THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-40-7647 - Appellate No.: 2018-000162

Meritage Asset Management, Inc., d/b/a Century Glass Company.....Appellant,

v.

Freeland Construction Company, Inc. and South Carolina Military Department.....Defendants,

Of which South Carolina Military Department is the Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal arises from a breach of contract action initiated by Meritage Asset Management, Inc., d/b/a Century Glass Company ("Appellant") against Freeland Construction Company, Inc. ("Freeland") and South Carolina Military Department ("Respondent") as a result of nonpayment for work Appellant performed on the South Carolina National Guard Armory ("Saluda Armory") in Saluda, South Carolina. Petitioner filed the Summons and Complaint on December 29, 2016 in the Richland County Court of Common Pleas alleging, in part, Respondent's breach of contract. Respondent answered and subsequently filed its Motion for Summary Judgment on May 26, 2017. Petitioner filed a cross Motion for Summary Judgment on July 14, 2017. The competing Motions for Summary Judgment were heard on December 8, 2017. The Honorable G. Thomas Cooper, Jr. entered an Order denying Petitioner's Motion for Summary Judgment and granting Respondent's Motion on January 8, 2018. Petitioner served its Notice of Appeal of the trial court's order on February 5, 2018.

The undisputed facts underlying the case are as follows: On September 19, 2014, Respondent awarded Freeland the general contract for the Saluda Armory Project. It is undisputed that Respondent did not ensure that Freeland had a payment bond in place prior to awarding the contract or at any phase of the Saluda Armory Project. See e.g. Respondent's Motion for Summary Judgment at p. 1. Appellant submitted a subcontract proposal to Freeland for the Saluda Armory on January 21, 2016. Freeland accepted the proposal on January 27, 2016 and Appellant subsequently successfully completed all work due under the subcontract. See e.g. Court's Order, January 2, 2018 at p. 2. Appellant submitted a final invoice to Freeland on May 20, 2016 for $50,600.00, the total amount of the contract, with payment due on June 20, 2016. Transcript of Record 8:1–6; 16:19–23.

With Appellant's payment pending, Freeland finalized work on the Saluda Armory on June 1, 2016 and submitted its final invoice to Respondent on June 3, 2016. Respondent promptly paid the final invoice due to Freeland on June 7, 2016. On August 8, 2016, after Respondent had made final payment, Appellant notified Respondent that it had not been paid for its work. To date, Appellant has received no compensation its work completed on the Saluda Armory.

ARGUMENTS

I. BECAUSE NO FACTUAL ISSUES WERE PRESENTED TO THE TRIAL COURT, RULINGS ON CROSS-MOTIONS FOR SUMMARY JUDGMENT SHOULD BE REVIEWED *DE NOVO*.

In the parties' cross motions for summary judgment, "[b]oth parties agree[d] that the facts in this case are not in dispute. . . ." Court's Order at p. 1. As a result, the Court was asked to rule strictly on the legal issues presented. Id. As the only questions before the trial court were questions of law, the trial court's ruling should be reviewed *de novo*. See e.g. Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009) ("[The Court of Appeals] reviews all questions of law de novo."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718–19 (2000) (citing S.C. Const. art. V, §§ 5 and 9; S.C. Code Ann. §§ 14–3–320 and –330 (1976 & Supp. 1998); S.C. Code Ann. § 14–8–200 (Supp.1998) (granting Supreme Court and Court of Appeals the jurisdiction to correct errors of law in both law and equity actions)); see also S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008) ("Questions of law may be decided with no particular deference to the trial court.").

II. THE SOUTH CAROLINA SUBCONTRACTOR AND SUPPLIER PAYMENT PROTECTION ACT GIVES RISE TO A PRIVATE RIGHT OF ACTION AGAINST A GOVERNMENT ENTITY FOR FAILURE TO ENSURE THAT A CONTRACTOR IS PROPERLY BONDED.

A. South Carolina's Little Miller Act and Subcontractor and Suppliers Payment Protection Act ("SPPA") are intended to provide protection and recourse to subcontractors on government projects where traditional Mechanic's Liens are not available.

Prior to the enactment of South Carolina's "Little Miller Act", S.C. Code Ann. § 11-30-3030, South Carolina "law afforded limited protection to subcontractors and suppliers providing labor and materials on public projects." Sloan Const. Co. v. Southco Grassing, Inc. 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008). In a private construction setting, a subcontractor that has

not been paid for work completed may take out a lien on a property for which it provided labor and materials. See S.C. Code Ann. § 29-5-10. However, because no lien may be had against the government, unpaid subcontractors on government projects were left with little or no remedies available. In response to the discrepancy in remedy, the legislature stepped in. "[T]hese provisions are . . . enacted to address the problem of subcontractors who may not use liens on public property to secure payment for work performed on public projects . . . ." Sloan, 377 S.C. at 113, 69 S.E.2d at 161. South Carolina's Littler Miller Act is modeled after the Federal Miller Act legislation, which was enacted to address the problem of subcontractors who may not take out mechanic's liens on public property to secure payment for work performed on public projects and must otherwise rely on the financial solvency of prime contractors. 40 U.S.C. §§ 3131, et seq.

The Subcontractors' and Suppliers' Payment Protection Act ("SPPA") was designed to "expand[] the protections afforded these parties under the Little Miller Acts." Sloan, 377 S.C. at 114, 69 S.E.2d at 161. 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 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).

The South Carolina Supreme Court examined the statutory framework behind the SPPA in Sloan, first noting "that the very title of the SPPA clearly indicates the General Assembly intended to provide stronger payment protection specifically for subcontractors and suppliers on

government projects." Sloan, 377 S.C. at 115, 69 S.E.2d at 162 (citing Broadhurst v. City of Myrtle Beach Elec. Comm'n, 342 S.C. 373, 381, 537 S.E.2d 543, 546 (2000) (using title of statute to support a judicial interpretation)). Further, the Court noted that it "has long held that such remedial statutes should be liberally construed in order to effectuate their purpose." Id. (citing S.C. Dept. of Mental Health v. Hanna, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978).

The Supreme Court recognized that the General Assembly, in enacting the SPPA, went one step further than the Little Miller Act's bond requirement by establishing both a duty on the part of the governmental body to require payment bonding, as well as a standard of care for overseeing the issuance of a proper payment bond. Id. In other words, the General Assembly provided subcontractors greater protections and remedies by placing an affirmative duty on the governmental entity to assure the appropriate payment bond is issued. See id. "In placing an affirmative duty on the government that is absent from the Little Miller Acts, [the Supreme Court found] that 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. at 116, 659 S.E.2d at 162–3 (citing State ex. rel. McLeod. v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) (finding that a court must presume that the legislature "intended by its action to accomplish something and not to do a futile thing")). Thus, the Court in Sloan held 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." Id. at 118. Specifically, "government may be liable to a subcontractor for breach of contract for failing to comply with SPPA bonding requirements." Id. at 120; see Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013) (clarifying that "a governmental entity may be liable to a subcontractor *only*

for breach of contract for failing to comply with SPPA bonding requirements." (emphasis added)).

B. Appellant is entitled to Summary Judgment against the Appellant for Breach of Contract due to the Appellant's failure to ensure that the Contractor had obtained a payment bond.

Respondent awarded Freeland the general contract for the Saluda Armory Project on September 19, 2014. Court's Order at p. 2. It is undisputed that Respondent did not ensure that Freeland had a payment bond in place prior to awarding the contract or at any phase of the Saluda Armory Project. See e.g. Respondent's Motion for Summary Judgment at p. 1. Based on Respondent's failure to comply with its statutorily prescribed duty, Appellant remains unpaid for its work on the Saluda Armory to this day. Because Respondent failed to comply with the SPPA bonding requirements, Appellant was, and is, entitled to summary judgment in its favor for Respondent's breach of contract.

III. THE TRIAL COURT ERRED IN HOLDING THAT THE SUBCONTRACTOR WAS NOT ENTITLED TO RELIEF WHERE IT WAS NOT AFFORDED ANY OPPORTUNITY TO GIVE NOTICE OF NON-PAYMENT.

A. The holding in Sloan that purports to limit government liability should not by applied to the facts at hand.

Although the issue of limits on governmental liability under the SPPA was not directly before the Court in Sloan, the Court took the opportunity to "clarify" its holding. Sloan, 377 S.C. at 121, 69 S.E.2d at 165. They stated:

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

Sloan at 121, 166-67.

In Sloan, the subcontractor gave notice to the Department of Transportation that it was owed money by the general contractor 14 months before payment was made to by the DOT to the general contractor. Furthermore, payment was made after a direct representation to the DOT by the general contractor that all of the subcontractors were paid in full. Sloan at 111, 160. It appears that the record before the Court was insufficient to determine how much was owed at the time of the notice, thus the matter was remanded to the trial court for that determination. Id. at 121, 166.

Here, no notice of non-payment was given to the Respondent prior to its payment to the general contractor because no payment was due. Appellant submitted an invoice for its work on May 20, 2016, with payment due in 30 days. On June 1, 2016, the General Contractor submitted its final invoice to the Respondent, which was paid in 3 days. Thus, the Respondent paid the General Contractor 17 days before payment by the contractor was due to the Appellant. There is nothing Century Glass could have done to protect itself from this unfortunate situation.

Based on these facts, and applying the holding of Sloan, the trial court held that the Department had no liability to Century Glass and granted judgment. But, Century Glass could not have given notice of non-payment prior to the Department's payment because the non-payment had not yet occurred. Non-payment didn't occur until after liability was extinguished by payment.

This can't be the intended result of Sloan. The Trial Court should have relied on the fact that no payment was due, thus no "liability" had yet attached to the Department at the time payment was made to Freeland. Thus, because no liability had attached, no liability could be "limited" or, in this case, extinguished. In other words, Century Glass did not yet have a ripe

cause of action against the Department at the time that payment purporting to limit their liability was made.

B. The holding in Sloan that purports to limit governmental liability should be clarified in light of prevailing rules of statutory construction.

In the landmark United States Supreme Court decision in Marbury v. Madison, 5 U.S. 137, 164 (1803), Chief Justice John Marshall, writing for the majority, stated "[t]he government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." However, after discussing the clear statutory scheme intended to enhance the rights of subcontractors on government projects, stating that remedial statutes should be liberally construed to effectuate their purpose, and discussing that the legislature intended to accomplish something and not to do a futile thing, the South Carolina Supreme Court's holding in Sloan then purports to limit the government's liability "to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment." Sloan, 377 S.C. at 121, 659 S.E.2d at 165-66. As a result, Century Glass has a right without a remedy.

This holding in Sloan is the result of an over-extension of the analogy of SPPA and the traditional mechanic's lien statutes. While it is clear that the Legislature intended to provide a similar protection to subcontractors on public projects to that afforded to those on private, there is no indication that they intended the entire mechanic's lien rubric to apply. In fact, quite the contrary. The difference between the two statutory schemes are significant. For example:

- The SPPA imposes a specific duty on the part of the government owner to take action to protect subcontractors;[1] the mechanic's lien statutes create no such duty on the part of the owner.[2]

[1] S.C. Code Ann. § 29-6-250(1).

- The mechanic's lien statutes create a property interest (lien) that is enforced by foreclosure;[3] the SPPA creates a duty on the part of the government that is enforced by an action for breach of contract.[4]

- The mechanic's lien statutes impose strict deadlines for providing notice and taking action to foreclose;[5] the SPPA has no deadlines.[6]

- The mechanic's lien statutes strictly define notice requirements—what it must contain, to whom it is given, and how it must be delivered;[7] the SPPA contains no notice provision.[8]

There is no evidence the General Assembly intended to transfer the limitation on liability into the SPPA. In fact, the SPPA is silent on any requirement that government liability is limited to an amount outstanding on the contract. The language within the mechanic's lien statute explicitly limits the amount recoverable to the amount due under the general contract: "In no event shall the aggregate amount of any liens filed by a sub-subcontractor or supplier exceed the amount due by the contractor to the subcontractor. . . ." S.C. Code Ann. § 29-5-20. As the Sloan majority itself notes, "a basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject." Id. at 117, 659 S.E.2d at 163 (citations omitted). The General Assembly, aware of the mechanic's lien statutes' limitation on recovery, intentionally left out any such limitation in the SPPA. Presuming the legislature had knowledge of the mechanic's lien statutes to include explicit limitations, and liberally construing the SPPA to effectuate its purpose, the Supreme Court's holding in Sloan is at odds with its own principles for interpreting statutes and undermines the clear legislative intent of the SPPA.

Unlike the mechanics' lien statute, the SPPA gives no warning to the subcontractor that its right of recovery may be limited by a failure to give notice, or by the payments made to

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[2] S.C. Code Ann. § 29-5-20.
[3] S.C. Code Ann. § 29-5-10(a).
[4] S.C. Code Ann. § 29-6-250(1).
[5] S.C. Code Ann. § 29-5-20(B).
[6] S.C. Code Ann. § 29-6-250.
[7] S.C. Code Ann. § 29-5-20(B).
[8] S.C. Code Ann. § 29-6-250.

contractor. Also, the SPPA gives no instruction to assist the subcontractor in protecting these rights. The Sloan holding creates these limitations by analogy to the detriment of the statutory rights of recovery specifically granted by the SPPA.

C. Other states with statutory schemes similar to South Carolina hold the state as surety for failure to comply with a statutory duty.

While most, if not all, states have enacted "Little Miller Acts" which mirror the federal Miller Act, South Carolina is exceptional in affording additional protections. Like South Carolina, Texas and Florida have also enacted statutes that establish a governmental duty to ensure the general contractor has secured a payment bond. These states, however, have not limited recovery. In Texas Dep't of Mental Health and Mental Retardation v. Newbasis Cent., L.P., 58 S.W.3d 278 (Tex. App. 2001), the government failed to require the general contractor to secure a payment bond as required by statute. The general contractor completed the work and was paid in full while the subcontractor's balance remained unpaid. The Texas appellate court held that a subcontractor could recover even though the government had already paid the general contractor in full because the government failed to follow the statutory provision of requiring the contractor to execute a payment bond. See id. at 284.

Similarly, Florida enacted a statute that establishes a duty on the government to ensure the contractor has a bond in place before beginning the work. In Palm Beach County v. Trinity Industries, Inc., 661 So. 2d 942 (Fla. Dist. Ct. App. 1995), the general contractor became insolvent, "making it impossible for [the subcontractor] to collect against its default judgment." Id. at 944-45. Like the Texas court in Newbasis, the Florida court held that the subcontractor could recover against the government where it failed to require the contractor to execute a payment bond. Id. at 945.

In this regard, South Carolina finds itself as the only state that establishes a governmental duty only to limit the recovery such that no remedy exists. The facts of this case are analogous to those in the Texas and Florida cases above and are squarely in the center of the public policy the Legislature sought to promote. With Sloan as a shield, the government's failure to follow the law is of no consequence because the holding in Sloan subverts each of the protections afforded to small businesses by the legislature in enacting the Little Miller Act and the SPPA. The limitation on recovery by Sloan Court ensures that the outcome for subcontractors is the same as it would be without either piece of legislation. The Court's holding in Sloan should be clarified because it undermines the very purpose for which the SPPA was created: to protect subcontractors that choose to provide labor and/or materials on government projects.

CONCLUSION

Under the Trial Court's interpretation of Sloan, a sub-contractor is without remedy for failing to do what no statute requires it to do, while the government has no liability for failing to do what a statute specifically requires it to do. While Sloan rightly provides a right to the sub-contractor to sue the government for this breach of duty, the Trial Court's application of this doctrine has deprived the sub-contractor of any effective remedy. This thwarts the clear legislative purpose of the SPPA and should be clarified by this Court. For these reasons, the Court should overturn the Trial Court's grant of Summary Judgment in favor of the Respondent and its denial of the Summary Judgment in favor of the Appellant and remand the case for consideration of the amount due to the Appellant.

Respectfully submitted,

May 23, 2018

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THE STATE OF SOUTH CAROLINA
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Of whom South Carolina Military Department is the Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on the South Carolina Military Department, by hand delivery and by depositing a copy of the same in the United States Mail, postage prepaid on May 23, 2018 addressed to the attorney of record, Kevin Desmond Maroney, Esquire, of the Office of the Attorney General, 1000 Assembly Street, Post Office Box 11549, Columbia, South Carolina 29211.

May 23, 2018

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May 23, 2018

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VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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RE: Century Glass v. Freeland Construction and South Carolina Military Department
Civil Action No.: 2016-CP-40-7647
Appellate No.: 2018-000162
Our File: 5443-10614

Dear Ms. Kitchings:

Enclosed for filing is the Initial Brief of Appellants and Proof of Service in the above case. Please file the originals and return a filed copy to the courier.

Should you have any questions or concerns, please do not hesitate to contact me.

Yours truly,

SWEENY, WINGATE & BARROW, P.A.

William H. Yarborough, Jr.

WHY/smt
Enclosures

cc: Kevin Desmond Maroney, Esquire, Office of the Attorney General
South Carolina Military Department