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

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SC Court of Appeals

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.

REPY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities iii

Arguments

I. SLOAN CREATES A LIMITATION ON LIABILITY NOT FOUND IN THE SPPA 1

II. SLOAN, AS CONSTRUED BY RESPONDENT, SHIFTS THE BURDEN TO THE SUBCONTRACTOR TO TRIGGER THE PROTECTIONS AFFORDED BY THE SPPA 3

Conclusion 4

TABLE OF AUTHORITIES

CASES

Sloan Const. Co. v. Southco Grassing, Inc. 377 S.C. 108, 659 S.E.2d 158 (2008)................1, 2, 3

STATUTES

Subcontractors' and Suppliers' Payment Protection Act, S.C. Code Ann.
§ 29–6–210 Et seq...1, 2, 3

S.C. Code Ann. § 29–6–230...3

ARGUMENT

All parties agree that an injustice has occurred as a result of the application of Sloan to the facts of this case:

- Respondent failed to comply with the requirement of the Subcontractor and Suppliers Payment Protection Act ("SPPA") by requiring its contractor to obtain a Payment Bond;[1]
- Freeland accepted the full benefit of its subcontractors' work, received full payment from the Respondent and failed to pay Appellant;[2]
- Appellant fully performed on all its obligations and is left holding the (empty) bag.[3]

This is the type injustice that occurred prior to enactment of the SPPA and is the very injustice that the SPPA was enacted to avoid – ensuring that subcontractors working on government projects had assurance of payment from general contractors. The Respondent's Initial Brief highlights the two reasons why this occurred in this case, and why the holding in Sloan should not be applied in this case.

I. SLOAN CREATES A LIMITATION ON LIABILITY NOT FOUND IN THE SPPA.

The plain language of the SPPA, unlike the explicit requirements within the mechanic's lien statute, does not limit the liability of the Government for failing to comply with the SPPA. Instead, the limitation is entirely of judicial creation through *dicta* in the Sloan opinion.

The South Carolina Supreme Court, in Sloan, granted petition for writ of certiorari to review a single issue:

> Did the court of appeals err in holding that statutory bond requirements applicable to public projects do not create an enforceable duty giving rise to a private right of action by a subcontractor?

Sloan, 377 S.C. at 112, 659 S.E.2d at 161. Thus, the Court undertook the task of answering "whether a subcontractor may bring a private right of action against a government

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[1] Respondent South Carolina Military Department's Memorandum in Support of Summary Judgment, May 26, 2017, p. 1.
[2] Id.
[3] See Id.

entity for failure to comply with statutory bond requirements." Id. at 111, 659 S.E.2d at 160. Notably, the Court was not asked to review the limits of liability. After an extensive look into the history of the Miller Acts and the SPPA, the Court answered the lone question before it in the affirmative. Id. at 120, 659 S.E.2d at 165. The Sloan Court then undertook, in a solitary paragraph, to limit the remedy. Id.

Respondent's statement that "[t]he limit of government entity liability is never more than the remaining unpaid balance on the contract" highlights the very issue with the limitation in Sloan: if the government never pays more than the amount of the contract, what incentive does it have to comply with its duty and what penalty does it face if it does not? Extending Sloan's and Respondent's analysis, no incentive or penalty exists. This logic explains why Respondent did not ensure Freeland had a payment bond in place: Sloan eliminates any penalty Respondent may have faced for failing to comply with its duty. Surely, if this complies with the legislature's intent, the SPPA would have never been enacted. To extend Sloan to apply in this context would effectively eliminate the duty assigned to the government by the SPPA.

Respondent states that "[c]hanging a statute, after all, is completely within the authority of the General Assembly." Brief of Respondent at p. 11. However, Respondent's attempt to deflect the correction of this injustice to the Legislature is misplaced. Respondent argues that the lack of action by the Legislature is evidence of consent. However, the SPPA doesn't need to be changed because the SPPA doesn't contain the problematic limitation. Thus, the injustice should be resolved in the same way it was created – judicially.

II. SLOAN, AS CONSTRUED BY RESPONDENT, SHIFTS THE BURDEN TO THE SUBCONTRACTOR TO TRIGGER THE PROTECTIONS AFFORDED BY THE SPPA.

In its brief, Respondent suggests that Appellant "could have taken steps to mitigate if not remove the possibility of having no recourse," "Meritage could have structured the contract with Freeland to reflect the concern about notice," and "Meritage knew or should have known about the Supreme Court's holding in Sloan." Brief of Respondent at p. 10. Respondent's contentions are a distraction from the issue at hand. The plain language of the SPPA does not require a subcontractor to do anything to assure itself that it will get paid by the general contractor. That burden is placed entirely on the Government: Respondent should have taken steps to mitigate if not remove the possibility of subcontractors having no recourse and Respondent should not have granted the general contract with Freeland with no statutorily required payment bond in place.

Respondent argues that Sloan shifts that burden to the subcontractor when the Government breaches its statutory obligations. Respondent suggests that Appellant should have somehow anticipated that the Government would fail to require a Payment bond, that the Government would make final payment within 3 business days of the invoice, and that Freeland would illegally keep the money it was paid.[4] Anticipating all of those things before entering the contract, Century – according to Respondent – should have negotiated and drafted a special contract provision that would somehow require Freeland to refuse to receive full payment from the Government until after it refused to pay Century and Century had the opportunity to give notice of non-payment to the Government – notice that the SPPA does not even contemplate.

This suggestion is completely devoid of understanding of how subcontracts are entered and materials acquired on a construction project. Moreover, the SPPA does not require a written

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[4] S.C. Code § 29-6-230

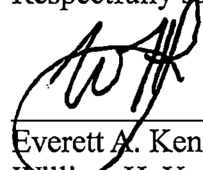
contract with any specific terms. In this case, the contract between Freeland and Century was in the form of an accepted proposal.[5] Oftentimes, contracts terms are stated in the small print of a purchase order, or they are entirely oral. Following Respondent's suggestion would bring the wheels of construction commerce to a grinding stop.

CONCLUSION

The application of Sloan to the facts of this case put subcontractors in a situation as though the SPPA had never been enacted. As a result, Sloan serves as a judicial veto of what was clearly intended by the Legislature. This unfortunate and unforeseen result can and should be corrected.

June 18, 2018

Respectfully submitted,



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[5] See eg., Respondent South Carolina Military Department's Memorandum in Support of Summary Judgment at p. 2; Appellant's Complaint at ¶¶ 13–14.