

STATE OF MICHIGAN  
COURT OF APPEALS

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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.

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UNPUBLISHED

June 21, 2005

No. 254148

Wayne Circuit Court

LC No. 02-214247

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