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-40-07647

Appellate Case No. 2018-000162

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

v.

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

Of which South Carolina Military Department is the Respondent.

INITIAL BRIEF OF THE RESPONDENT,

SOUTH CAROLINA MILITARY DEPARTMENT

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STATEMENT OF ISSUE ON APPEAL

I. In granting summary judgment for the Respondent, the circuit court correctly followed Supreme Court precedent and limited Respondent's liability to Appellant.

STATEMENT OF THE CASE

The Appellant (Meritage) filed an action against Freeland Construction Company, Inc. (Freeland) and the South Carolina Military Department (Respondent/Department) on December 29, 2016. As to the Department, the complaint alleged a third-party beneficiary breach of contract claim (based on the SPPA[1]) and an equitable claim for quantum meruit. The amount of the contract was $50,600. (Plaintiff's Complaint, p. 2, §16). (Meritage alleged damages of $55,027.50, however. (Plaintiff's Complaint, p. 4, §§27-28)). Meritage asked for actual damages, prejudgment interest, attorney's fees and costs, and further relief that the court deemed appropriate. (Plaintiff's Complaint, p. 4). The Department answered the complaint, and eventually filed a motion for summary judgment on May 26, 2017. Meritage filed its own motion for summary judgment on June 14, 2017.The Honorable Thomas G. Cooper, Jr. heard the competing motions on December 8, 2017. At the hearing, the quantum meruit claim was discarded; the only issue was the third-party beneficiary breach of contract claim. (Order of Judge Cooper (January 2, 2018), pp. 2-3). On January 8, 2018, Judge Cooper entered an order denying Meritage's motion while simultaneously granting the Department's motion for summary judgment. Meritage served its Notice of Appeal on February 5, 2018.

The case below was about the extent of government entity liability to a subcontractor. The issue on appeal is, whether, in granting the Department's motion for summary judgment, the circuit court correctly followed Supreme Court precedent and limited the Department's liability to Meritage. It did, so the court of appeals should affirm the lower court's ruling.

The following facts are undisputed. (Order of Judge Cooper (January 2, 2018), p. 2). In September of 2014, the Department and Freeland agreed on a contract that required Freeland to

[1] S.C. Code Ann. §§29-6-210 through 29-6-290 (the Subcontractors' and Suppliers' Payment Protection Act).

perform work on one of the Department's properties, the Saluda Armory. In January of 2016, Meritage submitted a subcontractor proposal to Freeland. Freeland accepted. On June 3, 2016, Freeland submitted a final invoice to the Department. The Department posted the amount due, on June 7, 2016; the final amount was deposited ten days later. Unbeknownst to the Department, Freeland had not paid Meritage. And Meritage did not inform the Department of Freeland's nonpayment until August 8, 2016—almost two months after the Department paid Freeland in full. Because of binding Supreme Court precedent, this last, undisputed fact determines the outcome of this case.

STANDARD OF REVIEW

"In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial judge under Rule 56(c), SCRCP." *Shirley's Iron works, Inc. v. City of Union*, 403 S.C. 560, 567, 743 S.E.2d 778, 782 (2013) (citation omitted). If there is no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, then summary judgment is proper. *Id.* In this case, the facts are undisputed and, after applying binding Supreme Court precedent, the Department must prevail as a matter of law.

ARGUMENT

In the first part of its brief, Meritage argues that, because the Department did not secure a bond, it is entitled to judgement as a matter of law. (Brief of the Appellant's, p. 7). In the next part of its brief, Meritage argues that the Supreme Court did not actually limit the extent of Government entity liability to a subcontractor, at least not in a factual situation that is similar to that of the parties in this case. (Brief of Appellant, pp. 7-9). In the final part, Meritage admits the Supreme Court did erect an applicable limit on liability, but argues this court should nevertheless overturn the higher court. (Brief of Appellant, pp.9-12). For example, Meritage disagrees with

"[t]he limitation on recovery by the Sloan Court," and contends the "Court's holding in Sloan should be clarified because it undermines the very purpose for which the SPPA was created." (Brief of Appellant, p. 12). After stating the Court erected a limit on liability, the word "clarified" can only mean, "overturned." The circuit court heard these exact same arguments, and did not consider them persuasive. Neither should this court.

I. Meritage was not entitled to summary judgment in this case, because the Department is not liable to Meritage for any amount of money.

Meritage first argues that, because the Department did not secure a payment bond, it is entitled to summary judgment on its third-party breach of contract claim. (Brief of Appellant, p. 7). (Although it may be a pedantic point, Meritage did not sign the contract between the Department and Freeland. (Order of Judge Cooper (January 2, 2018), p. 2). So, Meritage does not have a breach of contract claim; Meritage has a third-party beneficiary breach of contract claim, as the Supreme Court made clear in both *Sloan* and *Shirley's Iron Works*.). As will be shown below, Meritage's argument ignores the fact that, because Meritage did not give notice of Freeland's nonpayment before the Department paid Freeland in full, the Department is not liable to Meritage for any amount of money. Thus, Meritage's third-party beneficiary breach of contract claim fails. Consequently, the Department, not Meritage, was entitled to judgment as a matter of law.

"[A] governmental entity may be liable to a subcontractor only for breach of contract for failing to comply with the SPPA bonding requirements." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 564, 743 S.E.2d 778, 780 (2013). Although Meritage may pursue a third-party beneficiary breach of contract claim against the Department, the law is clear: "[T]he 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 Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 121, 659 S.E.2d 158, 165–66 (2008); *see also Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 575, 743 S.E.2d 778, 786 ("*Sloan I* limits the [government entity's] liability to the remaining unpaid balance on the contract with the [general contractor] at the time the [government entity] received notice of [the general contractor's] nonpayment.") (citing *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 120, 659 S.E.2d 158, 165-66).

Meritage informed the Department of Freeland's failure to pay on August 8, 2016. At that time, the Department did not owe any money to Freeland; it had paid Freeland in full on June 17, 2016. Because no outstanding balance existed between the Department and Freeland at the time of notice, the Department does not owe Meritage anything. Meritage's third party beneficiary breach of contract claim fails, consequently, as a matter of law. The circuit court properly granted the Department's motion for summary judgment.

II. Despite the clarity of the Supreme Court, Meritage unpersuasively argues that the Court did not actually limit the extent of government liability to a subcontractor, at least not in a factual situation that is similar to that of the parties in this case.

Freeland did not have to pay Meritage prior to June 19, 2016. The Department paid Freeland in full prior to that date. (Order of Judge Cooper (January 2, 2018), p. 2). Thus Meritage had no chance to notify the Department of Freeland's nonpayment. Meritage argues that the lack of an opportunity to provide notice of nonpayment distinguishes the facts of this case from those in *Sloan*, making the rule limiting a government entity's liability inapplicable. The argument is nothing more than wishful thinking.

In *Shirley's Iron Works*, subcontractors notified the government entity of the general

contractor's nonpayment. *Shirley's Iron Works v. City of Union*, 403 S.C. 560, 564-65, 743 S.E.2d 778, 780. The government entity tried to settle with the subs, offering to distribute to each of them an equal portion of the unpaid balance owed to the general contractor, in exchange for a release of the government entity's liability. *Id.*, 403 S.C. 560, 565, 743 S.E.2d 778, 780. Some of the subs accepted the offer, while a few others refused and proceeded to litigation. Eventually, the case arrived at the Supreme Court, and one of the issues was, whether the Court of Appeals should have affirmed the government entity's motion for summary judgment, given that the remaining unpaid balance on the contract with the general contractor had been paid to several of the subs. *Id.*, 403 S.C. 560, 575, 743 S.E.2d 778, 786. The government entity argued that, because the remaining unpaid balance had been paid, no remand was necessary. *Id.* The Supreme Court disagreed. Although the Court agreed, "*Sloan I* limits the [government entity's] liability to the remaining unpaid balance on the contract with [the general contractor] at the time the [government entity] received notice of [the government entity's] nonpayment," *Id.* (citing *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 120, 659 S.E.2d 158, 165-66, the record was not clear enough to determine that the limit had been reached.

> The record is unclear as to the [government entity's] methodology of payment disbursement, and there are genuine issues of material fact regarding the date upon which the [government entity] learned of [the general contractor's] nonpayment, as well as the amount remaining unpaid at that time.

Id.

If the record had been clear enough to determine that the limit on liability had been reached, the Court would have affirmed the grant of summary judgment: "Because factual questions are in dispute, summary resolution would be premature." *Shirley's Iron Works v. City of Union*, 403 S.C. 560, 575, 743 S.E.2d 778, 786. *Shirley's Iron Works* is very clear: subcontractors

who give notice of nonpayment before the government entity pays the general contractor in full—*i.e.*, before the limit of liability has been reached—can still be denied recovery if the limit of liability is subsequently reached through the payment of other subcontractors. The limit of government entity liability is never more than the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment.

There are no factual disputes in this case. Meritage gave notice of nonpayment, after the Department paid Freeland in full. If subcontractors who give notice of nonpayment, before the general contractor is paid in full, can be denied recovery because the limit of liability is subsequently reached through the payment of other subcontractors, then surely subcontractors who give notice of nonpayment—after the limit of government entity liability has been reached—are denied recovery. Meritage's contrary argument is untenable.

What is more, Meritage could have structured the contract with Freeland to reflect the concern about notice. After all, Meritage knew or should have known about the Supreme Court's holding in *Sloan*, as the Court issued the *Sloan* opinion in 2008. The Court issued the *Shirley's Iron Works* opinion in 2013. Both opinions came out prior to the contract between Meritage and Freeland. Meritage could have taken steps to mitigate if not remove the possibility of having no recourse against any entity other than Freeland; it just didn't take any.

III. Meritage is asking this this court to overturn the decision of the Supreme Court, which of course this court cannot and will not do.

Despite initially arguing that the limit on government entity liability does not apply here, Meritage proceeds to argue that, though the limitation does apply, this court should overturn the limitation. (Brief of Appellant, pp.9-12). Of course the court cannot do this, however, as the circuit

court pointed out. Order of Judge Cooper (January 2, 2018), p. 4 (citing *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) ("[I]t is incumbent upon the court of appeals to apply this Court's precedent.") (citing S.C. Const. art V., §9).

Nevertheless, the Department will give a few points in reply to Meritage's contentions. First, Meritage criticizes the Supreme Court for "an over extension of the analogy of [the] SPPA and the traditional mechanic's lien statutes." (Brief of Appellant, p. 9). The problem with this argument is that the Supreme Court did not think it over extended the analogy. And this court cannot effectively overrule the Supreme Court by analyzing the issue of government entity liability differently than the higher court did. Second, Meritage argues that the General Assembly was aware of the limitation on recovery within the mechanic's lien statute when it passed the SPPA, and "intentionally left out any such limitation in the SPPA." (Brief of Appellant, p. 10). If that were true, one would think the General Assembly would have altered the statute to reflect this intention, especially after the Supreme Court ruled otherwise. Changing a statute, after all, is completely within the authority of the General Assembly. Bryan A. Garner, et al., *The Law of Judicial Precedent*, p. 410 ("[I]f the precedent or precedents have misinterpreted the legislative intention, the Legislature's competency to correct the misinterpretation is readily at hand.") (internal citation omitted). Despite its authority to do so, the statute remains unchanged, even a decade after *Sloan*. Regardless, the Supreme Court's interpretation of the statute is binding precedent; this court cannot ignore it, even if the court thinks the General Assembly meant the words of the statute to indicate something other than what the Supreme Court says they mean. Third, Meritage argues the Supreme Court should be overruled, because the SPPA does not warn a subcontractor that the ability to recover from a government entity will be limited if it does not give notice of nonpayment before the general contractor is paid in full. The text of the SPPA may not

warn subcontractors—but case law does. *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 121, 659 S.E.2d 158, 165–66; *see also Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 575, 743 S.E.2d 778, 786. Sophisticated parties (among whom Meritage is counted) should know that it is the role of the Supreme Court to say what the law is,[2] and that consulting the judicial interpretation of a statute is therefore a necessity. Finally, Meritage claims an appellate court in Florida and an appellate court in Texas have ruled that their respective State statutes do not limit government entity liability to subcontractors, so the South Carolina Court of Appeals should rule similarly. Besides asking the court to ignore the fact that these Courts were not construing the South Carolina statute at issue, Meritage is arguing that this court should follow the appellate courts of Texas and Florida rather than the Supreme Court of South Carolina. Meritage does not provide any support for this novel legal theory.

The Texas statute, furthermore, expressly provides that, "if the governmental entity fails to obtain from a prime contractor a payment bond as required by Section 2253.021 [,] the entity is subject to the *same liability that a surety would have if the surety had issued a payment bond* and if the entity had obtained the bond." *Texas Dept. of Mental Health and Mental Retardation v. Newbasis Central, L.P.*, 58 S.W.3d 278, 281 (2001) (citing Tex. Gov't Code Ann. §2253.027) (emphasis in original). No similar provision, which makes the government entity the surety, exists in the SPPA. *See* S.C. Code Ann. §§29-6-210 through 29-6-290.

At bottom, Meritage is really arguing that the Supreme Court's limitation on government entity liability works a hardship in its case. That may be correct. It is nevertheless irrelevant.

> Considering the effect of the law in a particular case is tantamount to disregarding the law: In determining a case [,] the court is not concerned with what the law ought to be, but its sole function is to

[2] Meritage is aware of judicial review, as it quotes from "the landmark Supreme Court decision," *Marbury v. Madison*. (Brief of Appellant, p. 9).

declare what the law, applicable to the facts of the case, is.

Bryan A. Garner, et al., *The Law of Judicial Precedent*, pp. 412-13 (internal citations and quotations omitted).

So even if this court had the authority to overrule the Supreme Court (which it does not), no court should overrule, based on hardship in a particular case, *Sloan* or *Shirley's Iron Works*. Meritage incorrectly argues otherwise.

CONCLUSION

The governing law is clear: a 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. When Meritage notified the Department of Freeland's nonpayment, the Department had already paid Freeland in full. Consequently, the Department has no outstanding liability to Meritage.

This court should affirm the ruling of the circuit court.

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Respectfully submitted,

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PROOF OF SERVICE

I certify that I served the Appellant with copies of the Respondent's Initial Brief and Designation of Matter (including Certification) via U.S. mail. The copies were sent to the following address:

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