STATE OF MICHIGAN

COURT OF APPEALS

MIDWEST ENGINEERING,

Plaintiff-Appellee,

V

SWS ENGINEERING, RHS GROUP, INC., and ROBERT STELLWAGEN,

Defendants-Appellants,

and

TRAVELERS CASUALTY & SURETY, NATIONAL FIRE INSURANCE CO. and AMERICAN HOME ASSURANCE CO.,

Defendants.

UNPUBLISHED
June 21, 2005

No. 254148
Wayne Circuit Court
LC No. 02-214247-CK

Before: O'Connell, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendants, SWS Engineering, RHS Group, Inc., and Robert Stellwagen, appeal by right a judgment awarding plaintiff, Midwest Engineering, LLC, damages and from the trial court's order denying defendants' motion to amend the judgment, findings of fact and conclusions of law in this contract claim. We affirm.

Defendants first argue that the trial court erred when it found defendant Stellwagen individually liable to plaintiff for $50,151.95 from the Waterworks and Palais Royale construction projects under the Michigan Builders' Trust Fund Act (MBTFA), MCL 570.151 *et seq.,* because it does not apply to those projects. We hold defendants waived the judicially created public construction project defense by not properly pleading it as required by the court rules and by not raising the issue either in a pretrial motion or at trial. MCR 2.111(F)(2).

The MBTFA imposes a trust on funds paid to contractors and subcontractors for products and services provided under construction contracts. MCL 570.151 *et seq.* An individual officer of a contractor or subcontractor on a construction project may be found liable for the diversion of

contract funds in contrary the provisions of the MBTFA. *People v Brown,* 239 Mich App 735, 740-741; 610 NW2d 234 (2000). The statute provides in its entirety:

> Sec. 1. In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors or materialmen, and the contractor or subcontractor shall be considered the trustee of all funds so paid to him for building construction purposes.
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> Sec. 2. Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefor, of any payment made to him, for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement, shall be guilty of a felony in appropriating such funds to his own use while any amount for which he may be liable or become liable under the terms of his contract for such labor or material remains unpaid, and may be prosecuted upon the complaint of any persons so defrauded, and, upon conviction, shall be punished by a fine of not less than 100 dollars or more than 5,000 dollars and/or not less than 6 months nor more than 3 years imprisonment in a state prison at the discretion of the court.
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> Sec. 3. The appropriation by a contractor, or any subcontractor, of any moneys paid to him for building operations before the payment by him of all moneys due or so to become due laborers, subcontractors, materialmen or others entitled to payment, shall be evidence of intent to defraud. [MCL 570.151 - 153.]

The MBTFA was originally enacted in 1931. Our Supreme Court first interpreted the statute in *Club Holding Co v Flint Citizens Loan & Investment Co,* 272 Mich 66; 261 NW 133 (1935), overruled in part *BF Farnell Co v Monahan,* 377 Mich 552, 557; 141 NW2d 58 (1966). The Court held that the statute did not apply to public construction projects opining, "we cannot presume, in the absence of explicit language, that it was intended to apply to the erection of public buildings or to public works." *Club Holding, supra* at 72. The Court reasoned that if the MBTFA applied to public construction projects it would negate 1905 PA 187, MCL 570.101 *et seq*., which required that contractors obtain bonds to secure payment of subcontractors and suppliers for construction projects involving public buildings or other public works. The Court was concerned that the application of MBTFA to public works contracts "might possibly relieve the principal contractor's surety from the obligations imposed by [MCL 570.101 *et seq*.], and bonds given pursuant thereto." *Club Holding, supra* at 72.

In 1981, our Supreme Court reaffirmed "that the [MBTFA] applies only to private construction contracts. It has no applicability to public construction contracts." *In re Certified Question,* 411 Mich 727, 732; 311 NW2d 731 (1981). The Court adopted the reasoning that the MBTFA was a Depression-era measure intended to benefit subcontractors and suppliers on private construction projects who, unlike their counterparts on public works projects, were unprotected by statutorily required payment and performance bonds with only ineffective mechanics' liens to guard against defaulting general contractors. *In re Certified Question, supra* at 722-723, citing and quoting *General Insurance Co of America v Lamar Corp,* 482 F2d 856,

860 (CA 6, 1973); see also *Nat'l Bank of Detroit v Eames & Brown, Inc*, 396 Mich 611, 619-620; 242 NW2d 412 (1976). Although we do not discern either ambiguity in the failure of the MBTFA to specify the nature of the underlying construction contracts to which it applies or irreconcilable conflict with MCL 570.101 *et seq*., thus permitting judicial construction, *Mayor of Lansing v Public Service Comm*, 470 Mich 154, 157, 166; 680 NW2d 840 (2004), we are bound by our Supreme Court's prior decisions to the contrary, *O'Dess v Grand Trunk Western Railroad Co,* 218 Mich App 694, 700; 555 NW2d 261 (1996).

Although the MBTFA is a criminal statute that does not expressly provide a civil remedy, our Supreme Court has long recognized a civil cause of action for its violation. *Nat'l Bank of Detroit, supra* at 620-621; *Diponio Co v Rosati Co,* 246 Mich App 43, 48; 631 NW2d 59 (2001).

> The prima facie elements of a civil cause of action brought under the act include (1) the defendant is a contractor or subcontractor engaged in the building construction industry, (2) a person paid the contractor or subcontractor for labor or materials provided on a construction project, (3) the defendant retained or used those funds, or any part of those funds, (4) for any purpose other than to first pay laborers, subcontractors, and materialmen, (5) who were engaged by the defendant to perform labor or furnish material for the specific project. [*Id*. at 49.]

Defendants argue that the Waterworks and Palais Royale projects were public construction contracts and therefore the MBTFA does not apply to them as a matter of law. Plaintiff asserts that defendants had the burden of pleading that the projects were public as an affirmative defense and waived that defense when they failed to so plead. Defendants counter that plaintiff must establish the private nature of construction projects as part of its burden to present a prima facie case that the MBTFA applies, so the public nature of the construction projects is not an affirmative defense that defendants were required to plead.

Thus, the essence of the question presented here is whether plaintiff must prove as part of its prima facie MBTFA case that the underlying construction project was a private rather than a public works project. If so, then defendants contend plaintiff failed to state a claim for which relief may be granted and the issue is not subject to waiver. MCR 2.111(F)(2). Also, defendant may raise the issue at any time. MCR 2.116(D)(3). On the other hand, if the nature of the underlying construction project is not part of plaintiff's prima facie case, then establishing that the public works exception applies is a "defense" or an "affirmative defense" subject to waiver if not timely raised. MCR 2.111(F)(2), (3). We hold the latter view is the correct one.

The facts of this case establish that defendant waived the "public works" defense by not specifically pleading it, MCR 2.111(D) ("Each denial must state the substance of the matters on which the pleader will rely to support the denial."), and by not timely raising the defense, MCR 2.111(F)(2) ("A party against whom a cause of action has been asserted by complaint, cross-claim, counterclaim, or third-party claim must assert in a responsive pleading the defenses the party has against the claim. A defense not asserted in the responsive pleading or by motion as provided by these rules is waived, except for the defenses of lack of jurisdiction over the subject matter of the action, and failure to state a claim on which relief can be granted.").

Defendants pleaded a general denial to plaintiff's MBTFA claim and did not state that they were relying on the public works exception to deny liability, as required by MCR 2.111(D);

consequently, defendant did not specifically plead as an affirmative defense that the public works exception applied to the two construction projects at issue. MCR 2.111(F)(3). Further, defendants did not raise this issue in a pretrial motion for partial summary disposition. MCR 2.111(F)(2). Instead, the case proceeded through a four-day bench trial. Four months after the conclusion of proofs and oral argument during which the public works exception was not raised, defendants submitted to the trial court written proposed findings of fact and conclusions of law. On page 26 of this 34-page document, defendants propose that the trial court find that the Waterworks and Palais Royale projects involved "public contracts." On pages 31-32, defendants proposed the public works exception as one of four alternative reasons why plaintiff's MBTFA claim should be dismissed. Defendants' argument is far too late. Defendants utterly failed to comply with the requirements of MCR 2.111(D), (F)(2), or (F)(3).

As already discussed, this Court did not include proof as to the nature of the underlying construction project involved as an element of a prima facie case of a civil action under the MBTFA. Indeed, the plain language of the statute contains no such requirement. The "public works" exception is based solely on our Supreme Court's interpretation of the statute. Accordingly, application of the exception may be described as an "immunity granted by law," a specifically delineated affirmative defense under MCR 2.111(F)(3)(a). An "affirmative defense" "is a matter that accepts the plaintiff's allegation as true and even admits the establishment of the plaintiff's prima facie case, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993), citing 2 Martin, Dean & Webster, Michigan Court Rules Practice, p 192. "Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." MCR 2.111(F)(3). The failure to plead an affirmative defense as required by the court rule constitutes a waiver of that affirmative defense. *Stanke, supra* at 312, citing *Campbell v St John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990).

Further, as this Court explained in *Stanke, supra* at 317, citing Martin, Dean & Webster, *supra* at 186, "the primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." Defendants failed to provide plaintiff such notice of their intent to rely the public works defense with respect to plaintiff's MBTFA claim. Because defendants did not properly plead the public works defense as required by the court rules, or raise the issue in a pretrial motion, or at trial, they waived the defense. MCR 2.111(C), (D), (F)(2); *Stanke, supra* at 311.

Defendants next argue that the trial court erred when it found that a valid contract was formed between the parties for work on the Marygrove Theatre project. We disagree. This Court reviews a trial court's findings of fact in a bench trial for clear error. MCR 2.613(C); *Glen Lake-Crystal River Watershed Riparians v Glen*, 264 Mich App 523, 531; ___NW2d ___ (2004). A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

A contract requires mutual assent or a meeting of the minds on all the essential terms. *Burkhardt v Baily,* 260 Mich App 636, 655; 680 NW2d 453 (2004). Whether the parties mutually assented to a contract is judged by an objective examination of their express words and visible acts. *Rood v General Dynamics Corp,* 444 Mich 107, 119; 507 NW2d 591 (1993).

Here, evidence was presented showing that defendants accepted plaintiff's offer to do work on the Marygrove Theatre project. Bhalchandra Amin, plaintiff's founder, testified that defendant Stellwagen asked him to provide electrical design drawings, and he presented a verbal proposal for $14,800. Defendant Stellwagen told Amin to proceed with the work. Amin gave defendant Stellwagen three invoices for the work, and defendants paid him for the first invoice and partially paid the second. Defendants' making payments on the invoices without objection manifested assent. Further, defendants had accepted Amin's proposals, told him to proceed with the work, and had fully paid him for five other electrical design projects. Based on these past dealings, Amin could reasonably believe that defendants' verbal assent to the Marygrove project proposal was binding on both parties. The trial court did not clearly err when it determined that there was a valid contract between plaintiff and defendants with respect to the Marygrove Theatre project.

Finally, defendants argue that the trial court abused its discretion when it denied defendants' motion to amend the judgment, findings of fact, and conclusions of law because: (1) the MBTFA did not apply to the Waterworks and Palais Royale projects; (2) there was no valid contract on the Marygrove project; and (3) the trial court failed to provide a concise statement of the reasons for denying the motion to amend the judgment in violation of MCR 2.611(F). We disagree. This Court reviews a trial court's decision to deny a motion under MCR 2.611 for an abuse of discretion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). In civil cases, an abuse of discretion is found only in extreme cases where the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

Because defendants waived the argument that the MBTFA did not apply to the Waterworks and Palais Royale projects, the court's denial of defendants' motion to amend the judgment on those grounds was not an abuse of discretion. In addition, because the trial court correctly determined that there was a valid contract on the Marygrove project, the trial court did not abuse its discretion when it denied defendants' motion to amend the portion of the judgment and facts regarding the Marygrove Theatre project.

Last, the trial court did not abuse its discretion by summarily denying defendants' motion. Defendants rely on MCR 2.611(F), which provides that "[i]n ruling on . . . a motion to amend the judgment, the court shall give a concise statement of the reasons for the ruling, either in an order or opinion filed in the action or on the record." But in essence, defendants moved for rehearing or reconsideration, and the trial court did not abuse its discretion by refusing to consider a waived legal argument as the basis for finding palpable error necessary to grant such a motion. See MCR 2.119(F)(3); see also *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000), and *Charbeneau v Wayne Co Gen Hospital*, 158 Mich App 730, 733; 405 NW2d 151 (1987). Further, in ruling on the motion, the trial court stated, "I have read the motion and everything that's been offered here. And in addition to that, the Court did not find your client credible." The trial court's explanation that he denied the motion because of defendants' lack of credibility was sufficient for the court's decision on the Marygrove Theatre

project claim because it was essentially a credibility contest between Amin and defendant Stellwagen.

We affirm.

/s/ Peter D. O'Connell
/s/ Jane E. Markey

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Before: O'Connell, P.J., Markey and Talbot, JJ.

TALBOT, P.J. (*dissenting in part and concurring in part*).

I respectfully dissent from the majority opinion because I believe that the private nature of a construction contract is an element of a prima facie civil claim under the Michigan Builders' Trust Fund Act (MBTFA), MCL 570.151 *et seq.* Defendant Stellwagen, therefore, could not waive his "public works" defense because it was not a defense at all, but rather, an element that plaintiff was required to plead and prove. I, however, concur with the majority opinion in all other respects.

The determination whether a statutory provision applies to a given action is purely a legal question that this Court reviews de novo. *Yaldo v North Pointe Ins Co,* 217 Mich App 617, 623; 552 NW2d 657 (1997), aff'd 457 Mich 341 (1998). Which party bears the burden of proof is a question of law that this Court reviews de novo on appeal. *Pickering v Pickering,* 253 Mich App 694, 696; 659 NW2d 649 (2002). Whether a particular assertion qualifies as an affirmative defense constitutes a question of law that is also reviewed de novo. *Citizens Ins Co of America v Juno Lighting, Inc,* 247 Mich App 236, 241; 635 NW2d 379 (2001).

The majority recognizes that the MBTFA is a criminal statute that does not expressly provide for a civil cause of action. A civil remedy under the MBTFA is, therefore, purely a

creation of the common law. See *B F Farnell Co v Monahan*, 377 Mich 552, 555; 141 NW2d 58 (1966); *Reiter v Kuhlman*, 59 Mich App 54, 57; 228 NW2d 830 (1975) ("When a statute provides a beneficial right but no civil remedy for its securance, the common law on its own hook provides a remedy, thus fulfilling the law's pledge of no wrong without a remedy."). The majority cites *Diponio Co v Rosati*, 246 Mich App 43, 48; 631 NW2d 59 (2001), for the elements of a civil cause of action under the MBTFA (which do not include a limitation to private construction contracts); however, this Court did not create the cause of action, our Supreme Court did, and its interpretation is controlling.

In *B F Farnell Co, supra*, the Supreme Court first recognized a civil cause of action under the MBTFA, but did not expressly limit the civil remedy's applicability to private construction contracts. In *In Re Certified Question*, 411 Mich 727, 732; 311 NW2d 731 (1981), however, the Court expressly reaffirmed its prior holdings that "the [MBTFA] applies only to private construction contracts" and "has no applicability to public construction contracts." Given the Supreme Court's unambiguous language limiting the applicability of civil causes of action under the MBTFA to private construction contracts only, a construction contract's private nature is a threshold requirement to the civil action's applicability and, therefore, an element, not an immunity granted by law.

Because the public nature of a construction project is a prerequisite for applicability of the MBTFA, defendant Stellwagen was not required by MCR 2.111(F)(3) to plead the public nature of the projects as an affirmative defense. Rather, plaintiff had the burden of pleading and proving that the construction projects were private. The trial court, therefore, erred in denying defendants' motion to amend with respect to the Waterworks and Palais Royale projects.

I would remand to the trial court to reduce the judgment against defendant Stellwagen, in his individual capacity, by $50,151.95.

/s/ Michael J. Talbot