regarding the basis of the Estate's claims against MSD. We determined the Estate had effectively asserted a "negligent construction" claim *directly* against MSD, despite the Estate's acknowledgement that MSD had utilized contractors to perform that work.

As to why, this Court is bound to take notice of and follow binding Kentucky precedent.[4] And, in our view, it is through that lens that we liberally construed the Estate's pleadings to determine whether it had stated a claim upon which relief could be granted.

As the Kentucky Supreme Court has explained, metropolitan sewer and sanitation districts such as MSD are municipal entities that may be sued directly in tort for injuries caused to third parties by the negligent construction, maintenance, or repair of their sewer lines. *See Coppage Constr. Co., Inc. v. Sanitation Dist. No. 1*, 459 S.W.3d 855 (Ky. 2015); *see also Mason v. City of Mt. Sterling*, 122 S.W.3d 500, 504 (Ky. 2003) ("once a municipality establishes or opens a sewer, *it* has a ministerial duty to non-negligently *construct*, maintain, and repair the sewer system." (Emphasis added.)); *City of Frankfort v. Byrns*, 817 S.W.2d 462, 464 (Ky. 1991).

The Kentucky Supreme Court has also explained that an entity or individual cannot contract away tort liability that the law imposes upon it with respect to third parties. *See, e.g., Saint Joseph Healthcare, Inc. v. Thomas*, 487 S.W.3d 864, 877 (Ky. 2016) ("one who delegates the performance of a statutory duty to an independent contractor is not relieved of liability for injuries arising

[4] *See Fields v. Lexington-Fayette Urban County Gov't*, 91 S.W.3d 110, 112 (Ky. App. 2001); *Buckler v. Mathis*, 353 S.W.3d 625, 631 (Ky. App. 2011).

from the contractor's failure to comply with the duty."); *Grubb v. Smith*, 523 S.W.3d 409, 422 (Ky. 2017), explaining (in the context of a corporate premises possessor's common law duty to maintain the premises in a reasonably safe condition) that while the corporate possessor:

> [C]an (indeed, as a corporation, it must) delegate to agents or others the performance of that duty, it cannot delegate to others its responsibility under the law of torts. Simply put, it remains directly, whether or not vicariously, liable for injury-causing breaches of that duty notwithstanding that the breach resulted from an agent's negligence.

See also Brown Hotel Co. v. Sizemore, 303 Ky. 431, 197 S.W.2d 911, 913-14 (Ky. 1946), explaining:

> Although it has always been considered settled law that an employer of another as an independent contractor is not liable for his collateral negligence, it is also quite well settled that *where one causes something to be done, the doing of which casts on him a duty, he cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to the contractor, and cannot relieve himself from liability to any person injured by a failure to perform it*.
>
> . . .
>
> [I]n holding [a] property owner liable for injuries sustained by a pedestrian in falling into an excavation at the edge of a sidewalk, made by a contractor and left unguarded, after recognizing the right of the property holder to build to the edge of the street or to encroach upon it, the court said: "But this legal right must be exercised in a prudent, legal manner; and in populous cities the public interest and individual safety impose

> responsibilities from which such proprietor cannot escape; neither can they, by private contract, shift this responsibility upon undertakers or others. Hence the distinction, that, when an act must necessarily result in a nuisance, unless it be prevented by the proper precautionary measures, the proprietor is bound to the exercise of such measures, else he must answer in damages for injuries resulting to others from the neglect thereof. No matter what may have been his contract with the undertakers, in such case his responsibility does not depend on the relation of master and servant nor principal and agent, but results from others doing, at his instance, that which must needs result in a nuisance, unless prevented by the appropriate precautions."
>
> . . .
>
> The principle is also recognized and applied as between a city having the duty of maintaining its streets in a reasonably safe condition and a contractor who created the condition which caused the injury to a third person.
>
> . . .
>
> And it is familiar law that a city may be liable for injury resulting from an unsafe condition in its streets and sidewalks caused by the act of persons other than the agents of the municipality.

(Internal citations omitted; emphasis added).

Here, the Estate's complaint alleged that because MSD had *caused* something to be done, it had assumed *duties* – the breaches of which were actionable in tort. By and through its Moorewick Way Collector Project, MSD had *caused* the construction of sewer lines, which had therefore cast upon MSD *duties* to *hire* properly qualified individuals to perform the construction, and to *supervise*

the performance of the construction, to avoid injuring third parties because of the *construction*.

As discussed, under binding Kentucky Supreme Court precedent, MSD has a direct, ministerial duty to non-negligently *construct* its sewers. *See Coppage Constr. Co., Inc.*, 459 S.W.3d 855; *Mason*, 122 S.W.3d at 504; *Byrns*, 817 S.W.2d at 464.

And, the basis of the Estate's claim was akin to the situation described in *Sizemore* that gave rise to direct liability for the employer of a contractor: As MSD described in its motion to dismiss, and as the Estate described in its response thereto, the Estate was seeking to hold a property owner (*i.e.*, MSD, the owner of the sewer lines) liable for injuries sustained by a third party who fell into a hole – a hole allegedly attributable to the construction of MSD's sewer lines, and which allegedly could have been prevented from forming if proper precautionary measures (*i.e.*, backfilling the septic tank) had been utilized.

As discussed, an entity cannot contract away tort liability that the law imposes upon it with respect to third parties.

Thus, taking the allegations in the light most favorable to the Estate, and considering what is set forth above, this Court concluded that the overarching premise of the Estate's claims against MSD was *the negligent construction* of MSD's sanitary sewer lines. And, it did not matter whether the construction was

accomplished by MSD or by a contractor; either way, MSD was "directly, whether or not vicariously, liable." *Grubb*, 523 S.W.3d at 422.

We have explained why, in our prior review, this Court concluded that the Estate had effectively asserted a "negligent construction" claim against MSD. Next, we will explain why we determined, in our prior review, that the Estate's assertion or nonassertion of a "negligent construction claim" against MSD was *dispositive* of this matter.

MSD asserted five bases in its motion to dismiss in support of its contention that the Estate had failed to state a claim under Kentucky law. The circuit court ultimately agreed and predicated its order of dismissal upon *all five* of MSD's asserted bases. But, if the Estate had asserted a negligent construction claim against MSD, none of those five bases were legally tenable.

First, MSD pointed out that Team Contracting and the Unknown Defendants were its *contractors*. It contended that Kentucky does not recognize "negligence in hiring or supervising *a contractor*" as an actionable tort. And, quoting *Miles Farm Supply v. Ellis*, 878 S.W.2d 803, 804 (Ky. App. 1994), MSD pointed out that "[*a*]*s a general rule,* an employer is not liable for the torts of an independent contractor in the performance of his job." (Emphasis added). The circuit court agreed.

However, we observed in our prior review of this matter that MSD had a *non-delegable duty* to ensure the non-negligent construction of its sewer lines. *See Mason*, 122 S.W.3d at 504. Accordingly, we determined this *general rule* did not apply under the circumstances, and that the circuit court erred in dismissing on this basis.

Second, MSD argued the Estate had failed to allege facts sufficient to support the elements of a "negligent hiring or supervision" claim, *i.e.*, that: (1) the employer knew or reasonably should have known that an employee was unfit for the job for which he was employed; and (2) the employee's placement or retention at that job created an unreasonable risk of harm to the plaintiff. *See Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438, 442 (Ky. App. 1998). The circuit court agreed.

Third, and similarly, MSD contended that the Estate could not hold it *vicariously liable* for any negligence of Team Contracting and the Unknown Defendants deriving from their construction of its sewer lines because, in its view, the Estate had failed to allege facts in its complaint capable of supporting that those contractors were functioning as its agents. The circuit court agreed.

As to both its second and third arguments, however, MSD was, in light of its non-delegable duty, *directly* and not merely *derivatively* liable for the negligent construction of its sewer lines. Irrespective of MSD's care in hiring or

supervising Team Contracting or the Unknown Defendants, and irrespective of the strict application of agency principles,

> where one causes something to be done, the doing of which casts on him a duty, he cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to the contractor, and cannot relieve himself from liability to any person injured by a failure to perform it.

Sizemore, 197 S.W.2d at 913.

Fourth, MSD asserted that even if the employer of a contractor could be held derivatively or vicariously liable for the negligence of the contractor, *it could not*. This, it argued, was due to the operative effect of the Claims Against Local Governments Act, KRS 65.200 *et seq*. ("CALGA").[5] In this vein, MSD argued:

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[5] 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;

> MSD's *decision* to contract for the Project, *decide* the requirements of the Project, *evaluate* responsive bids, *select* the entity to perform the contract in accordance with its procurement policies, *and what, if any oversight, supervision, or inspections MSD would conduct* are entirely discretionary acts. Plaintiff's claim against MSD is merely an attempt to second-guess MSD's evaluation of a contractor and its role in supervising the contractor when the evaluation and contractor work occurred twenty years ago. As such, MSD is exempt from liability for any such claims and Plaintiff's claim fails as a matter of law.

(Emphasis added.)

Stated differently, the centerpiece of MSD's CALGA argument – and all its other above-summarized arguments – was an emphasis on the *discretion* it believed it was afforded under the circumstances and its underlying assertion that the Estate was attempting to sue it for exercising that discretion. MSD began with the well-recognized principle that it had the discretion, for purposes of CALGA immunity, to decide *whether* to extend its sewer lines. *See City of Maysville v. Brooks*, 145 Ky. 526, 140 S.W. 665, 668 (1911) (explaining "the obligation to establish and open sewers is a legislative duty[.]"). It asserted that *choosing who*

> (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.

to contract with, out of a pool of well-qualified contractors, was likewise a discretionary act, and that the *scope of the work to be done* was likewise discretionary.

But then it went further: Activities associated with *ensuring the proper construction of its sewer lines* (*i.e.*, hiring a contractor properly qualified to perform the construction in a non-negligent fashion, or supervising to ensure the work was performed non-negligently) were, it asserted, also discretionary for purposes of CALGA. MSD asserted it had the *discretion*, for purposes of municipal tort immunity, to delegate and assign all liability associated with the construction of its sewer lines to an independent contractor. And, the circuit court agreed.

As an aside, CALGA immunity, like any other form of immunity, is an affirmative defense that must be pled and proven. *See Jerauld ex rel. Robinson v. Kroger*, 353 S.W.3d 636, 640 (Ky. App. 2011). To date, MSD has never filed an answer, and has thus pled nothing – hence our difficulty in seeing the correctness of this basis for dismissal. In our view, however, it is here (if nowhere else) that MSD placed its "discretion" to "delegate its tort liability," and thus the "delegability" of its tort liability for the negligent construction of its sewer lines, squarely at issue before the circuit court: Absent that "discretion," MSD could not have been entitled to CALGA immunity.

And tellingly, MSD cited no legal authority supportive of that assertion. This is because, as discussed, the duty to construct sewer lines in a non-negligent fashion is a non-discretionary, *ministerial* duty. *Mason*, 122 S.W.3d at 504. If MSD had no discretion to refuse to construct sewer lines in a non-negligent fashion, it follows that it likewise had no discretion to delegate to others its responsibility under the law of torts. *See* KRS 65.2003(3) (predicating the non-liability of a covered entity for injuries and losses upon the "exercise of judgment or discretion *vested*" in the entity) (Emphasis added).

As for its fifth argument, MSD appeared to accept that the basis of the Estate's claims against it was, indeed, the negligent construction of its sewer lines. In this vein, MSD contended the Estate's claims against it were untimely due to the applicable statute of limitations, which it argued were KRS 413.120(6)[6] or (13); revealingly, KRS 413.120(13) provides a five-year limitation period regarding:

> 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*.

(Emphasis added).

[6] KRS 413.120(6) provides that an "action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated[,]" must be brought within five years of the date it accrues.

And, the circuit court *agreed* that KRS 413.120(13) applied to the Estate's claims. Thus, at least for purposes of MSD's statute of limitations argument, the circuit court recognized MSD was being sued for its role as the "builder" of "improvements" that MSD had "caused to be erected." *Id*.

That aside, we rejected MSD's limitations arguments in our prior review of this matter, explaining:

> 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.") 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 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.[7] 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.

Based upon what is set forth above, this Court reversed and remanded for further proceedings.

But thereafter, the Kentucky Supreme Court vacated our disposition of this appeal and directed this Court to review it again. In full, the Kentucky Supreme Court's order stated:

> The Louisville and Jefferson County Metropolitan Sewer District moved this Court for discretionary review, arguing that the Court of Appeals wrongly reversed based on issues that were not raised in the circuit court or in the parties' appellate briefs. After examining the

[7] In its response to MSD's motion to dismiss and limitations argument, the Estate clarified that its action was based upon the notion that its decedent's injuries were due to a *latent* defect caused by negligence. *Saylor*, in turn, held that the five-year limitations period set forth in KRS 413.120(14) (now KRS 413.120(13)) does not apply when the subject injury is caused by a latent construction defect. As indicated, KRS 413.120(13) was enumerated KRS 413.120(14) at the time *Saylor* was rendered and was subsequently reenacted without change to its current form. The legislature is presumed to know previous constructions of a statute; and, where the statute is reenacted without change, the legislature's intent is presumed to include the constructions already given to the statute. *See Epling v. Four B & C Coal Co., Inc.*, 858 S.W.2d 216 (Ky. App. 1993) (citing *Inland Steel Co. v. Hall*, 245 S.W.2d 437, 438 (Ky. 1952)); *see also Breedlove v. Smith Custom Homes, Inc.*, 530 S.W.3d 481, 487 (Ky. App. 2017) (recognizing the continued validity, post-reenactment, of the construction of this statute set forth in *Saylor*).

> record, we agree. Carolyn Moore, as executrix of Dorothy Brown's estate, did not assert a negligent construction claim against MSD and did not cite MSD's statutory duties under KRS 76.100 as the basis for such a claim. Instead, the Court of Appeals sua sponte raised these issues on Moore's behalf. In doing so, the appellate panel erred. *See Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846, 852 (Ky. 2016) ("The proper role for an appellate court is to review for error—and there can be no error when the issue has not been presented to the trial court for decision."); *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009) ("An appellate court 'is without authority to review issues not raised in or decided by the trial court.'") (quoting *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989)).
>
> Because Court of Appeals exceeded its authority, the motion for discretionary review is granted. The Court of Appeals decision is vacated and the case is remanded to the Court of Appeals for consideration of the merits of Moore's appeal. On remand, the Court of Appeals is cautioned not to reverse on legal grounds that were not raised in the circuit court or in the parties' appellate briefs.
>
> All sitting. All concur.

At the beginning of this Opinion, we explained that a dispositive issue presented – one that has already been answered by the Kentucky Supreme Court – is the *basis* of the wrongful death claim that the Estate asserted against MSD. The Kentucky Supreme Court has determined that the basis of the Estate's claim was *not* the non-delegable nature of MSD's duty to construct its sewer lines in a non-negligent fashion; and, that this Court is *not* at liberty to address that point under any circumstances because it was not affirmatively raised by the Estate.

As an aside, we find the Kentucky Supreme Court's directive in this matter difficult to reconcile with its earlier pronouncement in *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 930 (Ky. 2002), which was as follows:

> There are two schools of thought as to what policy an appellate court should follow in such instances—which are, we might add, not at all rare. One view is that when a party fails to argue a theory on which he is entitled to win he should simply lose, the courts having enough to do without practicing lawyers' cases. On the other hand, much bad law will go into the books (more, that is, than is there already) if courts confine their analyses of cases to the theories presented in the briefs. It is probable that in well over 50% of the cases coming before it an appellate court will size up the dispositive logic of a controversy differently from the way in which the opposing parties have conceived it. For the sake of the litigants, who have some right, it seems to us, to expect the courts to assume a full share of responsibility for seeing that the controversy is correctly determined, we are of the opinion that insofar as the pleadings, the evidence, the rules of procedure and the principles of law permit, an appellate court should resolve cases on their merits, aided by but not necessarily restricted to the arguments of counsel.
>
> *First Nat'l Bank of Louisville v. Progressive Cas. Ins. Co.*, Ky., 517 S.W.2d 226, 230 (1974). In other words, applicable legal authority is not evidence and can be resorted to at any stage of the proceedings whether cited by the litigants or simply applied, *sua sponte*, by the adjudicator(s). Nor is legal research a matter of judicial

> notice, for the issue is one of law, not evidence. Commentary to KRE 201, Evidence Rules Study Committee, Final Draft (1989); FRE 201 Advisory Committee Note (1972).

With that said, it is not our prerogative to disobey a direct, unequivocal mandate from the Kentucky Supreme Court. *See* Supreme Court Rule (SCR) 1.030(8)(a). Thus, we will review the Estate's appeal anew.

Abiding to the Kentucky Supreme Court's mandate, we affirm the circuit court's disposition of this matter in the following respect: To the extent that the Estate attempted, through the allegations of its complaint, to hold MSD directly, derivatively, or vicariously liable for its decedent's injuries based upon MSD's asserted negligence in hiring or supervising *independent contractors*, the Estate has raised no argument indicating that "the old common-law rule that an employer is not liable vicariously for the negligence of his independent contractor"[8] does not apply. Thus, we are compelled by the mandate of the Kentucky Supreme Court to find no error.

However, to the extent that the circuit court held that the Estate did not plead a claim for *vicarious liability* against MSD, we reach a different result.

To explain, the breadth of the circuit court's analysis of this issue was as follows:

[8] *See Collins v. Liquid Transporters*, 262 S.W.2d 382, 383 (Ky. 1953).

> In [the Estate's] Response, [it] argues that [its] Complaint does allege negligence under the theory of vicarious liability against MSD. The Court has reviewed the Complaint and finds that Paragraph 7 alleges a single claim of negligent hiring and supervision against MSD. [The Estate] now argues [it] has pled the vicarious liability of MSD in the first sentence in Paragraph 8, which states, "[a]s a direct and proximate result of the negligence of the Defendants, by and through their agents and/or employees, the Plaintiff has sustained funeral and burial expenses . . ." Regardless of the fact that an entity that hires an independent contractor generally cannot be held vicariously liable for the acts of that independent contractor, the "pleading" in the Complaint does not sufficiently plead negligence under the theory of vicarious liability. [The Estate] failed to outline the elements of negligence or allege facts to support each element of this theory of negligence. Therefore, this claim also fails as a matter of law.

On appeal, the Estate takes issue with the circuit court's conclusion. On pages eight and nine of its brief, the Estate argues:

> [T]he Trial Court concluded erroneously that the Appellant failed to assert a claim for vicarious liability against MSD. As hereinabove referenced, Paragraph 8 of the Appellant's Complaint clearly pleads negligence by and through their agents and/or employees. Clearly, Team Contracting, LLC, was an agent of MSD and as such, its negligence can be imputed to MSD under a theory of vicarious liability.

Upon review, we agree with the Estate that its complaint is sufficient to defeat a CR 12.02(f) motion. In Kentucky, the sufficiency of a pleading is determined under a commonsense standard to do substantial justice. *McCollum v. Garrett*, 880 S.W.2d 530 (Ky. 1994); CR 8.06. To meet this standard, a pleading

must simply identify the basis of the claim. *Natural Res. & Envtl. Prot. Cab. v. Williams*, 768 S.W.2d 47, 51 (Ky. 1989). Wide latitude is allowed in the exact language used in pleadings, and liberal interpretation is to be used to construe a pleading as stating a cause of action or a defense. *See W.R. Willett Lumber Co. v. Hall*, 375 S.W.2d 266 (Ky. 1964).

Here, as detailed above, the Estate alleged that its decedent was injured and ultimately died due to Team Contracting's and the Unknown Contractors' negligence in performing work on MSD's sewers. For purposes of outlining the elements of negligence, that suffices under our notice pleading standard. Moreover, "[a] principal may be held vicariously liable for the negligent acts of his or her agent[.]" *Nazar v. Branham*, 291 S.W.3d 599, 606 (Ky. 2009). And, the Estate claimed that *every* defendant – including MSD – was liable "by and through *their* agents and/or employees" for its decedent's injuries and resulting death. *See* ¶ VIII (Emphasis added).

When a plaintiff sets forth in a complaint that a defendant "by and through its agent" committed actionable conduct, a plaintiff is alleging an agency relationship existed, along with what that relationship necessarily entails (*e.g.*, that the purported agent was at all relevant times acting within the scope of the agency). *See Field Enterprises Educational Corp. v. Hopkins*, 378 S.W.2d 797 (Ky. 1964) (explaining a plaintiff's "allegation that defendant 'by and through its agent'

committed the alleged wrongful acts" necessarily implied that the "defendant's agent was acting within the scope of his authority."); *see also American Convalescent Centers of Kentucky, Inc. v. Daniel*, 514 S.W.2d 192, 194 (Ky. 1974). Accordingly, for purposes of asserting vicarious liability under our notice pleading standard, the Estate sufficiently alleged MSD was vicariously liable.

MSD also argues that it cannot as a matter of law be held vicariously liable for the acts of Team Contracting or the Unknown Contractors because those entities *were* independent contractors.

But, a demurrer is not the proper vehicle for resolving whether the Unknown Contractors or Team Contracting were MSD's independent contractors as opposed to agents. What differentiates an agency relationship from one involving an independent contractor is not the label given to it by the parties. "Substance prevails over form, and . . . the main dispositive criterion is whether it is understood that the alleged principal or master has the right to control the details of the work." *United Engineers & Constructors, Inc. v. Branham*, 550 S.W.2d 540, 543 (Ky. 1977). "One pleading and relying on agency has the burden of proving both the agency and its extent." *Cincinnati Ins. Co. v. Clary*, 435 S.W.2d 88, 89 (Ky. 1968) (citations omitted). To date, though, no discovery has taken place regarding the issue of agency. Indeed, an answer has not even been filed in this case. And, the *allegation* of agency – like any other allegation of a complaint

– is presumed true and deemed admitted if not denied in an answer. *See Perry v. Livingston*, 296 S.W.2d 217, 218-19 (Ky. 1956). The question before us is simply whether the Estate raised the issue of MSD's potential vicarious liability in its complaint sufficient to defeat a CR 12.02(f) motion, and we have answered that question in the affirmative.

Likewise, to the extent that MSD argues it cannot be held *vicariously* (*i.e.*, *secondarily* as opposed to *directly*) liable for the conduct of its alleged agents on the basis of CALGA or the applicable statute of limitations, we reject any such arguments for the same reasons set forth above.

In light of the foregoing, we AFFIRM IN PART, REVERSE IN PART, and REMAND for further proceedings not inconsistent with this Opinion.

DIXON, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS IN RESULT ONLY.

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