

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM UNION COUNTY
John C. Few, Circuit Court Judge

Op. No. 4637
(S.C. Ct. App. re-filed May 20, 2010)

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S.C. 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.

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

- I. Did the Court of Appeals err in ruling that a violation of Section 29-6-250 of the Subcontractors' and Suppliers' Payment Protection Act, which constitutes a tort, is not governed by the South Carolina Tort Claims Act and consequently is not barred by sovereign immunity under Section 15-78-60(4)?
- II. Did the Court of Appeals err in failing to give effect to the law of this case as set forth in unappealed orders of Judges Short and John, both of which established for this case that the Respondents' tort claim for a violation of Section 29-6-250 is governed and controlled by the Tort Claims Act?
- III. Did the Court of Appeals err in misapplying the law of the case doctrine in its ruling that the Respondents had pled a third-party beneficiary breach of contract claim in their amended complaint?
- IV. Did the Court of Appeals err in ruling that Respondents actually pled a third-party beneficiary breach of contract claim based upon a single allegation contained in the "Facts" section of the amended complaint and despite the absence of any allegations of the specific elements of a breach of contract claim?
- V. Did the Court of Appeals err in reversing summary judgment on the quantum meruit claim and in failing to even consider or address the two distinct and independent grounds for summary judgment as found by the lower court?
- VI. Did the Court of Appeals err in refusing to affirm summary judgment based on the City of Union's additional sustaining ground because the City cannot be held liable as a matter of law under the Subcontractors' and Suppliers' Payment Protection Act where it agreed to pay in full the remaining contract balance to the unpaid subcontractors, a remedy that the Respondents refused?

STATEMENT OF THE CASE

The Respondents Shirley's Iron Works, Inc. and Tindall Corporation are two subcontractors who contracted with the general contractor, Gilbert Group LLC, for work performed in the construction of a spec building for the Petitioner City of Union. The Respondents allege that Section 29-6-250, which is part of the Subcontractors' and Suppliers' Payment Protection Act (SPPA), creates a statutory duty of care whereby the City had a duty to ensure that a payment bond in the amount of the contract was furnished by the general contractor. Section 29-6-250(3) of the Code of Laws provides: "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." *See*, S.C. Code Ann. § 29-6-250(3). No payment bond was furnished by the Gilbert Group. Further, the Respondents allege that they have not received full payment for the work they did and, as a result, have been harmed by the City's failure to ensure that an appropriate payment bond was issued. The Respondents brought suit against the City of Union for breach of a duty of care required by Section 29-6-250.

The City of Union also brought cross-claims against the Gilbert Group, LLC and its principal, William E. Gilbert. The City alleged causes of action for breach

of contract, breach of contract accompanied by a fraudulent act, negligence and fraud. With respect to its negligence cause of action, the City alleges that the Gilbert Group, LLC and William E. Gilbert were negligent in failing to acquire and furnish an appropriate payment bond for the project as required by Section 29-6-250. The City further alleges that Gilbert committed fraud by falsely representing to the City that the subcontractors and suppliers had been paid. While William E. Gilbert and Gilbert Group, LLC were originally joined to this action by third party complaint, by order of then Circuit Judge Paul E. Short, they were re-designated as Defendants to allow for apportionment of fault under Section 15-78-100(c). (R. 5-9). Judge Short ruled that the Respondents' claims against the City for a violation of Section 29-6-250 were tort claims governed by the South Carolina Tort Claims Act. (R. 2-3, 6). This ruling was later reaffirmed in an order by Judge Steven John. (R. 10-12).

The Respondents and the City filed cross motions for summary judgment which were heard by then Circuit Judge John C. Few on January 23, 2006, which was the day the case was called to trial. After receiving additional briefing from the parties, Judge Few granted the City's motion for summary judgment and denied the Respondents' motion. (R. 13-21).

The Respondents then filed an appeal to the Court of Appeals from the order of Judge Few granting the City's motion for summary judgment. Importantly, the

Respondents did not appeal from any other pre-trial orders including the orders of Judge Paul E. Short, Jr., filed April 19, 2004, or the order of Judge Steven H. John dated December 12, 2005

The Court of Appeals ultimately filed three different opinions in this case. On December 9, 2009, the Court reversed summary judgment on the Respondents' tort and contract claims under the SPPA. The Court affirmed summary judgment on the quantum meruit claim and the claim for attorney's fees and interest pursuant to Section 27-1-15. (App. 1-9).

Following a petition for rehearing filed by the City, the Court of Appeals issued a new opinion on February 11, 2010, in which the Court affirmed summary judgment as modified. (App. 10-15). The Court affirmed summary judgment on the SPPA claim based on the following reasoning: "we see no reason to remand this case to determine the extent of the City's liability for the Appellants' SPPA claims because liability for such claims is limited to the unpaid balance on the Contract and there is no genuine dispute as to whether the City has already paid out the remaining balance." (App. 14). Also, the Court again affirmed summary judgment on the quantum meruit claim and the claim for attorney's fees and interest pursuant to Section 27-1-15.

Thereafter, the Respondents filed a joint petition for rehearing. The Court of Appeals reversed itself a second time. The Court issued another re-filed opinion

on May 20, 2010, which reversed summary judgment on the SPPA claims. The Court for the first time reversed summary judgment on the quantum meruit claim – despite the fact that the Respondents never sought such relief by way of petition for rehearing. The Court again affirmed summary judgment on the claim for attorney's fees and interest pursuant to Section 27-1-15. (App. 16-28).

The City petitioned for rehearing with respect to the May 20, 2010 opinion, and that petition was denied. (App. 33).

The City petitioned this Court for a writ of certiorari. That petition was granted by order filed June 8, 2012.

ARGUMENTS

- I. The Court of Appeals erred in ruling that a violation of Section 29-6-250 of the Subcontractors' and Suppliers' Payment Protection Act, which constitutes a tort, is not governed by the South Carolina Tort Claims Act and consequently is not barred by sovereign immunity under Section 15-78-60(4).**

The Court of Appeals ruled that Respondents' cause of action for a violation of the Subcontractors' and Suppliers' Payment Protection Act (SPPA) constitutes a tort. That ruling is correct. A tort is generally defined or characterized by a breach of a legal duty of care. It is well settled that "[a]n affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Charleston Dry Cleaners & Laundry, Inc. v. Zurich American Ins. Co.*, 355 S.C. 614, 586 S.E.2d 586, 588 (2003). *See also, Rayfield v. South Carolina Dept. of Corrections*, 297 S.C. 95, 374 S.E.2d 910, 913 (Ct. App. 1988) ("a statute may be the source of a duty owed in negligence"); *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 691 S.E.2d 170, 174 (Ct. App. 2010) (same). Here, the legal duty is created by statute, specifically Section 29-6-250 of the SPPA.

While correctly holding that a violation or breach of a duty created by the SPPA is a tort, the Court of Appeals nonetheless erred in holding that the Respondents' tort cause of action is somehow *not* governed by the South Carolina

Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* Specifically, the Court of Appeals overlooked and failed to even address the impact of Section 15-78-200 which provides: "*Notwithstanding any provision of law, this chapter, the 'South Carolina Tort Claims Act,' 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.*" S.C. Code Ann. § 15-78-200. (Emphasis added).¹ Likewise, the Court of Appeals disregarded existing precedent which holds that "[t]he Tort Claims Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees." *See e.g., Proctor v. Department of Health and Environmental Control*, 368 S.C. 279, 628 S.E.2d 496, 502 (Ct. App. 2006); *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003); *Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 455 S.E.2d 688 (1995).

The Court of Appeals compounded the error by ruling that the Respondents have properly brought their claim under the SPPA rather than under the Tort Claims Act. The Court wrote: "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." (App.

¹ Similarly, Section 15-78-20(b) states that the Tort Claims Act is the "exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b)." S.C. Code Ann. § 15-78-20(b). The exceptions as set forth in Section 15-78-70(b) have no applicability here.

23). The Court then concluded that the Respondents "may proceed under section 29-6-250" rather than under the Tort Claims Act. (App. 23).

The Court of Appeals never explains, however, how a tort claim against a governmental entity may proceed outside of the Tort Claims Act. The City submits that the General Assembly has spoken in clear and unambiguous language that any tort committed by a governmental entity is governed by the Tort Claims Act. The Tort Claims Act indeed provides the "exclusive and sole remedy." S.C. Code Ann. § 15-78-200.

Furthermore, Section 15-78-200 is prefaced by the phrase "[n]otwithstanding any provision of law." Thus, regardless of what any other provision of law states, including the SPPA,² the Tort Claims Act governs any tort against a governmental entity, including the City in this case. There is no other plausible interpretation or application of Section 15-78-200. In essence, to rule as it has, the Court of Appeals had to totally ignore Section 15-78-200, which is what has occurred. Quite simply, there is no basis in the Tort Claims Act or the SPPA or any other statutory or constitutional provision to have allowed the Court of Appeals to circumvent the bar of sovereign immunity and provide for a tort remedy

² The SPPA does not expressly provide for a cause of action that falls outside of the scope of the Tort Claims Act.

against a governmental entity where sovereign immunity has not been expressly and explicitly waived.

The Court of Appeals' error in all likelihood stems from confusion over the meaning and legal import of footnote five in this Court's decision in *Sloan Construction Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008) (hereinafter *Sloan I*).³ To the extent that this Court intended to or indeed did hold that a tort arising out of a violation of the SPPA is not governed by the Tort Claims Act, that holding needs to be re-examined. The City respectfully submits that a tort arising out of a violation of the SPPA must be governed by the Tort Claims Act. The legal duty is created by the SPPA, but the City's liability for a breach of that duty is subject to the limitations of the Tort Claims Act. The tort must be brought pursuant to the Tort Claims Act which provides the "exclusive and sole remedy." S.C. Code Ann. § 15-78-200.

³ In *Sloan Construction Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008), this Court held that "an implied private right of action by a subcontractor against the government exists under the SPPA." 659 S.E.2d at 163. This Court further concluded that "the duty created under the SPPA gives rise to a private right of action against a government entity for failure to ensure that a contractor is properly bonded." 659 S.E.2d at 164. In 2011, after a second appeal in *Sloan*, this Court modified its holding from *Sloan I*. In *Sloan I*, this Court held that a governmental entity owed a duty created by the SPPA to initially secure an appropriate payment bond for its projects. In *Sloan II*, the Court held that the governmental entity did not owe a continuing duty to maintain the payment bond throughout the course of the project. See, *Sloan Construction Co. v. Southco Grassing, Inc.*, 395 S.C. 164, 717 S.E.2d 603 (2011). The decision in *Sloan II* does not appear to impact the present case because the Respondents here allege that the City failed to insure that a payment bond was initially procured.

Furthermore, as this Court recognized in *Sloan I*, a claim for failure to enforce the bonding requirements of the SPPA is barred under Section 15-78-60(4) of 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." 659 S.E.2d at 164, n.5. However, simply because a tort claim is barred by sovereign immunity under the Tort Claims Act does not authorize the courts to disregard the Tort Claims Act entirely and hold that the claim is brought pursuant to the SPPA and not the Tort Claims Act. That is where the confusion or error exists which requires further review and analysis from this Court.

In short, the tort claims alleged by the Respondents are necessarily governed by the Tort Claims Act as the exclusive remedy for torts committed by governmental entities such as the City of Union. Further, the City submits that this Court was correct in *Sloan I* in observing that Section 15-78-60(4) bars a tort claim arising from a violation of Section 29-6-250. Therefore, the Respondents' tort claims are barred by sovereign immunity, specifically Section 15-78-60(4), and as a result, summary judgment should be affirmed.⁴

⁴ The City raised the Section 15-78-60(4) sovereign immunity defense both in its motion for summary judgment and at the hearing before Judge Few. (R. 66, 141, 214-215).

II. The Court of Appeals erred in failing to give effect to the law of this case as set forth in unappealed orders of Judges Short and John, both of which established for this case that the Respondents' tort claim for a violation of Section 29-6-250 is governed and controlled by the Tort Claims Act.

The Court of Appeals also failed to properly apply the law of the case doctrine. Regardless of whether it is right or wrong, the law of *this* case holds that the Respondents' tort claims are governed and controlled by the Tort Claims Act. As a result, regardless of any ruling in *Sloan I* or the meaning of footnote five in that opinion, the Respondents' tort claims in *this* case should be barred by sovereign immunity under Section 15-78-60(4) because the Respondents' tort claims are governed by the Tort Claims Act.

In an order filed April 19, 2004, then Circuit Judge Paul E. Short, Jr. held as follows:

This Court finds that the Plaintiffs' cause of action against the City sounds in tort. As a result, the Plaintiffs' cause of action is necessarily brought pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.*, which is the exclusive civil remedy for governmental torts. *See, Flateau v. Harrison*, 355 S.C. 197, 584 S.E.2d 413, 416 (Ct. App. 2003); *Shaw v. City of Charleston*, 351 S.C. 32, 567 S.E.2d 530 (Ct. App. 2002); S.C. Code Ann. § 15-78-200.

(R. 6). Judge Short thus ruled that the Respondents' cause of action is a tort claim governed by the Tort Claims Act. (R. 2-3, 6). It is without dispute that the Respondents have not appealed from Judge Short's order, and as a result his ruling

that the Respondents' cause of action is a tort claim *governed by the Tort Claims Act* -- right or wrong -- is the law of this case.

The Respondents also did not appeal the order of Circuit Judge Steven H. John granting the City's motion to strike. In that order, Judge John recognized that "Judge Short ruled that the Plaintiffs' claims that the City breached S.C. Code Ann. § 29-6-250 by failing to provide a payment bond for the construction project at issue constitute a tort and are controlled by the South Carolina Tort Claims Act." (R. 10). Judge John further explained that "the Plaintiffs did not appeal from Judge Short's earlier order, and as a result, his rulings as discussed above constitute the law of this case." (R. 11). Judge John's unappealed order is also the law of this case.

In *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997), this Court explained that an "unappealed ruling is the law of the case" and the unappealed ruling "should not have been reconsidered by the Court of Appeals." 489 S.E.2d at 472. This Court has also routinely held that an "unappealed ruling, right or wrong, is the law of the case." *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d 869, 871 (2000); *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653, 673 (2006).

Consequently, for purposes of this case – regardless of whether right or wrong – the Court of Appeals was bound to find that the Respondents' tort claims are governed by the Tort Claims Act. If controlled by the Tort Claims Act, then consistent with footnote five in *Sloan I*, the Respondents' tort claims must be dismissed as barred by sovereign immunity under Section 15-78-60(4). The Court of Appeals erred in not so holding.

III. The Court of Appeals erred in misapplying the law of the case doctrine in its ruling that the Respondents had pled a third-party beneficiary contract claim in their amended complaint.

The Court of Appeals also misapplied the law of the case doctrine in its ruling on the Respondents' purported third-party beneficiary contract claim.⁵ The Court of Appeals failed to recognize that the unappealed order of Judge John in particular demonstrates that no third-party beneficiary contract claim was pled in the amended complaint. Judge John concluded that both the first and third causes of action alleged torts.

In its latest opinion filed May 20, 2010, the Court of Appeals ruled that unappealed orders from Judges Short and John are not the law of the case "because

⁵ The Court of Appeals' current analysis of this issue differs substantially from the analysis contained in the December 9, 2009 opinion. The Court of Appeals eliminated much of the earlier discussion on this issue and in a summary fashion rejected the City's position.

[their] statements that the Respondents' claims sounded in tort came in the context of a motion to strike" and as a result "neither judge had before them the question of whether the Respondents could pursue their case on a breach of contract theory." (App. 26). The Court of Appeals, however, erred in reaching this conclusion because certainly Judge John had before him the purported third-party beneficiary breach of contract claim. That claim – assuming such was even pled – was contained in the Respondents' amended complaint.⁶ There can be no dispute that Judge John's order was issued *after the amended complaint*.⁷ Contrary to the Court of Appeals' finding, Judge John in his order was indeed adjudicating a motion to strike *directed at that very amended complaint*. The impact and legal effect of Judge John's order is quite clear. If the Respondents asserted a third-party beneficiary contract claim in their amended complaint (which is denied), it was necessarily pled in either the first or third causes of action. Yet, Judge John ruled that the first and third causes of action both allege a tort, are both governed by the Tort Claims Act, and do not allow for the recovery of attorney's fees. (R. 10-11). That unappealed ruling is the law of the case *with respect to that very amended complaint*. Therefore, the Court of Appeals was incorrect in concluding that Judge John's order does not address the purported third-party beneficiary breach of

⁶ The amended complaint was the final pleading filed in this case and was the operative pleading at the summary judgment stage.

contract claim. Indeed, he found that only a tort had been pled and that unappealed ruling is the law of the case and should have been given conclusive effect by the Court of Appeals.

IV. The Court of Appeals erred in ruling that Respondents actually pled a third-party beneficiary breach of contract claim based upon a single allegation contained in the "Facts" section of the amended complaint and despite the absence of any allegations of the specific elements of a breach of contract claim.

The Court of Appeals erred in concluding that the Respondents specifically pled a third-party beneficiary breach of contract claim. The Court of Appeals concluded that such a claim was pled because the Respondents were described as third-party beneficiaries in the "Facts" section of their amended complaint. *See*, Amended Complaint, para. 21. (R. 41). The Court of Appeals then held that that was sufficient to plead a contract claim.

The City strenuously disagrees. A single paragraph in the "facts" section of a complaint should not and does not comport with the requirements of Rule 8(a), SCRCPC. That single paragraph -- even when read in conjunction with other parts of the amended complaint -- does not plead the elements of a breach of contract

⁷ The amended complaint was filed on August 17, 2005. (R. 38-47). Judge John's order adjudicating the City's motion to strike was issued on December 12, 2005. (R. 10-12).

claim. Nowhere in the amended complaint is it alleged that the City breached its agreement with the Gilbert Group, LLC.

Furthermore, the Court of Appeals erred in concluding that the Respondents "further discussed this theory under the section of the amended complaint discussing their cause of action for violation of section 29-6-250." (App. 25). This conclusion disregards the law of the case as established by Judges Short and John.

Judge Short's order addressed the original complaint which includes a single cause of action that Judge Short ruled to be a tort claim. That cannot be disputed because the Respondents did not appeal Judge Short's order. The allegations in the first cause of action of the amended complaint is entitled "Violation of S.C. Code Ann. § 29-6-250" and is not suggestive in any respect of a contract claim. That cause of action is word-for-word identical to the cause of action pled in the original complaint which Judge Short found to allege a tort. Paragraphs 29 through 35 of the amended complaint are identical to paragraphs 10 through 16 of the original complaint. (Compare R. 23-24 to R. 42-43). Thus, the law of the case dictates that the first cause of action of the amended complaint alleges a tort. This was Judge Short's initial ruling and was agreed to by Judge John *after* the filing of the amended complaint. Those orders are unappealed. The third cause of action is labeled as a "negligence" claim and may only be construed as alleging a tort. Judge John also so found, and that finding is the law of the case.

In short, a review of the pleadings, including a comparison of the original complaint and the amended complaint, supports the City's position that only tort claims were pled for a violation of the SPPA. That conclusion is further confirmed by the law of the case as set forth in the unappealed orders of Judges Short and John. The Respondents did not plead a third-party beneficiary breach of contract claim. The elements of such a claim were simply never pled, and as a result, it was error to construe the amended complaint as including a third-party beneficiary breach of contract claim.

V. The Court of Appeals erred in reversing summary judgment on the quantum meruit claim and in failing to even consider or address the two distinct and independent grounds for summary judgment as found by the lower court.

In its original opinion filed December 9, 2009, the Court of Appeals affirmed the lower court's grant of summary judgment on the Respondents' quantum meruit claim. In the most recent re-filed opinion, the Court of Appeals reversed summary judgment on the quantum meruit claim and then failed to provide any analysis directed at that specific claim. In addition, the Court of Appeals failed to recognize or address that summary judgment had been granted on two distinct and independent grounds.

In particular, then Circuit Judge John Few ruled that the City was not liable on a quantum meruit claim because there was no evidence that the City retained any amount of the contract price or failed to pay the full contract price. In addition, Judge Few ruled that the quantum meruit claim is barred by sovereign immunity. (R. 18-21). The Court of Appeals' latest opinion fails to address either of these grounds. Without question, that latest opinion from the Court of Appeals makes absolutely no mention of the sovereign immunity ruling.

With respect to the first ground, Judge Few correctly ruled that the City cannot be held liable on a quantum meruit claim brought by subcontractors where there is no evidence that the City retained any amount of the contract price or failed to pay the full contract price. In *Columbia Wholesale Company, Inc. v. Scudder May N.V.*, 312 S.C. 259, 440 S.E.2d 129 (1994), this Court held that "[c]ourts addressing a claim of unjust enrichment by a subcontractor against a property owner have typically denied recovery where the owner in fact paid on its contract with the general contractor." 440 S.E.2d at 131. Here, it is undisputed that the City has paid the full contract price and hence cannot be held liable for quantum meruit. (R. 245).

In *Myrtle Beach Hospital, Inc. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000), this Court clarified the standard applicable to quantum meruit claims. This Court adopted as the "sole test" the following elements: "(1) benefit

conferred by plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value." 532 S.E.2d at 872. The retention of the benefit by the City is not inequitable under these facts because the City has *fully* paid for that benefit. In other words, it is undisputed that the City has fully paid the value of the benefit by paying out the entire contract price. Therefore, consistent with the holding in the *Columbia Wholesale* case, which the Court of Appeals did not address in its latest opinion, the Respondents cannot prevail on their claim for quantum meruit.

The Court of Appeals erroneously treated the quantum meruit claim as the same as the SPPA claims brought by the Respondents. The Court of Appeals found that issues of fact were "not fully developed at the circuit court" on the SPPA claims presumably because the Supreme Court had not decided the *Sloan I* case when Judge Few issued his summary judgment order. (App. 26). As the latest re-filed opinion suggests, however, the Court of Appeals has ordered a remand because of the *Sloan I* case, but *Sloan* was not a quantum meruit case. The burden of proof in a quantum meruit claim is much different from the SPPA claims. The elements of the claims are different. The Court of Appeals should not have simply reversed the quantum meruit claim because the SPPA claims were reversed.

Furthermore, if the facts on quantum meruit were not "fully developed," that is no basis for reversing summary judgment. The Respondents did not claim in the lower court or on appeal that the facts on the quantum meruit were not "fully developed" so as to preclude summary judgment. They never argued in the lower court or on appeal that further discovery needed to be done on the quantum meruit claim. Indeed, Judge Few addressed that claim in the context of cross motions for summary judgment heard on the day that the case was called to trial. Discovery was over. If the Respondents could not support their quantum meruit claim factually at that point, then summary judgment was obviously appropriate. In short, the Respondents have presented no evidence – as the Court of Appeals correctly noted in its December 9, 2009 opinion – that the City failed to pay out the entire contract price. (App. 7). There is no disputing that fact – the contract balance has been paid.⁸ Hence, as this Court held in *Columbia Wholesale*, there can be no recovery on the quantum meruit claim.

In addition, Judge Few granted summary judgment on an alternative basis – one that is purely a legal question and requires no factual basis and thus cannot be subject to a factual dispute. As determined by Judge Few, the quantum meruit

⁸ The Court of Appeals indeed found in the December 9, 2009 opinion that "the record indicates that although all of the subcontractors might not have been paid in full for their work, the City has not retained any of the unpaid balance on the Contract." (App. 7). That finding is not disputed by the Respondents.

claim is barred by sovereign immunity. In the Tort Claims Act, the General Assembly affirmatively states that it "intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, *only to the extent provided herein.*" S.C. Code Ann. § 15-78-20(b). (Emphasis added). "All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved." *Id.*

Thus, it is well settled that in reaction to *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), the General Assembly reinstated sovereign immunity subject *only* to the limited waiver specifically provided in the Tort Claims Act. The Act does not include a waiver of sovereign immunity for a non-tort cause of action for unjust enrichment or quantum meruit. Moreover, the General Assembly has not enacted any other legislation that expressly or implicitly waives sovereign immunity for an unjust enrichment or quantum meruit claim.

Judge Few's ruling that a governmental entity is entitled to sovereign immunity for an unjust enrichment or quantum meruit claim is supported by well-reasoned case law from our sister state of North Carolina. In *Eastway Wrecker Service, Inc. v. City of Charlotte*, 165 N.C. App. 639, 599 S.E.2d 410 (2004), the North Carolina Court of Appeals ruled that a quantum meruit claim against a municipality was barred by sovereign immunity. The Court explained:

[D]ismissal of the *quantum meruit* claim was ... appropriate because such a claim when brought against

an arm of the State is barred by sovereign immunity. In North Carolina, the State waives sovereign immunity when it expressly enters into a valid contract. Sovereign immunity bars *quantum meruit* actions against the State, however, because the remedy of *quantum meruit* is based on an implied contract and an implied contract cannot support the inference of an express waiver. Our Supreme Court held ... that "[a] contract implied in law -- as opposed to an express valid contract -- simply will not form a sufficient basis for a court to make a reasonable inference that the State has intended to waive its sovereign immunity."

599 S.E.2d at 412. (Citations omitted). The *Eastway* Court relied on the decision of the North Carolina Supreme Court in *Whitfield v. Gilchrist*, 348 N.C. 39, 497 S.E.2d 412 (1998), where the Court ruled that "the State's waiver of sovereign immunity only applies to express contracts and that contracts implied in law, such as a claim in *quantum meruit*, are insufficient to constitute a waiver of the State's sovereign immunity." *See, Moore v. North Carolina Cooperative Extension Service*, 146 N.C. App. 89, 552 S.E.2d 662, 665 (2001), *citing Whitfield, supra*. The *Whitfield* Court held that "[o]nly when the State has implicitly waived sovereign immunity by *expressly* entering into a *valid* contract through an agent of the State expressly authorized by law to enter into such contract may a plaintiff proceed with a claim against the State upon the State's breach." *Whitfield*, 497 S.E.2d at 415. (Emphasis in original).

The North Carolina case law is equally persuasive in the present case. Given the absence of any statutory law or case law providing for a waiver of

sovereign immunity in a quantum meruit claim and given the lack of consent by the City to be sued, Judge Few correctly ruled that the City is entitled to sovereign immunity on the quantum meruit claim.

In sum, summary judgment on the quantum meruit claim should be affirmed on either of the alternative bases as found by Judge Few.

VI. The Court of Appeals erred in refusing to affirm summary judgment based on the City of Union's additional sustaining ground because the City cannot be held liable as a matter of law under the Subcontractors' and Suppliers' Payment Protection Act where it agreed to pay in full the remaining contract balance to the unpaid subcontractors, a remedy that the Respondents refused.

The Court of Appeals also erred in denying relief on the additional sustaining ground raised by the City with respect to the Respondents' SPPA claims. The City argued that the dismissal of the Respondents' claims should be affirmed because the City complied with the SPPA by agreeing to distribute the \$111,270.00 that remained to be paid to the general contractor when the City learned that subcontractors were not paid in full. The Court of Appeals agreed with the City's position in its February 11, 2010 opinion and then reversed itself again in the latest opinion filed May 20, 2010. The City submits that the Court of Appeals' analysis of the issue contained in the February 11, 2010 opinion was correct, and that ruling should be reinstated.

In *Sloan I*, this Court limited the extent of the government's liability for a violation of the SPPA. This Court explained "that the government's liability for failure to ensure compliance with statutory bond requirements is not open-ended." *Sloan Construction Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158, 165 (2008). Specifically, this Court noted that "[t]he purpose of the SPPA is similar to that underlying the subcontractor's lien outlined in the mechanics' lien statute" and that the mechanics' lien statute limits the owner's liability "to the remaining unpaid balance on the contract with the general contractor at the time the owner receives notice from the subcontractor of the general contractor's nonpayment." *Id.* As a result, this Court ruled as follows:

Given the similar purposes behind the SPPA bond requirements for public projects and the subcontractors' mechanics' lien on private work, we hold that in a tort or 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.*

659 S.E.2d at 165-166. (Emphasis added).

Therefore, the City's liability under the SPPA is limited to the unpaid balance owed to the general contractor. Although City officials did not have the benefit of the *Sloan I* decision in 2003, when these issues arose, the City offered all of the unpaid subcontractors to share in the unpaid contract balance still owed to the Gilbert Group.

At the point that the City learned that subcontractors had not been paid in full, a total of \$111,270.00 remained to be paid to the Gilbert Group. (R. 244-245, 278). Those funds were offered to all unpaid subcontractors, including the two Respondents. (R. 279). William Gilbert of the Gilbert Group testified that he successfully negotiated with the City to release those remaining funds to be distributed to the unpaid subcontractors. (R. 247-251). Ultimately, all of the unpaid subcontractors -- with the exception of the Respondents -- accepted a share of the \$111,270.00 in exchange for releasing the City from further liability. The Respondents refused any portion of the \$111,270.00. After the Respondents refused, the portion of the \$111,270.00 which had been offered to them was distributed to other unpaid subcontractors which increased those parties' shares of the remaining contract balance. (R. 250-255).

The record demonstrates that the remaining contract balance of \$111,270.00 owed by the City was paid in full to unpaid subcontractors. (R. 245). In addition, the City's liability under the holding of *Sloan I* was limited to the \$111,270.00 that remained to be paid to the Gilbert Group. A portion of those funds was offered to the Respondents, who rejected the offer and insisted on full payment from the City. However, the City is not liable to the Respondents under *Sloan I* for the full amounts owed by the Gilbert Group to the Respondents. By rejecting the share of the \$111,270.00 offered to them, the Respondents cannot prevail on their present

claim for a violation of the SPPA. In actuality, the City complied with the SPPA by agreeing to pay each Respondent a share of the \$111,270.00 and cannot be held liable given that the Respondents rejected those amounts.

In its latest opinion filed May 20, 2010, the Court of Appeals was persuaded that the result in *Sloan I* required a reversal and remand of summary judgment on the SPPA claims despite the fact that *Sloan* is factually distinguishable from the present case – a point overlooked in the Court of Appeals' latest opinion. First and foremost, in *Sloan*, the owner (SCDOT) did pay out the final retainage, but the owner paid that retainage *to the general contractor* rather than making payments to the unpaid subcontractors. In the present case, *in sharp contrast to Sloan*, the owner -- City of Union -- paid out the final retainage of \$111,270.00 to the unpaid subcontractors and *not* to the general contractor. The Respondents were offered but refused a share of that retainage amount. The City therefore agrees that an owner cannot after notice make payments of the remaining unpaid balance to the general contractor and escape liability. However, the owner can pay that remaining balance to the unpaid subcontractors, which was done in this case. In fact, that is the very purpose and intent of the statutory scheme as construed and applied by this Court in *Sloan I*. Therefore, the fact that this Court remanded in *Sloan I* did not mandate or require a remand in this case. The cases are factually dissimilar in this critical respect.

In sum, based upon the holding in *Sloan I* and the City's attempt to satisfy its liability under the SPPA, judgment in the City's favor on both the SPPA claims should have been affirmed. Unlike the SCDOT in *Sloan*, the City of Union did pay out the remaining retainage to the unpaid subcontractors rather than to the general contractor. Because the City has complied with the SPPA, summary judgment on the SPPA claims should have been affirmed.

CONCLUSION

Based on the foregoing discussion and analysis, the Petitioner City of Union respectfully requests that this Court reverse the decision of the South Carolina Court of Appeals with respect to the Respondents' claims under the SPPA and their quantum meruit claim. The City further requests that this Court affirm the order of former Circuit Court Judge John C. Few granting summary judgment to the City as to all claims.

Respectfully submitted,

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August 8, 2012

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Petitioner City of Union certifies that the Brief of Petitioner complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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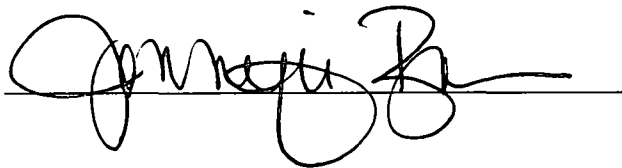
CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Petitioner, does hereby certify that service of the **Brief of Petitioner** was made upon the below listed counsel of record placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelope this the 8th day of August 2012:

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The Honorable Daniel E. Shearouse
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RECEIVED

AUG - 8 2012

S.C. Supreme Court

RE: Shirley's Iron Works, Inc. and Tindall Corporation v. City of Union, South Carolina,
Gilbert Group, LLC and William E. Gilbert
Supreme Court Tracking Number: 2010-170066
Civil Action Number: 2003-CP-44-171B
Claim Number: A301583
Our File Number: 321.6239

Dear Mr. Shearouse:

Please find enclosed for filing the original and fifteen copies of the **Brief of Petitioner** in the above referenced matter. Please file the original and return a clocked-in copy to me by way of my courier.

By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/jmb
Enclosures

The Honorable Daniel E. Shearouse
August 8, 2012
Page Two

cc: (w/ Enclosure)

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