The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

June 14, 2013

The Honorable William F. Gault
Clerk of Court
PO Box 703
Union SC 29379-0703

REMITTITUR

Re: Shirley's Iron Works v. City of Union - Appellate Case No. 2010-170066
Lower Court Case No. 2003CP4400171

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: William E. Whitney, Jr., Esquire
Raymond Patrick Smith, Esquire
Norman Ward Lambert, Esquire
Gilbert Bagnell, Esquire
Boyd Benjamin Nicholson, Jr., Esquire
Andrew F. Lindemann, Esquire
The Honorable John C. Few

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Shirley's Iron Works, Inc., and Tindall Corporation,
Respondents,

v.

City of Union, South Carolina, Gilbert Group LLC and
William E. Gilbert, Defendants,

Of whom, City of Union, South Carolina is Petitioner.

Appellate Case No. 2010-170066

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Union County
John C. Few, Circuit Court Judge

Opinion No. 27256
Heard March 6, 2013 – Filed May 29, 2013

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

William E. Whitney, Jr., of Whitney Law Firm, of Union, and Andrew F. Lindemann, of Davidson & Lindemann, PA, of Columbia, for Petitioner.

Boyd B. Nicholson, Jr., of Haynsworth Sinkler Boyd, PA, of Greenville, and Norman W. Lambert and Raymond P. Smith, both of Harper Lambert & Brown, P.A., of Greenville, for Respondents.

JUSTICE KITTREDGE: This case concerns the interplay between the Subcontractors' and Suppliers' Payment Protection Act (SPPA)[1], the Tort Claims Act (TCA)[2], and this Court's opinion in *Sloan Construction Co. v. Southco Grassing, Inc.* (*Sloan I*), 377 S.C. 108, 659 S.E.2d 158 (2008). When subcontractors Shirley's Iron Works, Inc. and Tindall Corporation (collectively Respondents) did not receive full payment from the general contractor Gilbert Group, LLC (Gilbert) for their work on a public construction project for the City of Union (the City), they filed suit, asserting the City failed to comply with the statutory bond requirements pertaining to contractors working with subcontractors on public projects found in the SPPA. The circuit court granted summary judgment to the City. The court of appeals reversed and remanded. *Shirley's Iron Works, Inc. v. City of Union*, 397 S.C. 584, 726 S.E.2d 208 (Ct. App. 2009). We granted a writ of certiorari to review the court of appeals decision. We now affirm in part, reverse in part, and remand. Further, we clarify *Sloan I* and hold that a governmental entity may be liable to a subcontractor only for breach of contract for failing to comply with the SPPA bonding requirements.

I.

In 2002, the City issued a request for proposals for the design and construction of a spec building. Thereafter, the City contracted with Gilbert for the project, the cost of which totaled approximately $875,000. Gilbert entered into contractual agreements with various subcontractors, including Respondents. The City did not require Gilbert to secure a payment bond, and it is undisputed no payment bond was secured. Ultimately, Gilbert failed to fully compensate all of the subcontractors after they completed work on the project.

---

[1] S.C. Code Ann. §§ 29-6-210 -290 (Supp. 2012).

[2] S.C. Code Ann. §§ 15-78-10 -220 (Supp. 2012).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Shirley's Iron Works, Inc., and Tindall Corporation,
Respondents,

v.

City of Union, South Carolina, Gilbert Group LLC and
William E. Gilbert, Defendants,

Of whom, City of Union, South Carolina is Petitioner.

Appellate Case No. 2010-170066

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Union County
John C. Few, Circuit Court Judge

Opinion No. 27256
Heard March 6, 2013 – Filed May 29, 2013

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

William E. Whitney, Jr., of Whitney Law Firm, of Union, and Andrew F. Lindemann, of Davidson & Lindemann, PA, of Columbia, for Petitioner.

Boyd B. Nicholson, Jr., of Haynsworth Sinkler Boyd, PA, of Greenville, and Norman W. Lambert and Raymond P. Smith, both of Harper Lambert & Brown, P.A., of Greenville, for Respondents.

JUSTICE KITTREDGE: This case concerns the interplay between the Subcontractors' and Suppliers' Payment Protection Act (SPPA)[1], the Tort Claims Act (TCA)[2], and this Court's opinion in *Sloan Construction Co. v. Southco Grassing, Inc.* (*Sloan I*), 377 S.C. 108, 659 S.E.2d 158 (2008). When subcontractors Shirley's Iron Works, Inc. and Tindall Corporation (collectively Respondents) did not receive full payment from the general contractor Gilbert Group, LLC (Gilbert) for their work on a public construction project for the City of Union (the City), they filed suit, asserting the City failed to comply with the statutory bond requirements pertaining to contractors working with subcontractors on public projects found in the SPPA. The circuit court granted summary judgment to the City. The court of appeals reversed and remanded. *Shirley's Iron Works, Inc. v. City of Union*, 397 S.C. 584, 726 S.E.2d 208 (Ct. App. 2009). We granted a writ of certiorari to review the court of appeals decision. We now affirm in part, reverse in part, and remand. Further, we clarify *Sloan I* and hold that a governmental entity may be liable to a subcontractor only for breach of contract for failing to comply with the SPPA bonding requirements.

I.

In 2002, the City issued a request for proposals for the design and construction of a spec building. Thereafter, the City contracted with Gilbert for the project, the cost of which totaled approximately $875,000. Gilbert entered into contractual agreements with various subcontractors, including Respondents. The City did not require Gilbert to secure a payment bond, and it is undisputed no payment bond was secured. Ultimately, Gilbert failed to fully compensate all of the subcontractors after they completed work on the project.

---

[1] S.C. Code Ann. §§ 29-6-210 -290 (Supp. 2012).

[2] S.C. Code Ann. §§ 15-78-10 -220 (Supp. 2012).

At the project's completion, the City contended it owed $111,270 on its contract with Gilbert. Respondents also had significant unpaid invoices.[3] After the City was notified of Gilbert's failure to pay its subcontractors,[4] the City offered to distribute the balance of its contract with Gilbert to the unpaid subcontractors in exchange for a release of the City's liability. The City offered each Respondent $25,000. Upon Respondents' refusal to accept the offer and execute a release in favor of the City, the City distributed their pro rata portions to the other unpaid subcontractors.

In 2003, Respondents filed a Complaint against the City, alleging the City should be required to pay the amounts owed under their respective subcontracts because the City failed to require Gilbert to secure a payment bond in violation of S.C. Code Ann. section 29-6-250.[5] Respondents also requested attorney's fees pursuant to S.C. Code Ann. section 15-77-300 (Supp. 2012).[6] The City filed an answer denying Respondents' allegations. The City also filed a third-party complaint against Gilbert, alleging Gilbert was negligent in failing to acquire a payment bond.

---

[3] Respondent Shirley's Iron Works had unpaid invoices in the amount of $132,782. Respondent Tindall Corporation had unpaid invoices in the amount of $165,500.

[4] A City administrator testified that the $111,270 was the balance owed as of the project's completion. However, he could not remember the date upon which the City learned of Gilbert's nonpayment, but stated it was while the project was still under construction.

[5] Section 29-6-250(1) provides that when a governmental entity is a party to a contract to improve real property, and the contract is for a sum in excess of $50,000, the property owner must require the general contractor to provide a payment bond in the full amount of the contract.

[6] Section 15-77-300(A) states that in any civil case contesting state action, the prevailing party may recover reasonable attorney's fees if the governmental agency acted without substantial justification in pressing its claim against the party, and there are no special circumstances that would make the award of attorney's fees unjust.

In 2004, Judge Paul Short granted the City's motion to strike Respondents' request for attorney's fees.[7] No appeal was taken from the order granting the motion to strike.

In August 2005, Respondents filed an Amended Complaint against the City and Gilbert, asserting third-party beneficiary status of the contract between the City and Gilbert, alleging Gilbert failed to pay Respondents for their work, and contending the City failed to require Gilbert to secure a payment bond in violation of the SPPA. This Amended Complaint was considerably more detailed than the original complaint. In the "Facts" section, Respondents contended section 29-6-250(1) created an obligation on the City to ensure that a payment bond is in place to protect subcontractors and is a term of the City's contract with Gilbert. Respondents asserted they were third-party beneficiaries of the City's contract with Gilbert because the bonding requirements of section 29-6-250 serve to protect Respondents as subcontractors and are "legislatively mandated contractual obligations" incorporated into the contract as a matter of law. Respondents argued they were damaged by the City's breach of its statutorily imposed contractual obligation to secure a payment bond from Gilbert. Respondents asserted causes of action for (1) "[v]iolation of S.C. Code Ann. [section] 29-6-250," (2) attorney's fees for violation of S.C. Code Ann. section 27-1-15, (3) negligence, (4) quantum meruit, and (5) attorney's fees and prejudgment interest.

Thereafter, Judge Steven John granted the City's motion to strike Respondents' claims for attorney's fees and prejudgment interest. Judge John noted that Judge Short's previous order stated Respondents' original complaint sounded in tort, and that attorney's fees and prejudgment interest were not available under the TCA. Judge John held that Judge Short's unappealed order "constitute[d] the law of the case," which he was "bound to apply."

Subsequently, both parties moved for summary judgment. Judge John Few granted the City's motion for summary judgment on all of Respondents' causes of action and denied Respondents' motion. Judge Few found Respondents' claims sounded

---

[7] Judge Short also granted the City's motion to join Gilbert as a defendant, finding Gilbert and the City were "joint tortfeasors whose alleged acts combined and concurred to cause the harm for which [Respondents] seek to recover."

At the project's completion, the City contended it owed $111,270 on its contract with Gilbert. Respondents also had significant unpaid invoices.[3] After the City was notified of Gilbert's failure to pay its subcontractors,[4] the City offered to distribute the balance of its contract with Gilbert to the unpaid subcontractors in exchange for a release of the City's liability. The City offered each Respondent $25,000. Upon Respondents' refusal to accept the offer and execute a release in favor of the City, the City distributed their pro rata portions to the other unpaid subcontractors.

In 2003, Respondents filed a Complaint against the City, alleging the City should be required to pay the amounts owed under their respective subcontracts because the City failed to require Gilbert to secure a payment bond in violation of S.C. Code Ann. section 29-6-250.[5] Respondents also requested attorney's fees pursuant to S.C. Code Ann. section 15-77-300 (Supp. 2012).[6] The City filed an answer denying Respondents' allegations. The City also filed a third-party complaint against Gilbert, alleging Gilbert was negligent in failing to acquire a payment bond.

---

[3] Respondent Shirley's Iron Works had unpaid invoices in the amount of $132,782. Respondent Tindall Corporation had unpaid invoices in the amount of $165,500.

[4] A City administrator testified that the $111,270 was the balance owed as of the project's completion. However, he could not remember the date upon which the City learned of Gilbert's nonpayment, but stated it was while the project was still under construction.

[5] Section 29-6-250(1) provides that when a governmental entity is a party to a contract to improve real property, and the contract is for a sum in excess of $50,000, the property owner must require the general contractor to provide a payment bond in the full amount of the contract.

[6] Section 15-77-300(A) states that in any civil case contesting state action, the prevailing party may recover reasonable attorney's fees if the governmental agency acted without substantial justification in pressing its claim against the party, and there are no special circumstances that would make the award of attorney's fees unjust.

In 2004, Judge Paul Short granted the City's motion to strike Respondents' request for attorney's fees.[7] No appeal was taken from the order granting the motion to strike.

In August 2005, Respondents filed an Amended Complaint against the City and Gilbert, asserting third-party beneficiary status of the contract between the City and Gilbert, alleging Gilbert failed to pay Respondents for their work, and contending the City failed to require Gilbert to secure a payment bond in violation of the SPPA. This Amended Complaint was considerably more detailed than the original complaint. In the "Facts" section, Respondents contended section 29-6-250(1) created an obligation on the City to ensure that a payment bond is in place to protect subcontractors and is a term of the City's contract with Gilbert. Respondents asserted they were third-party beneficiaries of the City's contract with Gilbert because the bonding requirements of section 29-6-250 serve to protect Respondents as subcontractors and are "legislatively mandated contractual obligations" incorporated into the contract as a matter of law. Respondents argued they were damaged by the City's breach of its statutorily imposed contractual obligation to secure a payment bond from Gilbert. Respondents asserted causes of action for (1) "[v]iolation of S.C. Code Ann. [section] 29-6-250," (2) attorney's fees for violation of S.C. Code Ann. section 27-1-15, (3) negligence, (4) quantum meruit, and (5) attorney's fees and prejudgment interest.

Thereafter, Judge Steven John granted the City's motion to strike Respondents' claims for attorney's fees and prejudgment interest. Judge John noted that Judge Short's previous order stated Respondents' original complaint sounded in tort, and that attorney's fees and prejudgment interest were not available under the TCA. Judge John held that Judge Short's unappealed order "constitute[d] the law of the case," which he was "bound to apply."

Subsequently, both parties moved for summary judgment. Judge John Few granted the City's motion for summary judgment on all of Respondents' causes of action and denied Respondents' motion. Judge Few found Respondents' claims sounded

---

[7] Judge Short also granted the City's motion to join Gilbert as a defendant, finding Gilbert and the City were "joint tortfeasors whose alleged acts combined and concurred to cause the harm for which [Respondents] seek to recover."

in tort and were barred by the TCA. Additionally, Judge Few held that a governmental entity's violation of the SPPA does not give rise to a private cause of action by a subcontractor.[8] Respondents appealed, and the court of appeals reversed and remanded.

Specifically, the court of appeals reversed Judge Few's findings with respect to Respondents' negligence claim, holding that the SPPA provided for a tort cause of action which was not governed by the TCA. The court reasoned that *Sloan I* supported its conclusion. Additionally, the court of appeals held Judge John's and Judge Short's previous orders stating Respondents' claims sounded in tort were not the law of the case and Respondents' Amended Complaint, when read as a whole, sufficiently pled a third-party beneficiary breach of contract cause of action for violation of the SPPA. Concluding a ruling on the merits would be premature, the court of appeals remanded to the circuit court for findings regarding Respondents' tort, breach of contract, and quantum meruit claims to determine liability and damages.[9] This court granted the City's writ of certiorari to review the court of appeals opinion.

II.

In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial judge under Rule 56(c), SCRCP. *Bovian v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.*

---

[8] Judge Few's order was based, in part, on the court of appeals decision in the *Sloan I* litigation. *See Sloan Constr. Co. v. Southco Grassing, Inc.*, 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006). However, Judge Few issued his summary judgment order prior to our opinion in *Sloan I*, which reversed the court of appeals.

[9] The court of appeals also found Respondents' claim for attorney's fees under section 27-1-15 of the South Carolina Code was not preserved for review and Respondents have not appealed this ruling.

III.

A.

With the enactment of the TCA in 1986, the legislature intended to remove the common law bar of sovereign immunity in certain circumstances, but only to the extent legislatively authorized. *See* S.C. Code Ann. § 15-78-20 (declaring it is the public policy of the state that government entities are only liable for torts within the limitations of this chapter). However, the TCA expressly delineated many exceptions to the waiver of immunity, including that the governmental entity is not liable for loss resulting from failure to enforce any law or statute. *See id.* § 15-78-60(4).

Thereafter, in 2000, the legislature enacted the SPPA. The SPPA reads in pertinent part as follows:

> (1) When a governmental body is a party to a *contract* to improve real property, and the *contract* is for a sum in excess of fifty thousand dollars, the owner of the property shall require the contractor to provide a labor and material payment bond in the full amount of the *contract* . . . .
>
> . . . .
>
> (3) For purposes of any *contract covered by the provisions of this section*, it is the duty of the entity *contracting* for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form.

S.C. Code Ann. § 29-6-250 (emphasis added).

It is the interplay of these two statutory schemes which is implicated in the present case. Both parties rely on *Sloan I* to advance their respective positions.

In *Sloan I*, this Court addressed whether a subcontractor may bring a private right of action against a governmental entity for failure to comply with the statutory bonding requirements of the SPPA. A subcontractor working on a state highway maintenance project brought claims against the Department of Transportation (SCDOT) for its alleged failure to comply with the bonding requirements of the SPPA. The subcontractor brought an action for negligence against SCDOT

in tort and were barred by the TCA. Additionally, Judge Few held that a governmental entity's violation of the SPPA does not give rise to a private cause of action by a subcontractor.[8] Respondents appealed, and the court of appeals reversed and remanded.

Specifically, the court of appeals reversed Judge Few's findings with respect to Respondents' negligence claim, holding that the SPPA provided for a tort cause of action which was not governed by the TCA. The court reasoned that *Sloan I* supported its conclusion. Additionally, the court of appeals held Judge John's and Judge Short's previous orders stating Respondents' claims sounded in tort were not the law of the case and Respondents' Amended Complaint, when read as a whole, sufficiently pled a third-party beneficiary breach of contract cause of action for violation of the SPPA. Concluding a ruling on the merits would be premature, the court of appeals remanded to the circuit court for findings regarding Respondents' tort, breach of contract, and quantum meruit claims to determine liability and damages.[9] This court granted the City's writ of certiorari to review the court of appeals opinion.

II.

In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial judge under Rule 56(c), SCRCP. *Bovian v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.*

---

[8] Judge Few's order was based, in part, on the court of appeals decision in the *Sloan I* litigation. *See Sloan Constr. Co. v. Southco Grassing, Inc.*, 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006). However, Judge Few issued his summary judgment order prior to our opinion in *Sloan I*, which reversed the court of appeals.

[9] The court of appeals also found Respondents' claim for attorney's fees under section 27-1-15 of the South Carolina Code was not preserved for review and Respondents have not appealed this ruling.

III.

A.

With the enactment of the TCA in 1986, the legislature intended to remove the common law bar of sovereign immunity in certain circumstances, but only to the extent legislatively authorized. *See* S.C. Code Ann. § 15-78-20 (declaring it is the public policy of the state that government entities are only liable for torts within the limitations of this chapter). However, the TCA expressly delineated many exceptions to the waiver of immunity, including that the governmental entity is not liable for loss resulting from failure to enforce any law or statute. *See id.* § 15-78-60(4).

Thereafter, in 2000, the legislature enacted the SPPA. The SPPA reads in pertinent part as follows:

> (1) When a governmental body is a party to a *contract* to improve real property, and the *contract* is for a sum in excess of fifty thousand dollars, the owner of the property shall require the contractor to provide a labor and material payment bond in the full amount of the *contract*. . . .
>
> . . . .
>
> (3) For purposes of any *contract covered by the provisions of this section*, it is the duty of the entity *contracting* for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form.

S.C. Code Ann. § 29-6-250 (emphasis added).

It is the interplay of these two statutory schemes which is implicated in the present case. Both parties rely on *Sloan I* to advance their respective positions.

In *Sloan I*, this Court addressed whether a subcontractor may bring a private right of action against a governmental entity for failure to comply with the statutory bonding requirements of the SPPA. A subcontractor working on a state highway maintenance project brought claims against the Department of Transportation (SCDOT) for its alleged failure to comply with the bonding requirements of the SPPA. The subcontractor brought an action for negligence against SCDOT

pursuant to the TCA and a breach of contract claim alleging SCDOT was obligated to it, as a third-party beneficiary to the contract between SCDOT and the contractor, to ensure that the contractor was properly bonded pursuant to the SPPA.

We held the SPPA is specifically applicable to subcontractors and suppliers on government projects and outlines a detailed bonding scheme that significantly expands the protections already afforded these parties. *Sloan I*, 377 S.C. at 114, 659 S.E.2d at 161. However, the Court noted the SPPA does not expressly provide for a private right of action between the subcontractor and the contracting government body. *Id.* at 114, 659 S.E.2d at 162. Nevertheless, the Court reasoned the "very title of the SPPA clearly indicates the [legislature] intended to provide stronger payment protection specifically for subcontractors and suppliers on government projects." After an analysis of the terms of the SPPA, we held "the legislature must have intended for those to whom the government owed the duty to be able to vindicate their rights under a statute enacted for their special benefit." *Id.* (noting "the SPPA is framed solely in the context of payment security by virtue of its location in Chapter 6, Title 26, entitled 'Payments to Contractors, Subcontractors, and Suppliers'"). Thus, we found "an implied private right of action by a subcontractor against the government exists under the SPPA."[10]

Specifically addressing the third-party beneficiary claim, the Court relied on the reasoning of the Seventh Circuit Court of Appeals in *A.E.I. Music Network, Inc. v. Bus. Computers, Inc.*, 290 F.3d 952 (7th Cir. 2002). In *A.E.I.*, the Seventh Circuit explained that the statutory bond requirement, which is similar to this state's, was a contractual term incorporated by the legislature. In creating the bond requirement, the Seventh Circuit reasoned the legislature intended public works construction contracts to protect subcontractors. *A.E.I.*, 290 F.3d at 955. Thus, the *A.E.I.* court held the subcontractor's claim as a third-party beneficiary sounded in common law as a claim for breach of contract. *Id.* at 957.

---

[10] In 2011, after a second appeal in the *Sloan* litigation, this Court modified its holding from *Sloan I*. *See Sloan Constr. Co. v. Southco Grassing, Inc. (Sloan II)*, 395 S.C. 164, 717 S.E.2d 603 (2011). In *Sloan II*, we held that the governmental entity did not owe a continuing duty to maintain the payment bond throughout the course of the project. However, because Respondents allege that the City failed to ensure that a payment bond was procured in the first instance, *Sloan II*'s holding does not impact this case.

We found *A.E.I.*'s analysis persuasive and stated:

> Because the legislature intended to protect contractors by creating bonding requirements, and because the subcontractors are the only ones with a financial stake in enforcing the bond requirements, subcontractors are direct third-party beneficiaries to the contract between a government entity and a general contractor to which the SPPA is applicable. *For this reason, the government may be liable to a subcontractor for breach of contract for failing to comply with the SPPA bonding requirements.*

Sloan I, 377 S.C. at 120, 659 S.E.2d at 165 (emphasis added).

The *Sloan I* Court did not address the subcontractor's negligence claim in the body of the opinion. However, in footnote five, which is the source of the apparent confusion in the current appeal, the Court stated:

> Although we find that the court of appeals incorrectly based its conclusion with respect to the SPPA on this issue on federal Miller Act jurisprudence, *we nevertheless agree that a claim for failure to enforce the bonding requirements of the SPPA is not properly brought pursuant to the Tort Claims Act because the Act does not act as a waiver of sovereign immunity when a governmental entity fails to enforce a statute.* *See* S.C. Code Ann. § 15–78–60(4) (2005). *See also Hawkins v. City of Greenville,* 358 S.C. 280, 292–93, 594 S.E.2d 557, 563–64 (Ct.App.2004) (noting that the South Carolina Tort Claims Act is only a limited waiver of sovereign immunity for tort claims against government entities and does not create new substantive causes of action). *Therefore, the Tort Claims Act is not relevant to the government's liability for failure to comply with a duty under the SPPA.*

Id. at 118, 659 S.E.2d at 164, n.5 (emphasis added).

We find footnote five is clear and presents no ambiguity. The TCA forecloses a tort action under the SPPA. Indeed, this Court must presume the legislature knew of and contemplated the TCA in enacting the SPPA. *See State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003) ("There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions

pursuant to the TCA and a breach of contract claim alleging SCDOT was obligated to it, as a third-party beneficiary to the contract between SCDOT and the contractor, to ensure that the contractor was properly bonded pursuant to the SPPA.

We held the SPPA is specifically applicable to subcontractors and suppliers on government projects and outlines a detailed bonding scheme that significantly expands the protections already afforded these parties. *Sloan I*, 377 S.C. at 114, 659 S.E.2d at 161. However, the Court noted the SPPA does not expressly provide for a private right of action between the subcontractor and the contracting government body. *Id.* at 114, 659 S.E.2d at 162. Nevertheless, the Court reasoned the "very title of the SPPA clearly indicates the [legislature] intended to provide stronger payment protection specifically for subcontractors and suppliers on government projects." After an analysis of the terms of the SPPA, we held "the legislature must have intended for those to whom the government owed the duty to be able to vindicate their rights under a statute enacted for their special benefit." *Id.* (noting "the SPPA is framed solely in the context of payment security by virtue of its location in Chapter 6, Title 26, entitled 'Payments to Contractors, Subcontractors, and Suppliers'"). Thus, we found "an implied private right of action by a subcontractor against the government exists under the SPPA." [10]

Specifically addressing the third-party beneficiary claim, the Court relied on the reasoning of the Seventh Circuit Court of Appeals in *A.E.I. Music Network, Inc. v. Bus. Computers, Inc.*, 290 F.3d 952 (7th Cir. 2002). In *A.E.I.*, the Seventh Circuit explained that the statutory bond requirement, which is similar to this state's, was a contractual term incorporated by the legislature. In creating the bond requirement, the Seventh Circuit reasoned the legislature intended public works construction contracts to protect subcontractors. *A.E.I.*, 290 F.3d at 955. Thus, the *A.E.I.* court held the subcontractor's claim as a third-party beneficiary sounded in common law as a claim for breach of contract. *Id.* at 957.

---

[10] In 2011, after a second appeal in the *Sloan* litigation, this Court modified its holding from *Sloan I*. *See Sloan Constr. Co. v. Southco Grassing, Inc. (Sloan II)*, 395 S.C. 164, 717 S.E.2d 603 (2011). In *Sloan II*, we held that the governmental entity did not owe a continuing duty to maintain the payment bond throughout the course of the project. However, because Respondents allege that the City failed to ensure that a payment bond was procured in the first instance, *Sloan II*'s holding does not impact this case.

We found *A.E.I.*'s analysis persuasive and stated:

> Because the legislature intended to protect contractors by creating bonding requirements, and because the subcontractors are the only ones with a financial stake in enforcing the bond requirements, subcontractors are direct third-party beneficiaries to the contract between a government entity and a general contractor to which the SPPA is applicable. *For this reason, the government may be liable to a subcontractor for breach of contract for failing to comply with the SPPA bonding requirements.*

Sloan I, 377 S.C. at 120, 659 S.E.2d at 165 (emphasis added).

The *Sloan I* Court did not address the subcontractor's negligence claim in the body of the opinion. However, in footnote five, which is the source of the apparent confusion in the current appeal, the Court stated:

> Although we find that the court of appeals incorrectly based its conclusion with respect to the SPPA on this issue on federal Miller Act jurisprudence, *we nevertheless agree that a claim for failure to enforce the bonding requirements of the SPPA is not properly brought pursuant to the Tort Claims Act because the Act does not act as a waiver of sovereign immunity when a governmental entity fails to enforce a statute.* *See* S.C. Code Ann. § 15–78–60(4) (2005). *See also Hawkins v. City of Greenville,* 358 S.C. 280, 292–93, 594 S.E.2d 557, 563–64 (Ct.App.2004) (noting that the South Carolina Tort Claims Act is only a limited waiver of sovereign immunity for tort claims against government entities and does not create new substantive causes of action). *Therefore, the Tort Claims Act is not relevant to the government's liability for failure to comply with a duty under the SPPA.*

Id. at 118, 659 S.E.2d at 164, n.5 (emphasis added).

We find footnote five is clear and presents no ambiguity. The TCA forecloses a tort action under the SPPA. Indeed, this Court must presume the legislature knew of and contemplated the TCA in enacting the SPPA. *See State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003) ("There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions

construing that legislation when later statutes are enacted concerning related subjects."). The TCA is the sole and exclusive remedy for tort actions against the government. *See* S.C. Code Ann. § 15-78-200 ("Notwithstanding any other provisions of law, [the TCA] is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty."). And, subsection (4) of section 15-78-60 makes clear that the government is not liable in tort for its failure to enforce a statute. *See also Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 290, 628 S.E.2d 496, 502 (Ct. App. 2006) ("The [TCA] governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees." (quoting *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 280, 607 S.E.2d 711, 714 (Ct. App. 2005))). Footnote five in *Sloan I* reinforces these provisions and plainly excludes a tort action under the SPPA.

Finally, after expressly stating that "the government may be liable to a subcontractor *for breach of contract* for failing to comply with the SPPA bonding requirements[,]" we addressed the extent of governmental liability under the SPPA. *Sloan I*, 377 S.C. at 120, 659 S.E.2d at 165(emphasis added). The Court observed that "in a *tort or a contract* action arising under the SPPA, the government entity's liability is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment." *Id.* at 121, 659 S.E.2d at 165-66 (emphasis added). We believe the superfluous use of the term "tort" here is the reason for the lingering confusion whether a violation of the SPPA will support a tort cause of action.

In this case, the court of appeals found that the Respondents could proceed against the City on a tort cause of action based on our conclusion that "the SPPA establishes both an affirmative duty on the governmental body to require payment bonding, as well as a standard of care for overseeing the issuance of a proper payment bond." The court of appeals held such language "clearly suggested a tort remedy for breach of the duty created pursuant to section 29-6-250 of the SPPA."

B.

Both parties contend the court of appeals was correct in finding Respondents' cause of action for violation of the SPPA was a tort. The City argues a tort cause of action is governed by, and ultimately barred by, the TCA. Conversely, Respondents contend the court of appeals properly held the SPPA permits a tort

cause of action, notwithstanding the TCA. We reject both contentions, for the SPPA does not permit a private cause of action sounding in tort.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." *McKnight*, 352 S.C. at 648, 576 S.E.2d at 175. "It is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would . . . expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first." *Hodges*, 341 S.C. at 88-89, 533 S.E.2d at 583.

We reject the suggestion that the legislature intended to provide a tort remedy under the SPPA. First, the text of the pertinent sections of the SPPA sounds in contract, not tort. *Sloan I* adopted the reasoning of *A.E.I.*, which held the bonding requirement is incorporated into public works construction contracts and a subcontractor's claim sounded in common law as a claim for breach of contract. And this Court's definitive holding in *Sloan I* could not have been clearer: "For this reason, the government may be liable to a subcontractor for breach of contract for failing to comply with the SPPA bonding requirements." *Sloan I*, 377 S.C. at 120, 659 S.E.2d at 165.

Finally, it is true that *Sloan I*, in the section concerning relief, referenced a "*tort or contract* action arising under the SPPA . . . ." However, we now clarify that no tort action arises under the SPPA. Therefore, we reverse the court of appeals with respect to its holding and find that the SPPA does not provide for a tort cause of action against a governmental entity.

C.

The City next contends the court of appeals erred in reversing the circuit court's grant of summary judgment as to the claim of third-party beneficiary breach of contract. Specifically, the City contends the law of the case doctrine forecloses a third-party beneficiary claim, and even assuming it does not, Respondents did not sufficiently plead a third-party beneficiary breach of contract action in their Amended Complaint. We disagree and affirm the court of appeals in both respects.

construing that legislation when later statutes are enacted concerning related subjects."). The TCA is the sole and exclusive remedy for tort actions against the government. *See* S.C. Code Ann. § 15-78-200 ("Notwithstanding any other provisions of law, [the TCA] is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty."). And, subsection (4) of section 15-78-60 makes clear that the government is not liable in tort for its failure to enforce a statute. *See also Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 290, 628 S.E.2d 496, 502 (Ct. App. 2006) ("The [TCA] governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees." (quoting *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 280, 607 S.E.2d 711, 714 (Ct. App. 2005))). Footnote five in *Sloan I* reinforces these provisions and plainly excludes a tort action under the SPPA.

Finally, after expressly stating that "the government may be liable to a subcontractor *for breach of contract* for failing to comply with the SPPA bonding requirements[,]" we addressed the extent of governmental liability under the SPPA. *Sloan I*, 377 S.C. at 120, 659 S.E.2d at 165(emphasis added). The Court observed that "in a *tort or a contract* action arising under the SPPA, the government entity's liability is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment." *Id.* at 121, 659 S.E.2d at 165-66 (emphasis added). We believe the superfluous use of the term "tort" here is the reason for the lingering confusion whether a violation of the SPPA will support a tort cause of action.

In this case, the court of appeals found that the Respondents could proceed against the City on a tort cause of action based on our conclusion that "the SPPA establishes both an affirmative duty on the governmental body to require payment bonding, as well as a standard of care for overseeing the issuance of a proper payment bond." The court of appeals held such language "clearly suggested a tort remedy for breach of the duty created pursuant to section 29-6-250 of the SPPA."

B.

Both parties contend the court of appeals was correct in finding Respondents' cause of action for violation of the SPPA was a tort. The City argues a tort cause of action is governed by, and ultimately barred by, the TCA. Conversely, Respondents contend the court of appeals properly held the SPPA permits a tort

cause of action, notwithstanding the TCA. We reject both contentions, for the SPPA does not permit a private cause of action sounding in tort.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." *McKnight*, 352 S.C. at 648, 576 S.E.2d at 175. "It is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would . . . expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first." *Hodges,* 341 S.C. at 88-89, 533 S.E.2d at 583.

We reject the suggestion that the legislature intended to provide a tort remedy under the SPPA. First, the text of the pertinent sections of the SPPA sounds in contract, not tort. *Sloan I* adopted the reasoning of *A.E.I.*, which held the bonding requirement is incorporated into public works construction contracts and a subcontractor's claim sounded in common law as a claim for breach of contract. And this Court's definitive holding in *Sloan I* could not have been clearer: "For this reason, the government may be liable to a subcontractor for breach of contract for failing to comply with the SPPA bonding requirements." *Sloan I*, 377 S.C. at 120, 659 S.E.2d at 165.

Finally, it is true that *Sloan I*, in the section concerning relief, referenced a "*tort or contract* action arising under the SPPA . . . ." However, we now clarify that no tort action arises under the SPPA. Therefore, we reverse the court of appeals with respect to its holding and find that the SPPA does not provide for a tort cause of action against a governmental entity.

C.

The City next contends the court of appeals erred in reversing the circuit court's grant of summary judgment as to the claim of third-party beneficiary breach of contract. Specifically, the City contends the law of the case doctrine forecloses a third-party beneficiary claim, and even assuming it does not, Respondents did not sufficiently plead a third-party beneficiary breach of contract action in their Amended Complaint. We disagree and affirm the court of appeals in both respects.

i.

An unappealed ruling is the law of the case and requires affirmance. *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 432, 699 S.E.2d 687, 691 (2010). Certainly,

> The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right. . . . Ordinarily an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits.

Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989) (quoting 21 C.J.S. Courts Section 195 at 335 (1940)). This State has a long-standing rule that one judge of the same court cannot overrule another. *Charleston Ctny. Dep't of Soc. Servs. v. Father*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995).

We find the orders of Judge John and Judge Short are not the law of the case insofar as the Amended Complaint is concerned. Neither Judge Short nor Judge John specifically ruled on the issue of whether Respondents pled a third-party beneficiary breach of contract claim. Moreover, the City's motions to strike did not require the trial court to determine whether a breach of contract action had been pled.[11] Therefore, we hold the law of the case doctrine does not foreclose Respondents' third-party beneficiary contract claim.

ii.

"Pleadings are to be liberally construed 'to do substantial justice to all parties.'" *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000) (quoting Rule 8(f), SCRCP). "It is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial." *S.C. Nat'l Bank v. Joyner*, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct. App. 1986); *see also Langston v. Niles*, 265 S.C. 445,

---

[11] Furthermore, the two orders merely granted the City's motion to strike with regard to attorney's fees and prejudgment interest pursuant to section 15-7-300 and should not be viewed beyond their intended and limited purpose.

455, 219 S.E.2d 829, 833 (1975) ("The purpose of pleadings is to place the adversary on notice as to what the issues are.").

We find Respondents' Amended Complaint pled a third-party beneficiary contract claim. In the "Facts" section of the Amended Complaint, Respondents allege they were "third-party beneficiaries" of the City's contract with Gilbert because the bonding requirements are "legislatively mandated contractual obligations" that were incorporated into the contract as a matter of law. The First Cause of Action incorporated the allegations within the "Facts" section and is entitled "Violation of S.C. Code Ann. section 29-6-250." While the word "contract" does not appear in the first cause of action, neither do the words "tort" or "negligence." A fair reading of the Amended Complaint leads to the reasonable conclusion that the first cause of action is one for breach of contract. Moreover, in light of our holding in section B, *infra*, the only claim that can be asserted under section 29-6-250 is a contract claim. Thus, we hold the Amended Complaint sufficiently put the City on notice that Respondents were proceeding on a third-party beneficiary claim theory.

Therefore, we affirm the court of appeals on the issues relating to Respondents' third-party beneficiary breach of contract claim.

D.

The City also contends the court of appeals erred in reversing summary judgment as to Respondents' quantum meruit claim. We agree. Because there is no dispute as to the existence or validity of the underlying contract at issue, which is fundamentally at odds with the quasi-contractual theory of quantum meruit, we reverse the court of appeals' holding with respect to this claim. *See Sloan I*, 377 S.C. 108, 659 S.E.2d 158 (holding the SPPA's bonding requirements are incorporated into all public works construction contracts); *Strickland v. Coastal Design Assocs.*, 294 S.C. 421, 424, 365 S.E.2d 226, 228 (Ct. App. 1987) ("The law is well settled in this nation that where an express contract has been rescinded or abandoned, one furnishing labor or materials in part performance may recover in quantum meruit *unless the original contract remains in force*." (emphasis added)). The grant of summary judgment in favor of the City on the quantum meruit claim is reinstated.

i.

An unappealed ruling is the law of the case and requires affirmance. *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 432, 699 S.E.2d 687, 691 (2010). Certainly,

> The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right. . . . Ordinarily an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits.

Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989) (quoting 21 C.J.S. Courts Section 195 at 335 (1940)). This State has a long-standing rule that one judge of the same court cannot overrule another. *Charleston Ctny. Dep't of Soc. Servs. v. Father*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995).

We find the orders of Judge John and Judge Short are not the law of the case insofar as the Amended Complaint is concerned. Neither Judge Short nor Judge John specifically ruled on the issue of whether Respondents pled a third-party beneficiary breach of contract claim. Moreover, the City's motions to strike did not require the trial court to determine whether a breach of contract action had been pled.[11] Therefore, we hold the law of the case doctrine does not foreclose Respondents' third-party beneficiary contract claim.

ii.

"Pleadings are to be liberally construed 'to do substantial justice to all parties.'" *Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000) (quoting Rule 8(f), SCRCP). "It is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial." *S.C. Nat'l Bank v. Joyner*, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct. App. 1986); *see also Langston v. Niles*, 265 S.C. 445,

---

[11] Furthermore, the two orders merely granted the City's motion to strike with regard to attorney's fees and prejudgment interest pursuant to section 15-7-300 and should not be viewed beyond their intended and limited purpose.

455, 219 S.E.2d 829, 833 (1975) ("The purpose of pleadings is to place the adversary on notice as to what the issues are.").

We find Respondents' Amended Complaint pled a third-party beneficiary contract claim. In the "Facts" section of the Amended Complaint, Respondents allege they were "third-party beneficiaries" of the City's contract with Gilbert because the bonding requirements are "legislatively mandated contractual obligations" that were incorporated into the contract as a matter of law. The First Cause of Action incorporated the allegations within the "Facts" section and is entitled "Violation of S.C. Code Ann. section 29-6-250." While the word "contract" does not appear in the first cause of action, neither do the words "tort" or "negligence." A fair reading of the Amended Complaint leads to the reasonable conclusion that the first cause of action is one for breach of contract. Moreover, in light of our holding in section B, *infra*, the only claim that can be asserted under section 29-6-250 is a contract claim. Thus, we hold the Amended Complaint sufficiently put the City on notice that Respondents were proceeding on a third-party beneficiary claim theory.

Therefore, we affirm the court of appeals on the issues relating to Respondents' third-party beneficiary breach of contract claim.

D.

The City also contends the court of appeals erred in reversing summary judgment as to Respondents' quantum meruit claim. We agree. Because there is no dispute as to the existence or validity of the underlying contract at issue, which is fundamentally at odds with the quasi-contractual theory of quantum meruit, we reverse the court of appeals' holding with respect to this claim. *See Sloan I*, 377 S.C. 108, 659 S.E.2d 158 (holding the SPPA's bonding requirements are incorporated into all public works construction contracts); *Strickland v. Coastal Design Assocs.*, 294 S.C. 421, 424, 365 S.E.2d 226, 228 (Ct. App. 1987) ("The law is well settled in this nation that where an express contract has been rescinded or abandoned, one furnishing labor or materials in part performance may recover in quantum meruit *unless the original contract remains in force*." (emphasis added)). The grant of summary judgment in favor of the City on the quantum meruit claim is reinstated.

E.

As a final matter, the City contends summary judgment should have been affirmed in any event because it has satisfied its obligation under the SPPA by paying the remaining balance on its contract with Gilbert to several of the unpaid subcontractors. Thus, the City argues no remand is necessary. We disagree.

Sloan I limits the City's liability to the remaining unpaid balance on the contract with Gilbert at the time the City received notice of Gilbert's nonpayment. 377 S.C. at 120, 659 S.E.2d at 165-66. The record is unclear as to the City's methodology of payment disbursement, and there are genuine issues of material fact regarding the date upon which the City learned of Gilbert's nonpayment, as well as the amount remaining unpaid at that time. Because factual questions are in dispute, summary resolution would be premature.[12]

IV.

For the foregoing reasons, the court of appeals is affirmed in part and reversed in part, and this matter is remanded to the circuit court for resolution of the remaining issues consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

---

[12] In light of our holdings, remand is limited to liability and damages based only on the surviving third-party beneficiary breach of contract claim.

E.

As a final matter, the City contends summary judgment should have been affirmed in any event because it has satisfied its obligation under the SPPA by paying the remaining balance on its contract with Gilbert to several of the unpaid subcontractors. Thus, the City argues no remand is necessary. We disagree.

Sloan I limits the City's liability to the remaining unpaid balance on the contract with Gilbert at the time the City received notice of Gilbert's nonpayment. 377 S.C. at 120, 659 S.E.2d at 165-66. The record is unclear as to the City's methodology of payment disbursement, and there are genuine issues of material fact regarding the date upon which the City learned of Gilbert's nonpayment, as well as the amount remaining unpaid at that time. Because factual questions are in dispute, summary resolution would be premature.[12]

IV.

For the foregoing reasons, the court of appeals is affirmed in part and reversed in part, and this matter is remanded to the circuit court for resolution of the remaining issues consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

---

[12] In light of our holdings, remand is limited to liability and damages based only on the surviving third-party beneficiary breach of contract claim.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shirley's Iron Works, Inc., and Tindall Corporation, Appellants,

v.

City of Union, South Carolina, Gilbert Group, LLC and William E. Gilbert, Respondents.

Appeal From Union County
John C. Few, Circuit Court Judge

Opinion No. 4637
Submitted October 1, 2009 – Filed December 9, 2009
Withdrawn, Substituted and Refiled on February 11, 2010
Withdrawn, Substituted and Refiled May 20, 2010

REVERSED IN PART AND AFFIRMED IN PART

Boyd Benjamin Nicholson, N. Ward Lambert and R. Patrick Smith, all of Greenville; for Appellants.

Andrew Lindemann, and Gilbert Bagnell, both of Columbia and William Whitney, Jr., of Union; for Respondents.

WILLIAMS, J.: In this case, we must determine whether the circuit court erred in granting summary judgment in favor of the City of Union (the City) as to Shirley's Iron Works, Inc. and Tindall Corporation's (Appellants) claims. We reverse in part and affirm in part.

FACTS/PROCEDURAL HISTORY

In 2000, the South Carolina Legislature enacted the Subcontractors' and Suppliers' Payment Protection Act (SPPA). S.C. Code Ann. §§ 29-6-210 to -290 (Supp. 2008). The SPPA states, in pertinent part:

> (1) When a governmental body is a party to a contract to improve real property, and the contract is for a sum in excess of fifty thousand dollars, the owner of the property shall require the contractor to provide a labor and material payment bond

in the full amount of the contract.

. . .

(3) For the purposes of any contract covered by the provisions of this section, it is the duty of the entity contracting for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form.

(4) "governmental body" means . . . all local political subdivisions.

S.C. Code Ann. § 29-6-250 (Supp. 2008) (emphasis added).

On or about February 26, 2002, the City issued a request to general contractors for proposals for the design and construction of a building (the Project). The City chose the proposal of Gilbert Group, LLC (Gilbert). On June 4, 2002, the City and Gilbert entered into a general contract[1] (the Contract) to build the Project. Gilbert, in turn, entered into various subcontracts, including agreements with Shirley's Iron Works, Inc. and Tindall Corporation (collectively the Appellants). However, the City did not require Gilbert to furnish a payment bond for the Contract. The Appellants claim they performed their work under their subcontracts, but Gilbert has still not paid them in full.

On June 11, 2003, the Appellants filed a complaint against the City in which they alleged the City failed to obtain a payment bond from Gilbert as required by section 29-6-250. In response, the City filed an answer and third-party complaint on July 15, 2003. In their answer, the City denied the allegations in the complaint and presented a third-party complaint against Gilbert and William E. Gilbert[2] for breach of contract, breach of contract accompanied by a fraudulent act, negligence, and fraud.

In an order dated April 19, 2004, Judge Paul E. Short granted the City's motion to redesignate Gilbert and William E. Gilbert as defendants because they, along with the City, were "joint tortfeasors whose alleged acts combined and concurred to cause the harm for which the Plaintiffs seek to recover." In the order, the circuit court held, "the Plaintiffs' cause of action against the City sounds in tort," and was, therefore, "necessarily brought pursuant to the South Carolina Tort Claims Act . . . ." (SCTCA). That same day, the circuit court granted the City's motion to strike the Appellants' prayer for recovery of attorneys' fees. In that order, Judge Short again held the Appellants had alleged a cause of action that sounded in tort. The Appellants did not appeal either of Judge Short's rulings.

On August 17, 2005, the Appellants filed an amended complaint against the City, Gilbert, and William E. Gilbert. In the amended complaint, the Appellants alleged Gilbert had failed to pay all the monies owed to them under their respective contracts. They also alleged the City failed to secure a payment bond from Gilbert, as required by section 29-6-250. The Appellants asserted causes of action for violation of section 29-6-250, violation of section 27-1-15 of the South Carolina Code, negligence, quantum meruit, and attorneys' fees. The Appellants also alleged for the first time in the amended complaint they were third-party beneficiaries of the Contract because the bonding requirements of section 29-6-250 are "legislatively mandated contractual obligations" that were incorporated into the Contract by operation of law.

On December 12, 2005, Judge Steven H. John granted the City's motion to strike the Appellants' causes of action for attorneys' fees and prejudgment interest as set forth in the

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shirley's Iron Works, Inc., and Tindall Corporation, Appellants,

v.

City of Union, South Carolina, Gilbert Group, LLC and William E. Gilbert, Respondents.

Appeal From Union County
John C. Few, Circuit Court Judge

Opinion No. 4637
Submitted October 1, 2009 – Filed December 9, 2009
Withdrawn, Substituted and Refiled on February 11, 2010
Withdrawn, Substituted and Refiled May 20, 2010

REVERSED IN PART AND AFFIRMED IN PART

Boyd Benjamin Nicholson, N. Ward Lambert and R. Patrick Smith, all of Greenville; for Appellants.

Andrew Lindemann, and Gilbert Bagnell, both of Columbia and William Whitney, Jr., of Union; for Respondents.

WILLIAMS, J.: In this case, we must determine whether the circuit court erred in granting summary judgment in favor of the City of Union (the City) as to Shirley's Iron Works, Inc. and Tindall Corporation's (Appellants) claims. We reverse in part and affirm in part.

FACTS/PROCEDURAL HISTORY

In 2000, the South Carolina Legislature enacted the Subcontractors' and Suppliers' Payment Protection Act (SPPA). S.C. Code Ann. §§ 29-6-210 to -290 (Supp. 2008). The SPPA states, in pertinent part:

> (1) When a governmental body is a party to a contract to improve real property, and the contract is for a sum in excess of fifty thousand dollars, the owner of the property shall require the contractor to provide a labor and material payment bond

in the full amount of the contract.

. . .

(3) For the purposes of any contract covered by the provisions of this section, it is the duty of the entity contracting for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form.

(4) "governmental body" means . . . all local political subdivisions.

S.C. Code Ann. § 29-6-250 (Supp. 2008) (emphasis added).

On or about February 26, 2002, the City issued a request to general contractors for proposals for the design and construction of a building (the Project). The City chose the proposal of Gilbert Group, LLC (Gilbert). On June 4, 2002, the City and Gilbert entered into a general contract[1] (the Contract) to build the Project. Gilbert, in turn, entered into various subcontracts, including agreements with Shirley's Iron Works, Inc. and Tindall Corporation (collectively the Appellants). However, the City did not require Gilbert to furnish a payment bond for the Contract. The Appellants claim they performed their work under their subcontracts, but Gilbert has still not paid them in full.

On June 11, 2003, the Appellants filed a complaint against the City in which they alleged the City failed to obtain a payment bond from Gilbert as required by section 29-6-250. In response, the City filed an answer and third-party complaint on July 15, 2003. In their answer, the City denied the allegations in the complaint and presented a third-party complaint against Gilbert and William E. Gilbert[2] for breach of contract, breach of contract accompanied by a fraudulent act, negligence, and fraud.

In an order dated April 19, 2004, Judge Paul E. Short granted the City's motion to redesignate Gilbert and William E. Gilbert as defendants because they, along with the City, were "joint tortfeasors whose alleged acts combined and concurred to cause the harm for which the Plaintiffs seek to recover." In the order, the circuit court held, "the Plaintiffs' cause of action against the City sounds in tort," and was, therefore, "necessarily brought pursuant to the South Carolina Tort Claims Act . . . ." (SCTCA). That same day, the circuit court granted the City's motion to strike the Appellants' prayer for recovery of attorneys' fees. In that order, Judge Short again held the Appellants had alleged a cause of action that sounded in tort. The Appellants did not appeal either of Judge Short's rulings.

On August 17, 2005, the Appellants filed an amended complaint against the City, Gilbert, and William E. Gilbert. In the amended complaint, the Appellants alleged Gilbert had failed to pay all the monies owed to them under their respective contracts. They also alleged the City failed to secure a payment bond from Gilbert, as required by section 29-6-250. The Appellants asserted causes of action for violation of section 29-6-250, violation of section 27-1-15 of the South Carolina Code, negligence, quantum meruit, and attorneys' fees. The Appellants also alleged for the first time in the amended complaint they were third-party beneficiaries of the Contract because the bonding requirements of section 29-6-250 are "legislatively mandated contractual obligations" that were incorporated into the Contract by operation of law.

On December 12, 2005, Judge Steven H. John granted the City's motion to strike the Appellants' causes of action for attorneys' fees and prejudgment interest as set forth in the

amended complaint. In his order, Judge John found because Judge Short ruled the Appellants' claims sounded in tort, and the Appellants had not appealed Judge Short's order, that ruling became the law of the case. The Appellants did not appeal Judge John's order.

Both parties moved for summary judgment, and the circuit court heard the motions on January 23, 2006. After the hearing, but before the circuit court ruled on the motions, this court issued its opinion in Sloan Construction Co. v. Southco Grassing, Inc., 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006) on April 24, 2006. In that case, this court held South Carolina Code sections 29-6-250 and 57-5-1660(a)(2) do not provide a subcontractor a private right of action against a governmental entity for failure to ensure a contractor is properly bonded. Id. In light of this court's holding in Sloan Construction, the circuit court granted summary judgment in favor of the City as to the Appellants' tort, third-party beneficiary breach of contract,[3] and quantum meruit claims on September 24, 2007. The circuit court did not rule on the Appellants' cause of action for attorneys' fees.

On March 24, 2008, however, our supreme court reversed this court's holding in Sloan Construction. See Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008). While acknowledging "the SPPA does not expressly provide for a right of action between the subcontractor and the contracting government body," the supreme court nevertheless held an implied right of action for subcontractors exists under the SPPA because the Legislature "must have intended for [suppliers and subcontractors] to be able to vindicate their rights under a statute enacted for their special benefit." Id. at 114-16, 659 S.E.2d at 162.

In a footnote, the supreme court held although it did not agree with this court's analysis of the SPPA, it nevertheless agreed:

> "[A] claim for failure to enforce the bonding requirements of the SPPA is not properly brought pursuant to the [(SCTCA)] because the [SCTCA] does not act as a waiver of sovereign immunity when a governmental entity fails to enforce a statute. [citations omitted]. Therefore, the [SCTCA] is not relevant to the government's liability for failure to comply with a duty under the SPPA."

Id. at 118 n.5, 659 S.E.2d at 164 n.5 (citing S.C. Code Ann. § 15-78-60(4) (2005)) (emphasis added).

The supreme court further held the government's failure to comply with the SPPA's bond requirements also gives rise to a third-party beneficiary breach of contract claim by the subcontractor against the government entity. Id. at 118, 659 S.E.2d at 164. In arriving at this conclusion, the Court adopted the reasoning of the Seventh Circuit in A.E.I. Music Network v. Bus. Computers, Inc., 290 F.3d 952 (7th Cir. 2002). At issue in that case was whether the bond requirement of the Illinois Bond Act gave rise to a third-party beneficiary breach of contract action against a public entity for failing to acquire bonds from contractors on public construction contracts. Id. at 953-54. The Illinois court held whereas the existence of a direct third-party beneficiary to a contract is normally determined by the intentions of the actual contracting parties, the relevant intentions in cases falling under the Illinois Bond Act were those of the Illinois Legislature alone. Id. at 955-56. Thus, because the Illinois Legislature intended the bond requirement term in the Illinois Bond Act to protect subcontractors, the bond requirement became a term in every construction contract involving a public entity. Id. at 955. In view of A.E.I. Music, our Supreme Court concluded because our Legislature intended the SPPA to bestow a special benefit to subcontractors, the bond requirements of the SPPA are,

therefore, incorporated into all construction contracts governed by the SPPA. Sloan Constr., 377 S.C. at 120, 659 S.E.2d at 165.

Finally, having found section 29-6-250 gives rise to a private right of action against the government, the court held the government's liability for failure to comply with the SPPA's bonding requirements was not open-ended. Id. at 121, 659 S.E.2d 165. Rather, the government's liability would be limited to the remaining balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's non-payment. Id. at 121, 659 S.E.2d at 165-66.

In light of our supreme court's decision in Sloan Construction, the Appellants argue the circuit court erred in granting the City's motion for summary judgment as to its claims in tort, breach of contract, quantum meruit, and violation of section 27-1-15. This appeal followed.

LAW/ANALYSIS

I. Standard of Review

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." Bovain v. Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Rule 56(c), SCRCP, provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id. (quoting Rule 56(c), SCRCP). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock, 381 S.C. at 330, 673 S.E.2d at 803.

II.Motions for Summary Judgment

1.Tort Claim for Violation of section 29-6-250

The City argues summary judgment as to the Appellants' tort cause of action should be affirmed because although the supreme court recognized a private right of action for failure to enforce the bonding requirements of the SPPA in Sloan Construction, if such a claim were brought as a tort, it would be barred by the SCTCA. We disagree.

The SCTCA governs all tort claims against governmental entities and is the exclusive remedy available in an action against a governmental entity or its employees. Flateau v. Harrison, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct. App. 2003). The SCTCA waives sovereign immunity "while also providing specific, enumerated exceptions limiting the liability of the state and its political subdivisions in certain circumstances." Wells v. City of Lynchburg, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998). One such exception to the waiver of immunity is found in section 15-78-60(4), which states the government is not liable for loss resulting from the

amended complaint. In his order, Judge John found because Judge Short ruled the Appellants' claims sounded in tort, and the Appellants had not appealed Judge Short's order, that ruling became the law of the case. The Appellants did not appeal Judge John's order.

Both parties moved for summary judgment, and the circuit court heard the motions on January 23, 2006. After the hearing, but before the circuit court ruled on the motions, this court issued its opinion in Sloan Construction Co. v. Southco Grassing, Inc., 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006) on April 24, 2006. In that case, this court held South Carolina Code sections 29-6-250 and 57-5-1660(a)(2) do not provide a subcontractor a private right of action against a governmental entity for failure to ensure a contractor is properly bonded. Id. In light of this court's holding in Sloan Construction, the circuit court granted summary judgment in favor of the City as to the Appellants' tort, third-party beneficiary breach of contract,[3] and quantum meruit claims on September 24, 2007. The circuit court did not rule on the Appellants' cause of action for attorneys' fees.

On March 24, 2008, however, our supreme court reversed this court's holding in Sloan Construction. See Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008). While acknowledging "the SPPA does not expressly provide for a right of action between the subcontractor and the contracting government body," the supreme court nevertheless held an implied right of action for subcontractors exists under the SPPA because the Legislature "must have intended for [suppliers and subcontractors] to be able to vindicate their rights under a statute enacted for their special benefit." Id. at 114-16, 659 S.E.2d at 162.

In a footnote, the supreme court held although it did not agree with this court's analysis of the SPPA, it nevertheless agreed:

> "[A] claim for failure to enforce the bonding requirements of the SPPA is not properly brought pursuant to the [(SCTCA)] because the [SCTCA] does not act as a waiver of sovereign immunity when a governmental entity fails to enforce a statute. [citations omitted]. Therefore, the [SCTCA] is not relevant to the government's liability for failure to comply with a duty under the SPPA."

Id. at 118 n.5, 659 S.E.2d at 164 n.5 (citing S.C. Code Ann. § 15-78-60(4) (2005)) (emphasis added).

The supreme court further held the government's failure to comply with the SPPA's bond requirements also gives rise to a third-party beneficiary breach of contract claim by the subcontractor against the government entity. Id. at 118, 659 S.E.2d at 164. In arriving at this conclusion, the Court adopted the reasoning of the Seventh Circuit in A.E.I. Music Network v. Bus. Computers, Inc., 290 F.3d 952 (7th Cir. 2002). At issue in that case was whether the bond requirement of the Illinois Bond Act gave rise to a third-party beneficiary breach of contract action against a public entity for failing to acquire bonds from contractors on public construction contracts. Id. at 953-54. The Illinois court held whereas the existence of a direct third-party beneficiary to a contract is normally determined by the intentions of the actual contracting parties, the relevant intentions in cases falling under the Illinois Bond Act were those of the Illinois Legislature alone. Id. at 955-56. Thus, because the Illinois Legislature intended the bond requirement term in the Illinois Bond Act to protect subcontractors, the bond requirement became a term in every construction contract involving a public entity. Id. at 955. In view of A.E.I. Music, our Supreme Court concluded because our Legislature intended the SPPA to bestow a special benefit to subcontractors, the bond requirements of the SPPA are,

therefore, incorporated into all construction contracts governed by the SPPA. Sloan Constr., 377 S.C. at 120, 659 S.E.2d at 165.

Finally, having found section 29-6-250 gives rise to a private right of action against the government, the court held the government's liability for failure to comply with the SPPA's bonding requirements was not open-ended. Id. at 121, 659 S.E.2d 165. Rather, the government's liability would be limited to the remaining balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's non-payment. Id. at 121, 659 S.E.2d at 165-66.

In light of our supreme court's decision in Sloan Construction, the Appellants argue the circuit court erred in granting the City's motion for summary judgment as to its claims in tort, breach of contract, quantum meruit, and violation of section 27-1-15. This appeal followed.

LAW/ANALYSIS

I. Standard of Review

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." Bovain v. Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Rule 56(c), SCRCP, provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id. (quoting Rule 56(c), SCRCP). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock, 381 S.C. at 330, 673 S.E.2d at 803.

II.Motions for Summary Judgment

1.Tort Claim for Violation of section 29-6-250

The City argues summary judgment as to the Appellants' tort cause of action should be affirmed because although the supreme court recognized a private right of action for failure to enforce the bonding requirements of the SPPA in Sloan Construction, if such a claim were brought as a tort, it would be barred by the SCTCA. We disagree.

The SCTCA governs all tort claims against governmental entities and is the exclusive remedy available in an action against a governmental entity or its employees. Flateau v. Harrison, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct. App. 2003). The SCTCA waives sovereign immunity "while also providing specific, enumerated exceptions limiting the liability of the state and its political subdivisions in certain circumstances." Wells v. City of Lynchburg, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998). One such exception to the waiver of immunity is found in section 15-78-60(4), which states the government is not liable for loss resulting from the

government's failure to enforce a statute. S.C. Code Ann. § 15-78-60(4) (2005).

The City argues summary judgment should be affirmed because the Appellants' claims sound in tort and are, therefore, barred under the doctrine of sovereign immunity. In support of this position, the City cites footnote 5 in Sloan Construction, which states: "[A] claim for failure to enforce the bonding requirements of the SPPA is not properly brought pursuant to the [SCTCA] because the [SCTCA] does not act as a waiver of sovereign immunity when a governmental entity fails to enforce a statute." 377 S.C. at 118 n.5, 659 S.E.2d at 164 n.5 (citing S.C. Code Ann. § 15-78-60(4) (2005)). The City interprets footnote 5 as saying if a claim for violation of section 29-6-250 is brought as a tort, it is barred by the SCTCA. Thus, because Appellants' claims were brought in tort, their claims are barred as a matter of law.

The Appellants, on the other hand, argue section 29-6-250 creates an affirmative duty on the government, and the SCTCA does not protect the government from liability for breach of that duty. In support of this, they cite to the latter portion of footnote 5, which states, "Therefore, the [SCTCA] is not relevant to the government's liability for failure to comply with a duty under the SPPA." Id.

We believe the Appellants' interpretation is correct. Footnote 5 was merely clarifying that while there exists a private right of action under the SPPA, it would be improper to assert that right by bringing a claim pursuant to the SCTCA for failure to enforce a statute because such claims are clearly barred under the SCTCA. Rather, the claim should be brought under the SPPA as a tort claim in negligence for breach of the duty created by section 29-6-250. Because the Appellants' tort claim alleges negligence arising out of the City's breach of its duty to require Gilbert to provide a bond, the Appellants may proceed under section 29-6-250.

A review of the Sloan Construction opinion supports the conclusion that a claim for violation of section 29-6-250 can be brought as a tort. As noted by the Supreme Court, the SPPA establishes both an affirmative duty on the governmental body to require payment bonding, as well as a standard of care for overseeing the issuance of a proper payment bond. Sloan Constr., 377 S.C. at 115-116, 659 S.E.2d at 162 (citing to S.C. Code Ann. § 29-6-250 and providing "it is the duty of the entity contracting for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form"). Such language clearly suggests a tort remedy for breach of the duty created pursuant to section 29-6-250 of the SPPA. See Troutman v. Facetglas, Inc., 281 S.C. 598, 601, 316 S.E.2d 424, 426 (Ct. App. 1984) ("The elements of a tort are (1) duty; (2) breach of that duty; (3) proximate causation; and (4) injury.").

Furthermore, the supreme court stated in Sloan Construction, "[W]e hold that in a tort or contract action arising under the SPPA, the government's liability is limited to the unpaid balance on the contract." 377 S.C. at 121, 659 S.E.2d at 166-67 (emphasis added). The court's holding clearly contemplates the possibility of claims being brought under the SPPA in tort or contract. In sum, because the Appellants' claim was brought under section 29-6-250 as a tort, it was properly asserted according to the supreme court's holding in Sloan Construction.

Accordingly, we reverse the circuit court's grant of summary judgment as to the Appellants' tort cause of action.

2. Third-Party Beneficiary Breach of Contract

The Appellants argue the circuit court's grant of summary judgment as to their third-party beneficiary breach of contract claim should be reversed in light of our supreme court's decision in Sloan Construction. Although the City concedes Sloan Construction establishes that the bonding requirements under the SPPA give rise to a private right of action for subcontractors for a third-party beneficiary breach of contract claim, the City presents two arguments as to why the circuit court's grant of summary judgment should be affirmed. We find both arguments to be without merit.

First, the City argues the Appellants never properly alleged a third-party beneficiary breach of contract claim in their amended complaint. We disagree.

"The purpose of a pleading is to put the adversary on notice as to what the issues are." Langston v. Niles, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975). To ensure substantial justice to the parties, pleadings must be liberally construed. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000). In determining whether to grant summary judgment, pleadings and documents on file must be liberally construed in favor of the non-moving party. Bates v. City of Columbia, 301 S.C. 320, 321, 391 S.E.2d 733, 733 (Ct. App. 1990). In construing a complaint or responsive pleading, the court must review the entire pleading. Doe ex rel. Legal Guardian v. Barnwell School Dist. 45, 369 S.C. 659, 663, 633 S.E.2d 518, 520 (Ct. App. 2006); seeSmith v. Nelson, 83 S.C. 294, 300, 65 S.E. 261, 263 (1909) (construing the "complaint upon the whole").

The Appellants alleged in the "Facts" section of their amended complaint: "[Appellants] are third-party beneficiaries of [the City]'s Agreement with Gilbert" because the terms of section 29-6-250 are intended to benefit subcontractors and are, therefore, incorporated into the Contract by operation of law. Appellants further discussed this theory under the section of the amended complaint discussing their cause of action for violation of section 29-6-250.

Looking at the amended complaint in its entirety, we believe the Appellants sufficiently pled a third-party beneficiary breach of contract claim. Although the complaint did not contain the heading "Third-Party Beneficiary Breach of Contract" in the section listing the causes of action, we believe the complaint as a whole sufficiently put the City on notice the Appellants wished to assert a third-party beneficiary theory. See e.g., Quality Towing 340 S.C. at 33, 530 S.E.2d at 371 (holding trial court erred in limiting the complaint to a single portion of an ordinance when, if read in its entirety, the complaint gave notice the plaintiff wished to attack the ordinance as a whole). This conclusion is supported by the fact that at the hearing on the cross-motions for summary judgment, the parties discussed extensively the question of whether the proposed private right of action under section 29-6-250 was a tort or a third-party beneficiary breach of contract. See id. (holding trial court erred in limiting operator's complaint to single portion of an ordinance when the plaintiff argued the invalidity of the ordinance as a whole at the summary judgment hearing).

Second, the City argues the law of the case doctrine precludes the Appellants from pursuing an action in contract because the circuit court twice held the Appellants' cause of action for violation of section 29-6-250 sounded in tort, and this holding was not appealed. We disagree.

The failure to challenge a ruling constitutes an abandonment of the issue, and the unchallenged ruling, right or wrong, is the law of the case. First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998). We do not believe the law of the case doctrine applies here. Judge Short's and Judge John's statements that the

government's failure to enforce a statute. S.C. Code Ann. § 15-78-60(4) (2005).

The City argues summary judgment should be affirmed because the Appellants' claims sound in tort and are, therefore, barred under the doctrine of sovereign immunity. In support of this position, the City cites footnote 5 in Sloan Construction, which states: "[A] claim for failure to enforce the bonding requirements of the SPPA is not properly brought pursuant to the [SCTCA] because the [SCTCA] does not act as a waiver of sovereign immunity when a governmental entity fails to enforce a statute." 377 S.C. at 118 n.5, 659 S.E.2d at 164 n.5 (citing S.C. Code Ann. § 15-78-60(4) (2005)). The City interprets footnote 5 as saying if a claim for violation of section 29-6-250 is brought as a tort, it is barred by the SCTCA. Thus, because Appellants' claims were brought in tort, their claims are barred as a matter of law.

The Appellants, on the other hand, argue section 29-6-250 creates an affirmative duty on the government, and the SCTCA does not protect the government from liability for breach of that duty. In support of this, they cite to the latter portion of footnote 5, which states, "Therefore, the [SCTCA] is not relevant to the government's liability for failure to comply with a duty under the SPPA." Id.

We believe the Appellants' interpretation is correct. Footnote 5 was merely clarifying that while there exists a private right of action under the SPPA, it would be improper to assert that right by bringing a claim pursuant to the SCTCA for failure to enforce a statute because such claims are clearly barred under the SCTCA. Rather, the claim should be brought under the SPPA as a tort claim in negligence for breach of the duty created by section 29-6-250. Because the Appellants' tort claim alleges negligence arising out of the City's breach of its duty to require Gilbert to provide a bond, the Appellants may proceed under section 29-6-250.

A review of the Sloan Construction opinion supports the conclusion that a claim for violation of section 29-6-250 can be brought as a tort. As noted by the Supreme Court, the SPPA establishes both an affirmative duty on the governmental body to require payment bonding, as well as a standard of care for overseeing the issuance of a proper payment bond. Sloan Constr., 377 S.C. at 115-116, 659 S.E.2d at 162 (citing to S.C. Code Ann. § 29-6-250 and providing "it is the duty of the entity contracting for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form"). Such language clearly suggests a tort remedy for breach of the duty created pursuant to section 29-6-250 of the SPPA. See Troutman v. Facetglas, Inc., 281 S.C. 598, 601, 316 S.E.2d 424, 426 (Ct. App. 1984) ("The elements of a tort are (1) duty; (2) breach of that duty; (3) proximate causation; and (4) injury.").

Furthermore, the supreme court stated in Sloan Construction, "[W]e hold that in a tort or contract action arising under the SPPA, the government's liability is limited to the unpaid balance on the contract." 377 S.C. at 121, 659 S.E.2d at 166-67 (emphasis added). The court's holding clearly contemplates the possibility of claims being brought under the SPPA in tort or contract. In sum, because the Appellants' claim was brought under section 29-6-250 as a tort, it was properly asserted according to the supreme court's holding in Sloan Construction.

Accordingly, we reverse the circuit court's grant of summary judgment as to the Appellants' tort cause of action.

2. Third-Party Beneficiary Breach of Contract

The Appellants argue the circuit court's grant of summary judgment as to their third-party beneficiary breach of contract claim should be reversed in light of our supreme court's decision in Sloan Construction. Although the City concedes Sloan Construction establishes that the bonding requirements under the SPPA give rise to a private right of action for subcontractors for a third-party beneficiary breach of contract claim, the City presents two arguments as to why the circuit court's grant of summary judgment should be affirmed. We find both arguments to be without merit.

First, the City argues the Appellants never properly alleged a third-party beneficiary breach of contract claim in their amended complaint. We disagree.

"The purpose of a pleading is to put the adversary on notice as to what the issues are." Langston v. Niles, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975). To ensure substantial justice to the parties, pleadings must be liberally construed. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000). In determining whether to grant summary judgment, pleadings and documents on file must be liberally construed in favor of the non-moving party. Bates v. City of Columbia, 301 S.C. 320, 321, 391 S.E.2d 733, 733 (Ct. App. 1990). In construing a complaint or responsive pleading, the court must review the entire pleading. Doe ex rel. Legal Guardian v. Barnwell School Dist. 45, 369 S.C. 659, 663, 633 S.E.2d 518, 520 (Ct. App. 2006); seeSmith v. Nelson, 83 S.C. 294, 300, 65 S.E. 261, 263 (1909) (construing the "complaint upon the whole").

The Appellants alleged in the "Facts" section of their amended complaint: "[Appellants] are third-party beneficiaries of [the City]'s Agreement with Gilbert" because the terms of section 29-6-250 are intended to benefit subcontractors and are, therefore, incorporated into the Contract by operation of law. Appellants further discussed this theory under the section of the amended complaint discussing their cause of action for violation of section 29-6-250.

Looking at the amended complaint in its entirety, we believe the Appellants sufficiently pled a third-party beneficiary breach of contract claim. Although the complaint did not contain the heading "Third-Party Beneficiary Breach of Contract" in the section listing the causes of action, we believe the complaint as a whole sufficiently put the City on notice the Appellants wished to assert a third-party beneficiary theory. See e.g., Quality Towing 340 S.C. at 33, 530 S.E.2d at 371 (holding trial court erred in limiting the complaint to a single portion of an ordinance when, if read in its entirety, the complaint gave notice the plaintiff wished to attack the ordinance as a whole). This conclusion is supported by the fact that at the hearing on the cross-motions for summary judgment, the parties discussed extensively the question of whether the proposed private right of action under section 29-6-250 was a tort or a third-party beneficiary breach of contract. See id. (holding trial court erred in limiting operator's complaint to single portion of an ordinance when the plaintiff argued the invalidity of the ordinance as a whole at the summary judgment hearing).

Second, the City argues the law of the case doctrine precludes the Appellants from pursuing an action in contract because the circuit court twice held the Appellants' cause of action for violation of section 29-6-250 sounded in tort, and this holding was not appealed. We disagree.

The failure to challenge a ruling constitutes an abandonment of the issue, and the unchallenged ruling, right or wrong, is the law of the case. First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998). We do not believe the law of the case doctrine applies here. Judge Short's and Judge John's statements that the

Appellants' claims sounded in tort came in the context of a motion to strike; neither judge had before him the question of whether the Appellants could pursue their case on a breach of contract theory. Thus, as Judge Few noted, they "couldn't have foreclosed it if it wasn't before them."

Accordingly, we reverse the circuit court's grant of summary judgment as to the Appellants' third-party breach of contract claim.

3. Necessity of Remand

The City next contends even assuming arguendo that pursuant to Sloan Construction, Appellants' tort and third-party breach of contract claims were properly brought under the SPPA, summary judgment as to those claims and their quantum meruit claim should nevertheless be affirmed because (1) pursuant to Sloan Construction, the City's liability is limited to the remaining balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's non-payment, Sloan Constr., 377 S.C. at 120, 659 S.E.2d at 165; and (2) there is no dispute in this case that the City paid out the remaining contract price after it was notified of the nonpayment. We disagree.

First, the City relies on facts not fully developed at the circuit court. Pursuant to Sloan Construction, the City's liability in this case is limited to (1) the remaining unpaid balance on the contract with Gilbert, (2) at the time the City received notice from the subcontractor of the general contractor's nonpayment. 377 S.C. at 121, 659 S.E.2d at 165-66. These are inherently factual questions that were disputed at the circuit court, and should not be resolved on summary judgment. Moreover, even if we were to assume the City did, in fact, pay out the remaining balance on the contract, that fact alone would not support summary judgment because the same was true in Sloan Construction. In that case, it was undisputed that the government entity disbursed the remaining funds to the general contractor when the subcontractor notified the government of nonpayment. See id. at 111, 659 S.E.2d at 160 ("Sloan notified SCDOT in January 2002 that it still had not received payment from Southco for the work completed and additionally informed SCDOT that Southco had not secured another payment bond following the cancellation of the Amwest bond. In March 2003, without having made full payment to Sloan, Southco notified SCDOT that it had made all payments on the project and SCDOT disbursed final retainage to Southco."). However, the supreme court chose to remand the case to determine the liability even though SCDOT had paid out the remaining balance.

Thus, pursuant to Sloan Construction, we reverse the circuit court's grant of summary judgment as to the Appellants' tort, breach of contract, and quantum meruit claims, and we remand to the circuit court for findings consistent with this opinion.

4. Section 27-1-15 of the South Carolina Code

The City argues the Appellants' claim for attorneys' fees under South Carolina Code Section 27-1-15[4] is not preserved for review. We agree.

Error preservation requirements are intended to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. I'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). It is axiomatic that for an issue to be preserved for appeal, it must have been raised to and ruled upon by the trial court. Elam v. S.C. Dept. of

Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). When an issue or argument has been raised to but not ruled upon by the trial court, a party must file a Rule 59(e), SCRCP, motion to preserve the issue for appeal. Id. at 24 n.4, 602 S.E.2d at 780 n.4.

The Appellants asserted claims pursuant to section 27-1-15 in their amended complaint. Thus, the issue of section 27-1-15 was properly raised to the circuit court. However, the circuit court's summary judgment order clearly does not address the question of the Appellants' entitlement to attorneys' fees and interest pursuant to section 27-1-15. Accordingly, it was incumbent upon the Appellants to file a Rule 59(e) motion to secure a ruling from the circuit court and, consequently, preserve this issue for appeal. The Appellants did not file such a motion. We, therefore, need not address this issue because it is not preserved for our review.

CONCLUSION

Accordingly, the decision of circuit court is

REVERSED IN PART AND AFFIRMED IN PART

GEATHERS, J., and GOOLSBY, A.J., concur.

---

[1] The total value of the Contract was approximately $875,000.

[2] William E. Gilbert is the sole proprietor of Gilbert Group, LLC.

[3] In granting summary judgment, the trial court did not specifically rule as to whether Appellants had properly raised a third-party beneficiary breach of contract claim in their amended complaint. The trial court held, "[T]o the extent the amended complaint may be construed as alleging a third-party beneficiary breach of contract claim, the Court finds that such claim must be dismissed . . . ."

[4] S.C. Code section 27-1-15 (Supp. 2008) states: "Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand."

Appellants' claims sounded in tort came in the context of a motion to strike; neither judge had before him the question of whether the Appellants could pursue their case on a breach of contract theory. Thus, as Judge Few noted, they "couldn't have foreclosed it if it wasn't before them."

Accordingly, we reverse the circuit court's grant of summary judgment as to the Appellants' third-party breach of contract claim.

3. Necessity of Remand

The City next contends even assuming arguendo that pursuant to Sloan Construction, Appellants' tort and third-party breach of contract claims were properly brought under the SPPA, summary judgment as to those claims and their quantum meruit claim should nevertheless be affirmed because (1) pursuant to Sloan Construction, the City's liability is limited to the remaining balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's non-payment, Sloan Constr., 377 S.C. at 120, 659 S.E.2d at 165; and (2) there is no dispute in this case that the City paid out the remaining contract price after it was notified of the nonpayment. We disagree.

First, the City relies on facts not fully developed at the circuit court. Pursuant to Sloan Construction, the City's liability in this case is limited to (1) the remaining unpaid balance on the contract with Gilbert, (2) at the time the City received notice from the subcontractor of the general contractor's nonpayment. 377 S.C. at 121, 659 S.E.2d at 165-66. These are inherently factual questions that were disputed at the circuit court, and should not be resolved on summary judgment. Moreover, even if we were to assume the City did, in fact, pay out the remaining balance on the contract, that fact alone would not support summary judgment because the same was true in Sloan Construction. In that case, it was undisputed that the government entity disbursed the remaining funds to the general contractor when the subcontractor notified the government of nonpayment. See id. at 111, 659 S.E.2d at 160 ("Sloan notified SCDOT in January 2002 that it still had not received payment from Southco for the work completed and additionally informed SCDOT that Southco had not secured another payment bond following the cancellation of the Amwest bond. In March 2003, without having made full payment to Sloan, Southco notified SCDOT that it had made all payments on the project and SCDOT disbursed final retainage to Southco."). However, the supreme court chose to remand the case to determine the liability even though SCDOT had paid out the remaining balance.

Thus, pursuant to Sloan Construction, we reverse the circuit court's grant of summary judgment as to the Appellants' tort, breach of contract, and quantum meruit claims, and we remand to the circuit court for findings consistent with this opinion.

4. Section 27-1-15 of the South Carolina Code

The City argues the Appellants' claim for attorneys' fees under South Carolina Code Section 27-1-15[4] is not preserved for review. We agree.

Error preservation requirements are intended to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. I'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). It is axiomatic that for an issue to be preserved for appeal, it must have been raised to and ruled upon by the trial court. Elam v. S.C. Dept. of

Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). When an issue or argument has been raised to but not ruled upon by the trial court, a party must file a Rule 59(e), SCRCP, motion to preserve the issue for appeal. Id. at 24 n.4, 602 S.E.2d at 780 n.4.

The Appellants asserted claims pursuant to section 27-1-15 in their amended complaint. Thus, the issue of section 27-1-15 was properly raised to the circuit court. However, the circuit court's summary judgment order clearly does not address the question of the Appellants' entitlement to attorneys' fees and interest pursuant to section 27-1-15. Accordingly, it was incumbent upon the Appellants to file a Rule 59(e) motion to secure a ruling from the circuit court and, consequently, preserve this issue for appeal. The Appellants did not file such a motion. We, therefore, need not address this issue because it is not preserved for our review.

CONCLUSION

Accordingly, the decision of circuit court is

REVERSED IN PART AND AFFIRMED IN PART

GEATHERS, J., and GOOLSBY, A.J., concur.

---

[1] The total value of the Contract was approximately $875,000.

[2] William E. Gilbert is the sole proprietor of Gilbert Group, LLC.

[3] In granting summary judgment, the trial court did not specifically rule as to whether Appellants had properly raised a third-party beneficiary breach of contract claim in their amended complaint. The trial court held, "[T]o the extent the amended complaint may be construed as alleging a third-party beneficiary breach of contract claim, the Court finds that such claim must be dismissed . . . ."

[4] S.C. Code section 27-1-15 (Supp. 2008) states: "Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand."