

2010-170066

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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S.C. SUPREME COURT

Op. No. 4637
(S.C. Ct. App. refiled May 20, 2010)

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.

APPENDIX

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**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

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 of both
Columbia and William Whitney, Jr., of Union, for
Respondents.

WILLIAMS, J.: In this case, we must determine whether the trial 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 (the Contract) to build the Project. The total value of the Contract was approximately \$875,000. 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^[1] 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 trial 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 trial 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 these holdings.

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.

Both parties moved for summary judgment, and the trial court heard the motions on January 23, 2006. After the hearing, but before the trial court ruled on the motions, this court issued its opinion in Sloan Constr. 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 trial court granted summary judgment in favor of the City as to the Appellants' tort, third-party beneficiary breach of contract,^[2] and quantum meruit claims on September 24, 2007.

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, however, 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 that section 29-6-250 gave 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 trial 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 summary judgment in favor of the City as to the Appellants' tort cause of action.

2. Third-Party Beneficiary Breach of Contract

The Appellants argue the trial 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 trial court's grant of summary judgment should nevertheless be affirmed. We find the City's 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); see Smith 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 on April 19, 2004, the trial court held the Appellants' cause of action for violation of section 29-6-250 sounded in tort, and this holding was not appealed. We disagree.

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). The law of the case doctrine derives from the principle of res judicata, which "bars a subsequent suit by the same parties on the same issues." Sub-Zero Freezer v. R.J. Clarkson Co., 308 S.C. 188, 190, 417 S.E.2d 569, 571 (1992); see Johnson v. Bd. of Comm'rs of Police Ins. & Annuity Fund of State, 221 S.C. 23, 25, 68 S.E.2d 629, 633 (1952) ("The rulings in a case even though admittedly wrong become the law of the case and [are] res judicata between the parties."); Profit Bankers Corp. v. Floyd, 285 S.C. 607, 613, 331 S.E.2d 362, 365 (Ct. App. 1985) ("An appealable order from which no appeal is taken becomes the law of the case in all subsequent proceedings involving the same parties on the same subject matter.").

We believe the law of the case doctrine does not apply here because the amended complaint involved additional parties and issues from those asserted in the original complaint. In 2004, when the trial court held the Appellants' cause of action against the City sounded in tort, it did so in the context of a motion to strike a portion of the original complaint. As stated above, the original complaint was against the City alone, and made no mention of a third-party beneficiary breach of contract theory. The first time the Appellants did allege a third-party beneficiary theory was in their amended complaint, filed August 17, 2005, which included Gilbert and William E. Gilbert as defendants. Thus, when Judge Short ruled on the City's motion to strike in 2004, Gilbert and William E. Gilbert were not parties, and the question of whether the Appellants could properly assert a breach of contract action was not before the court. As such, Judge Short's ruling that the original complaint sounded in tort cannot be res judicata as to the amended complaint.

Under the City's view of the law of the case doctrine, a trial court's ruling as to an original complaint would carry over to a subsequent amended complaint, regardless of the changes made in the amended complaint. Thus, as applied to this case, because Judge Short characterized the Appellants' original complaint as alleging a tort, the Appellants were thereafter precluded from alleging anything other than a tort in this case. This is inconsistent with our jurisprudence. See Adderton v. Aetna Casualty & Surety Co., 182 S.C. 465, 480, 189 S.E.2d 736, 742 (1937) (affirming trial court's determination that although its order sustaining defendants' demurrers as to the original complaint "was a final determination of all questions raised by the allegations of the original complaint, . . . the order [was] not res judicata as to any issue created by the allegations of new matter contained in the amended complaint").^[3]

Accordingly, we reverse the trial court's grant of summary judgment in favor of the City as to the third-party beneficiary breach of contract claim.

3. Quantum Meruit

The Appellants argue the trial court erred in granting summary judgment in favor of the City on their quantum meruit claim. We disagree.

To survive a motion for summary judgment, the non-moving party must offer some evidence that a genuine issue of material fact exists as to each element of the claim. Steele v. Rogers, 306 S.C.

546, 552, 413 S.E.2d 329, 333 (Ct. App. 1992). The elements of quantum meruit are the following: (1) a benefit conferred by the 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 the defendant to retain the benefit without paying its value. Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000).

The City argues there exists no genuine issue of material fact as to the third element of quantum meruit. At the trial court, the City maintained it had paid out the remaining balance on all subcontracts, and Appellants had failed to present sufficient evidence to the contrary to create a genuine issue of material fact. On this basis, the City now argues summary judgment as to quantum meruit should be affirmed because although the City has been "enriched" by the completion of the Project, such enrichment was not unjust because the City has paid out the full price of the Contract. See Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994) ("Courts 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."); see also Sloan Constr., 377 S.C. at 121, 659 S.E.2d at 165-66 (holding government's liability for failure to comply with section 29-6-250 is limited to the remaining unpaid balance on the contract with the general contractor). After reviewing the record, we agree.

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Gauld v. O'Shaughnessy Realty Co., 380 S.C. 548, 558, 671 S.E.2d 79, 85 (Ct. App. 2008). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Id. Once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Id. at 558-59, 671 S.E.2d at 85. Rather, the nonmoving party must present specific facts showing a genuine issue for trial. Id. at 559, 671 S.E.2d at 85.

William E. Gilbert stated in his deposition that at the time the City learned some of the subcontractors had not been paid in full, a total of \$111,270 remained to be paid to Gilbert on the Contract. Those funds were offered to the unpaid subcontractors, including the Appellants. Ultimately, all of the remaining unpaid subcontractors (except the Appellants) agreed to accept a share of the \$111,270 in exchange for releasing the City from further liability. The Appellants refused to grant the City such a release. Thereafter, the portion of the \$111,270 that was set aside to pay the Appellants was distributed among the other unpaid contractors. Thus, the record indicates 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.^[4] We believe this showing established an absence of evidence of the City's nonpayment such that the burden shifted to the Appellants to present evidence in support of its case.

The Appellants, however, do not point to any evidence, either in their Final Brief or in their Reply Brief, that would refute the trial court's finding that there was no evidence of the City's failure to pay. Rather, the Appellants merely allege in their Reply Brief, "It is very much disputed that the City has fully paid the value of the benefit by paying the entire contract price." The Appellants have shown no specific facts to support this contention; rather, they have rested on the allegations and denials in their pleadings. Under Gauld, this is not sufficient to survive summary judgment.

Accordingly, we affirm the trial court's grant of summary judgment as to the Appellants' quantum meruit claim.

4. Violation of 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[5] 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. 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 trial court. However, the trial 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 trial 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 trial court is

REVERSED IN PART AND AFFIRMED IN PART

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

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

[2] 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"

[3] At oral argument, the City noted the trial court twice ruled that the Appellants' causes of action sounded in tort. The first was in Judge Short's order, filed in April 2004, before the amended complaint. The second was in Judge John's order, filed in December 2005, which was after the amended complaint. Thus, one could argue because Judge John's ruling came after the amended complaint was filed, his ruling that the claims sound in tort does have res judicata effect, and the law of the case precludes the Appellants' claims in the amended complaint. However, this line of reasoning was not presented in the City's brief; rather, the City argued Judge Short's ruling was the law of the case. Moreover, to the extent the City did argue this line of reasoning, we find Judge John's ruling was nevertheless erroneous under Adderton).

[4] We also note at oral argument on the cross motions for summary judgment, when counsel for the City stated it was "undisputed . . . that the full contract price was ultimately paid out by the City," counsel for the Appellants did not respond.

[5] 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."

**THE STATE OF SOUTH CAROLINA
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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

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Submitted October 1, 2009 – Filed December 9, 2009
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AFFIRMED AS MODIFIED

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

Andrew F. Lindemann, of Columbia; Gilbert
Bagnell, of Columbia; William E. Whitney, Jr., of
Union; all for Respondents.

WILIAMS, 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 affirm as modified.

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 (the Contract) to build the Project. The total value of the Contract was approximately \$875,000. 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 its answer, the City denied the allegations in the complaint and presented a third-party complaint against Gilbert and William E. Gilbert^[1] 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 these holdings.

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.

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 Constr. 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,^[2] and quantum meruit claims on September 24, 2007.

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, however, 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 gave 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), SCRPC, 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), SCRPC). "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., Inc.*, 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 and Third-Party Breach of Contract

As an initial matter, the City concedes, and we agree, that in light of our supreme court's decision in *Sloan Construction*, the circuit court's grant of summary judgment in favor of the City on the grounds that Appellants have no private right of action against the City for breach of any duties created by the SPPA was in error. However, the City argues even assuming *arguendo* the consequence of *Sloan Construction* was Appellants' tort and third-party breach of contract claims were properly brought under the SPPA, summary judgment as to those claims 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 non-payment. We agree.

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Gauld v. O'Shaughnessy Realty Co.*, 380 S.C. 548, 558, 671 S.E.2d 79, 85 (Ct. App. 2008). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. *Id.* Once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Id.* at 558-59, 671 S.E.2d at 85. Rather, the nonmoving party must present specific facts showing a genuine issue for trial. *Id.* at 559, 671 S.E.2d at 85.

William E. Gilbert stated in his deposition that at the time the City learned some of the subcontractors had not been paid in full, a total of \$111,270 remained to be paid to Gilbert on the Contract. Those funds were offered to the unpaid subcontractors, including the Appellants. Ultimately, all of the remaining unpaid subcontractors (except the Appellants) agreed to accept a share of the \$111,270 in exchange for releasing the City from further liability. The Appellants refused to grant the City such a release. Thereafter, the portion of the \$111,270 that was set aside to pay the Appellants was distributed among the other unpaid contractors. Thus, the record indicates 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.^[3] We believe this showing established an absence of evidence of the City's nonpayment such that the burden shifted to the Appellants to present evidence in support of its case (i.e., evidence that the City did not, in fact, pay out in full).

The Appellants, however, do not point to any evidence, either in their Final Brief or in their Reply Brief, that would refute the circuit court's finding that there was no evidence of the City's

failure to pay. Rather, the Appellants merely make the conclusory allegation in their Reply Brief, "It is very much disputed that the City has fully paid the value of the benefit by paying the entire contract price." The Appellants have shown no specific facts to support this contention; instead, they have rested on the allegations and denials in their pleadings. Under Gauld, this is not sufficient to survive summary judgment.

Consequently, 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. Thus, we affirm the circuit court's grant of summary judgment on the tort and third-party breach of contract claims.

2. Quantum Meruit

The City argues summary judgment as to the Appellants' quantum meruit claims should be affirmed because there is no evidence tending to show the City has retained any of the contract price. We agree.

To survive a motion for summary judgment, the non-moving party must offer some evidence that a genuine issue of material fact exists as to each element of the claim. Steele v. Rogers, 306 S.C. 546, 552, 413 S.E.2d 329, 333 (Ct. App. 1992). The elements of quantum meruit are the following: (1) a benefit conferred by the 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 the defendant to retain the benefit without paying its value. Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000).

The City argues there exists no genuine issue of material fact as to the third element of quantum meruit. At the circuit court, the City maintained it paid out the remaining balance on all subcontracts, and that Appellants failed to present sufficient evidence to the contrary to create a genuine issue of material fact. On this basis, the City now argues summary judgment as to quantum meruit should be affirmed because while the City certainly has been "enriched" by the completion of the Project, such enrichment was not unjust because the City has paid out the full price of the Contract. See Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994) ("Courts 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.").

As discussed above, we find there existed no genuine issue of material fact as to whether the City has paid out in full on the Contract. Consequently, we affirm the circuit court's grant of summary judgment as to quantum meruit.

3. Violation of 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. 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

AFFIRMED AS MODIFIED

GOOLSBY and GEATHERS, JJ., concur

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

[2] In granting summary judgment, the circuit 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 circuit 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"

[3] We also note at oral argument on the cross motions for summary judgment, when counsel for the City stated it was "undisputed . . . that the full contract price was ultimately paid out by the City," counsel for the Appellants did not respond.

[4] South Carolina 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."

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:

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

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

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.

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"

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.

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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).

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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.

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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); see Smith 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 27-1-15⁴ 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. On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724

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."

(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.

RECEIVED

The South Carolina 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.

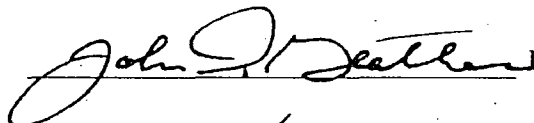
The Honorable John C. Few
Union County

Trial Court Case No. 2003-CP-44-171(B)
2003-CP-44-00171

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petitions for Rehearing, the Court has decided to issue a substituted opinion. It is, therefore, ordered that the Petitions for Rehearing be denied and the earlier opinion, 0000-00-04637, be withdrawn and substituted with the attached opinion.

 J. Williams

 Geathers

 J. Goolsby

Columbia, South Carolina

FEB 11 2010

cc: Boyd Benjamin Nicholson, Esquire
N. Ward Lambert, Esquire
R. Patrick Smith, Esquire
Andrew F. Lindemann, Esquire
Gilbert Bagnell, Esquire
William E. Whitney, Jr, Esquire

The South Carolina Court of Appeals

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

Appellants,

v.

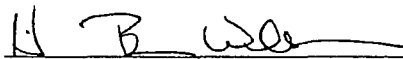
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Group, LLC and William E. Gilbert,

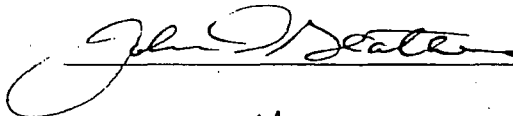
Respondents.

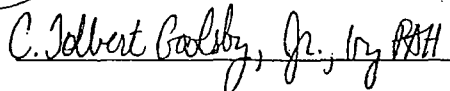
The Honorable John C. Few
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Trial Court Case No. 2003-CP-44-171(B)
2003-CP-44-00171

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petitions for Rehearing, the Court has decided to issue a substituted opinion. It is, therefore, ordered that the Petitions for Rehearing be denied and the earlier opinion, 0000-00-04637, be withdrawn and substituted with the attached opinion.

 J. Williams

 J. Geathers

 J. Goolsby

Columbia, South Carolina

May 20, 2016

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Gilbert Bagnell, Esquire
William E. Whitney, Jr, Esquire

The South Carolina 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,

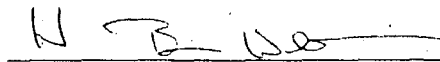
Respondents.

The Honorable John C. Few
Union County
Trial Court Case No. 2003-CP-44-00171

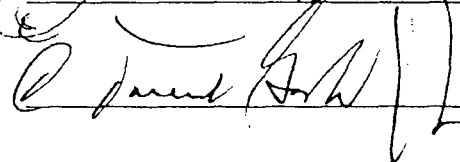
ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

 J. Williams

 J. Geathers

 A. J. Goolsby

Columbia, South Carolina

July 26, 2010

cc: Boyd Benjamin Nicholson, Esquire
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R. Patrick Smith, Esquire
Andrew F. Lindemann, Esquire
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William E. Whitney, Jr, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Op. No. 4637
(S.C. Ct. App. filed December 9, 2009)

RECEIVED
DEC 29 2009
SC 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:

PETITION FOR REHEARING

The Respondent City of Union petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Shirley's Iron Works, Inc. v. City of Union*, Op. No. 4637 (S.C. Ct. App. filed December 9, 2009).

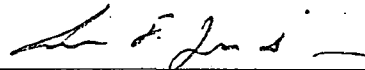
The grounds for the Respondent's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Respondent's petition for rehearing is based on the Court's decision in *Shirley's Iron Works, Inc. v. City of Union*, Op. No. 4637 (S.C. Ct. App. filed December 9, 2009), the

supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR;
Rule 224, SCACR; and other rules of court.

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December 29, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Op. No. 4637
(S.C. Ct. App. filed December 9, 2009)

RECEIVED
DEC 29 2009
SC 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.

MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING

The Respondent City of Union has petitioned this Court for a rehearing of the recent decision in *Shirley's Iron Works, Inc. v. City of Union*, Op. No. 4637 (S.C. Ct. App. filed December 9, 2009), specifically with respect to the portions of the decision where the Court reversed in part the summary judgment granted by the Circuit Court. The Respondent City respectfully submits that the following points were overlooked or misapprehended by this Court:

I.

This Court erred in failing to hold that the Appellants' tort cause of action is not governed by the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* Specifically, the Court 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 overlooked the numerous cases holding 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).

While this Court properly ruled that a violation of Section 29-6-250, which is part of the Subcontractors' and Suppliers' Payment Protection Act (SPPA), is a tort, the Court erred in finding that such a tort falls outside of the Tort Claims Act. To the contrary, 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.

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.

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, this Court 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 for this Court to circumvent the bar of sovereign immunity and provide for a tort remedy against a governmental entity where sovereign immunity has not been expressly and explicitly waived.

On rehearing, this Court is urged to give effect to Section 15-78-200, Section 15-78-20(b), and the supporting case law. The Court is respectfully requested to find that the tort alleged by the Appellants is governed by the Tort Claims Act. Further, the Court is urged to then conclude that the Appellants' tort claim is barred by sovereign immunity, specifically Section 15-78-60(4), consistent with footnote five in *Sloan Construction Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008).³

II.

The Court also failed to properly apply the law of the case doctrine. In an order filed April 19, 2004, then Circuit Judge Paul E. Short, Jr. held as follows:

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

³ In footnote number five, the Supreme Court ruled that a claim for failure to enforce the bonding requirements of the SPPA would be barred by 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." *Sloan Construction Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158, 164, n.5 (2008).

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

The Appellants have also not appealed 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), the Supreme 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. The Supreme 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).

Furthermore, in the same footnote, this Court found that "Judge John's ruling was nevertheless erroneous" which is a ruling that this Court should not have made because Judge John's order was not appealed. The law of the case doctrine clearly provides that the unappealed ruling applies – regardless of whether right or wrong. By finding Judge John's order to be in error when it was not appealed, this Court violated the holding in *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997), where the Supreme 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.

On rehearing, this Court is respectfully requested to vacate its finding that Judge John's unappealed order was in error. The Court is also requested to apply the law of the case as established by both Judge Short's and Judge John's unappealed orders and affirm the dismissal of the Appellants' third-party beneficiary contract claim.

IV.

This Court also overlooked and failed to address the additional sustaining ground raised by the City with respect to the Appellants' tort and third-party beneficiary contract claims. The City argued that the dismissal of the Appellants' claims should be affirmed because the City complied with the SPPA by distributing the \$111,270.00 that remained to be paid to the general contractor when the City learned that subcontractors were not paid in full.

In *Sloan Construction Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008), the Supreme Court limited the extent of the government's liability for a violation of the SPPA. The Court explained "that the government's liability for failure to ensure compliance with statutory bond requirements is not open-ended." 659 S.E.2d at 165. Specifically, the Supreme 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, the Supreme 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 Construction* 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 Appellants. (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 Appellants -- accepted a share of the \$111,270.00 in exchange for releasing the City from further liability. The Appellants refused any portion of the \$111,270.00. After the Appellants 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).⁴ In addition, the City's liability under the holding of *Sloan Construction* 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 Appellants, who rejected the offer and insisted on full payment from the City. However, the City is not liable to the Appellants under *Sloan Construction* for the full amounts owed by the Gilbert Group to the Appellants. By rejecting the share of the \$111,270.00 offered to them, the Appellants 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 Appellant a share of the \$111,270.00 and cannot be held liable given that the Appellants rejected those amounts. Based upon the holding in *Sloan Construction* and the City's attempt to satisfy its liability under the SPPA, judgment in the City's favor on both the statutory and contract claims should be affirmed. On rehearing, this Court is respectfully requested to address this additional sustaining ground and so find.

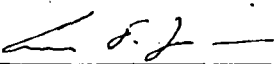
⁴ This Court indeed found that "the record indicates that although all of the subcontractors might not have been paid in full for their work, the City has not retained any of the unpaid balance on the Contract."

CONCLUSION

Based on the foregoing discussion, the Respondent City of Union respectfully requests that the Court rehear its decision reversing in part the order of Circuit Judge John C. Few granting summary judgment to the City of Union. The Respondent requests that, upon rehearing, this Court affirm summary judgment in toto in favor of the City.

Respectfully submitted,

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Columbia, South Carolina

December 29, 2009

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

John C. Few, Circuit Court Judge

Op. No. 4637
(S.C. Ct. App. filed December 9, 2009)

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

v.

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

APPELLANTS' JOINT RETURN TO PETITION FOR REHEARING

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Works, Inc.*

Pursuant to Rules 221 and 224, SCACR, Appellants Shirley's Iron Works, Inc. ("Shirleys") and Tindall Corporation ("Tindall") hereby respond to the Petition for Rehearing filed by Respondent City of Union (the "City") on or about December 29, 2009. In its Petition for Rehearing, the City simply repeats arguments that have been fully considered by this Court. Appellants will address such arguments in the order presented by Respondent.

In order to prevail on a Petition for Rehearing, Respondent must demonstrate that the Court overlooked or misapprehended its argument. Rule 221(a), SCACR; *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (S.C. 2001). Such a petition is not a vehicle for re-argument of questions which were considered and decided by the Court. *Huggins v. Atlantic C. L. R. Co.*, 96 S.C. 267, 283, 79 S.E. 406 (S.C. 1913). If the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, there is no basis for granting a rehearing, and such petition should be denied. *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 64, 620 S.E.2d 86 (Ct. App. 2005). As discussed below, there is no basis for granting Respondent's Petition for Rehearing filed in this matter, as the issues raised therein have been considered and decided by the Court.

I.

Respondent re-argues that the Court should find that the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 et. seq. (the "SCTCA") provides the "exclusive and sole remedy" and governs any tort remedy against a governmental entity. The Respondent made this same argument in its Respondent's Brief. See Respondent's Brief, p. 5, footnote 2. The Court neither misapprehended nor overlooked this argument.

Rather, the Court expressly considered and properly rejected this argument. Specifically, in addressing and rejecting this argument by Respondent, this Court stated:

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 (Cl. 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 (Cl. 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).

Decision, pp. 4-5. Therefore, this Court properly determined that the tort claims of the Appellants against Respondent for breach of its duty created by § 29-5-60 was proper and falls within the exception to the SCTCA codified in § 15-78-60(4).

The Respondent urges that footnote 5 of *Sloan Constr. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008) mandates that the Appellants' claims for violation of § 29-6-250 are barred by sovereign immunity. Memorandum in Support of Petition to Reconsider, p. 3. The Respondent previously made this argument in its appellate Brief. Respondent's Brief, pp. 4-5. The Court has explicitly considered this argument and rejected it, agreeing with the Appellants that the latter portion of footnote 5 indicates that the SCTCA is not relevant to the government's liability for failure to comply with a duty under the SPPA. Decision, p. 5. In so ruling, this Court was expressly adopting and

applying the Supreme Court's analysis in *Southco*. *Id.* at 118 n. 5, 659 S.E.2d at 164 n. 5. Therefore, these arguments have been neither overlooked nor disregarded, but fully considered and ruled on by this Court. As such, the Court should deny the Respondent's Petition for Rehearing as it relates to such arguments.

II. and III.

The Respondent incorrectly asserts that this Court misapplied the "law of the case" doctrine, by rejecting Respondent's assertions that this doctrine precludes Appellants' negligence claims for breach of the duty created by § 29-6-250 and/or the Appellants' third-party beneficiary breach of contract claim. These assertions lack merit. Properly characterized, Respondent asserts that the Appellants and this Court are barred from correcting the acknowledged legal error at issue in this appeal – the trial Court's ruling that the Appellants have no private right of action against the Respondent for breach of any duties created by the SPPA.

In its Memorandum in Support of Petition for Rehearing, the Respondent repeats its arguments that the Court failed to properly apply the law of the case doctrine and, in the process, contradicts itself as to the applicability of such doctrine. The Respondent asserts that prior orders of Judge Short dated April 19, 2004 and Judge John dated December 12, 2005 determined that the Appellants' cause of action is a tort claim governed by the SCTCA, that Appellants failed to appeal such orders, and that such orders are now binding on Appellants as the law of the case, thus preventing them from taking advantage of *Sloan v. Southco*, *supra*. The Respondent already made these arguments and this Court has rejected them. Respondent's Brief, pp. 6-8; Decision, pp. 6-7, footnote 3. The Respondent urges that this Court should address the impact of the

unappealed ruling of Judge John (Memorandum in Support of Petition for Rehearing, p. 5), then in the following paragraph asserts that the Court cannot rule on Judge John's Order at all because Appellants failed to appeal it. (Memorandum, p. 6). The Respondent cannot have it both ways. The Respondent, in its attempt to utilize the narrow and misplaced doctrine of the law of the case to prevent the broader application of *stare decisis* based on a fundamental shift in case law, placed the issue of Judge John's Order squarely before the Court. It may not now assign error to the Court's proper determination that said order is incorrect and thus not a proper judicial linchpin for the application of the law of the case doctrine.

Importantly, at the time Judge Short issued his April 19, 2004 Order, the case was in a completely different posture. Such Order was entered in the context of a motion to strike and was prior to the Appellants' Motion to Amend their Complaint so as to add a third-party beneficiary of a contract claim, which occurred in August of 2005. The trial Court below was aware of this. R. pp. 130-131. Indeed, the trial Court remarked "I read [Judge Short's] Order as a leaving open question [sic] of what is the nature of the [Appellants'] theory against the [Respondent]. [Judge Short's] Order is intended to address a motion on the part of the City to strike the cause of action for the recovery of attorneys' fees under a specific statute I don't read it as expressly forbidding the assertion of a breach of contract theory in this case....". R. p. 131. Respondent's counsel remarked, "I recognize that [Appellants' third-party beneficiary theory] was not a cause of action at the time Judge Short ruled on that....". R. p. 131.

Judge John's Order addressed the issue of whether "the Plaintiffs' claims for the recovery of attorney's fees under S.C. Code Ann. § 15-77-300 and pre-judgment interest

as sought in their Amended Complaint are barred by the law of the case as established by an earlier order by the Circuit Court Judge Paul E. Short, Jr." R. p. 10. Although Judge John's Order purports to utilize the law of the case doctrine, in actuality it simply relies on precedent that one Circuit Court Judge cannot reverse, override or disregard the rulings of another Circuit Court Judge. R. p. 11. Judge John's Order in no way determines that the first and third causes of action of Appellants allege a tort as Respondent suggests.

As the trial Court ruled, Judge Short did not have before him at the time the question of whether Appellants could properly assert the breach of a contractual obligation. So "he couldn't have foreclosed it if it wasn't before him." R. p. 132. Similarly, Judge John's determination that Judge Short's order was the law of the case is erroneous, and this Court properly so determined. This Court found that "the law of the case doctrine does not apply here because the amended complaint involved additional parties and issues from those asserted in the original complaint." Decision, p. 7. Thus, Judge Short's Order is not the law of the case, and Judge John's Order finding that Judge Short's Order is the law of the case, it naturally follows, is likewise erroneous. Judge Short's analysis, Judge John's analysis, and the trial Court's analysis in the Order under appeal, is incorrect in light of the Supreme Court's decision in *Sloan v. Southco, supra*.

Further, the rule of the "law of the case" doctrine means that what was decided on a former appeal is, if evidence is the same in another trial, controlling on the trial court and appellate court on another appeal. **unless on re-examination the appellate court is convinced that the first decision was wrong.** *Charleston Lumber Company, Inc. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d 869 (S.C. 2000), footnote 3, emphasis

added. By its literal terms, this doctrine cannot apply to Judge Short's Order or Judge John's Order for two reasons. First, the doctrine only applies to matters decided "on former appeal." The instant matter is being appealed for the first time and there have, therefore, been no issues decided on former appeal. The "law of the case" doctrine flows downward from superior to inferior courts, and operates to bind a lower court by the prior ruling of an appellate court. Second, even if the doctrine applied, which it does not, the appellate court may "on re-examination" determine that the initial decision was wrong. Such is precisely the scenario that would obtain in the instant matter, assuming that the doctrine applied. In other words, Judge John's Order, just like the orders of Judge Short and Judge Few, were all issued prior to the analysis mandated by the Supreme Court in *Sloan Constr. Co. v. SouthCo Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (S.C. 2008). The Court in this case found that, assuming the City argued that Judge John's Order was the law of the case, such order was nevertheless erroneous under binding caselaw. Decision, footnote 3, pp. 9-10. This analysis is not error as asserted by Respondent, but is part of the analysis militated by *Charleston Lumber, supra* - the Court has found that the Order of Judge John was wrong. Therefore the "law of the case" doctrine does not apply, and the Appellants cannot be bound by orders that (1) are interlocutory and (2) struggle with issues that have since been resolved by the binding precedent (*Sloan v. Southco, supra*) that this Court must apply.

Respondent's entire argument regarding the law of the case doctrine, aside from having already been argued and ruled on by the Court, assumes that such orders were "final" so as to give rise to appeal rights. Appellants submit that both such orders are interlocutory, do not fully and finally resolve Appellants' claims so as to be final orders.

and characterize (or, in light of the precedent giving rise to this appeal, mischaracterize) Appellants' claims in *dicta*. Further, Respondent has invited the "error" it now complains of (see Memorandum p. 6) by injecting the order of Judge John into the proceeding via the law of the case doctrine.

This Court duly determined that Judge John's Order was erroneous, as it is entitled to do under the *Charleston Lumber* analysis. The Court has neither overlooked nor disregarded the Respondent's arguments as to the law of the case doctrine, but has fully considered and ruled on them. As such, the Court should not entertain the Respondent's Petition for Rehearing as it relates to such arguments.

IV.

The Respondent argues that the Court overlooked and failed to address the additional sustaining grounds raised by the City that the dismissal of the Appellants' claims should be affirmed "because the City complied with the SPPA by distributing the \$111,270.00 that remained to be paid to the general contractor when the City learned that subcontractors were not paid in full." This is not the analysis mandated by *Sloan v. Southco*, *supra*, which limits the governmental entity's liability for failure to comply with the SPPA's bonding requirements for the remaining balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's non-payment. Decision, p. 4, citing *Sloan*, 377 S.C. 108, 121, 659 S.E.2d 158, 165-166.

Again, the Respondent has made a series of impermissibly factual arguments to the Court of Appeals, and has misconstrued and taken out of context the Court's determinations as to Appellants' *quantum meruit* claim. Such arguments bolster the

Appellants' position that a remand is appropriate for purposes of various factual determinations in keeping with the new precedent of *Sloan, supra*. Remand is an appropriate remedy on appeal when the record is incomplete or factual determinations must be made in keeping with the law as announced on appeal. See, e.g., *Ex Parte Foster*, 350 S.C. 238, 565 S.E.2d 290 (S.C. 2002) (reversal and remand appropriate when an appeal contains insufficient factual findings to support its determinations); *In re: Treatment & Care of Luckabaugh*, 351 S.C. 122, 568 S.E.2d 338 (S.C. 2002) (when the trial court fails to find on a material issue and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made); *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 382 S.E.2d 915 (S.C. 1989) (remand to resolve alleged discrepancies appropriate); *Micheau v. Micheau*, 285 S.C. 527, 331 S.E.2d 348 (S.C. 1985) (remand for factual findings to determine whether an attorneys' fees award is appropriate).

Respondent argued in its appellate Brief at 10 that "The City's liability is limited to the unpaid balance owed to the general contractor." Respondent argues in its Brief at 11 that such analysis confines itself to "the point that the City learned that said contractors had not been paid." Such are inherently factual determinations which are not settled by an examination of the Record. Indeed, *Sloan* states that its holding is limited to (1) the remaining unpaid contract balance on the contract with the general contractor, (2) at the time the owner received notice from the subcontractor of the general contractor's nonpayment. Such is a dually factual determination based on *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 93 S.E.2d 855 (S.C. 1956) and its progeny. The point at which Respondent learned of Gilbert Group, LLC's nonpayment is not

established in the Record. Such is the exact basis for Appellants' request that this Court reverse and remand for purposes of determining the remaining unpaid contract balance on the contract between the Respondent and Gilbert Group, LLC as of the time the Appellants notified Respondent of Gilbert Group, LLC's nonpayment. Respondent has now taken certain of the Court's findings as to Appellants' *quantum meruit* claims out of context (specifically that the City paid all the remaining balance on all subcontracts and was thus not unjustly enriched; Decision, p. 8) to argue that the City may somehow avail itself of the payment defense. While it appears that the City paid all the unpaid contract balance to certain subcontractors, it appears to have chosen its amounts at random (R. p. 279). More importantly, the City made these payments after receiving notice of the Appellants' claims of non-payment. R. pp. 244-48 and 279-81. In *Sloan v. Southco.*, the SCDOT likewise made payments to the general contractor of the full contract balance after receiving notice of non-payment. 377 S.C. 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."). SCDOT could not avail itself of a payment defense in its case, and for the same reasons the City may not avail itself of the payment defense in this case.

Facts which are outside the record should not be considered by appellate courts. See, e.g., *Davis v. Davis*, 356 S.C. 132, 588 S.E.2d 102 (S.C. 2003); SCACR 210(h). Further, a party prevailing at trial may only raise additional sustaining grounds for an

appellate court to affirm when the grounds appear in the record on appeal. *Ton, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). This doctrine by its terms applies to a third party “prevailing at trial.” *Id.* There was no trial in the instant case, and the Respondent is attempting to argue points, based loosely on the deposition testimony of William Gilbert, which are disputed.

The Respondent did not make these arguments below. *See generally*, R. pp. 114-234. Counsel for Respondent casually mentioned that “at that point in time there was a hundred and eleven thousand dollars that had not yet been paid on the contract price to Gilbert Group” but such date has not been definitively established or proved. R. p. 119. All parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling. *Id.*, 338 S.C. 406, 421. Appellants submit that the Respondent has waived such argument by failing to establish the factual predicate for same as of the motions hearing below. In any event, this argument was neither overlooked nor disregarded, but fully considered and ruled on by the Court. The Court should not entertain the Respondent’s Petition for Rehearing as it relates to such argument.

CONCLUSION

Based on the foregoing, this Court should deny the Respondent’s Petition for Rehearing.

Respectfully submitted,



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January 8, 2010
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Op. No. 4637
(S.C. Ct. App. filed December 9, 2009)

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

v.

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

**REPLY MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING**

The Respondent City of Union has petitioned this Court for a rehearing of the recent decision in *Shirley's Iron Works, Inc. v. City of Union*, Op. No. 4637 (S.C. Ct. App. filed December 9, 2009), specifically with respect to the portions of the decision where the Court reversed in part the summary judgment granted by the Circuit Court. The Appellants have filed a joint return to that Petition for Rehearing, to which a brief reply is warranted.

As a first ground for rehearing, the City pointed out that this Court erred in failing to hold that the Appellants' tort cause of action is and must be governed by the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* The City argued specifically that this Court overlooked and failed to 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 The Court also overlooked the numerous cases holding 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).

In their joint return, the Appellants have once again dodged this critical and dispositive issue. To be fair, the Appellants either dodged the issue or misapprehended it. Instead of addressing how a tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty – which is precisely what is at play in this case – falls outside the scope of the Tort Claims Act, the Appellants argued that their tort claim "falls within the exception to the SCTCA codified in § 15-78-60(4)." *See*, Appellants' Joint Return, p. 2. Frankly, that makes no sense. Section 15-78-60(4) is one of numerous exceptions to the waiver

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.

of sovereign immunity. They are not "exceptions to the Tort Claims Act." Section 15-78-60(4) does not allow or justify this Court's conclusion that the Appellants' tort claim arising from a breach of the duty created by Section 29-5-60 is not governed by the Tort Claims Act. It does not override or nullify Sections 15-78-200 and 15-78-20(b) which make clear the legislative intent that the Tort Claims Act is the "exclusive and sole remedy" for *any and every* tort committed by a governmental employee acting within his official duties and not constituting an intent to harm, actual malice, actual fraud or a crime of moral turpitude. In other words, the Appellants clearly fail to comprehend that Section 15-78-60(4) is not an exception to Tort Claims Act jurisdiction but is in actuality a sovereign immunity defense that bars their tort claim as long as that tort claim falls within the scope of the Act, which it clearly does.

On rehearing, the Court is asked to address this important issue. To rule as it has, this Court has failed to give any meaning or application to Sections 15-78-200 and 15-78-20(b). This Court has failed to explain how the Appellants' tort claim is not governed by the Tort Claims Act when the Act is the "exclusive and sole remedy" for *any and every* tort committed by a governmental employee acting within his official duties and not constituting an intent to harm, actual malice, actual fraud or a crime of moral turpitude. That is the issue that the City is requesting be addressed on rehearing. Contrary to the Appellants' claim, that issue has not been addressed in the Court's opinion and needs to be.

II and III.

In the second and third grounds for rehearing, the City argued that the Court failed to properly apply the law of the case doctrine and even found that Judge John committed error despite the undisputed fact that Judge John's order was never appealed. In an attempt to justify

the Court's rulings in this regard, the Appellants offer a largely convoluted discussion of the "law of the case" doctrine that is simply incorrect.

Although it is difficult to follow the Appellants' reasoning, it appears that they are arguing that the "law of the case" doctrine is not applicable to any unappealed interlocutory orders despite the fact that those orders become appealable after final judgment. *See, Link v. School District of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990). After Judge Few granted summary judgment and dismissed the Appellants' amended complaints, the Appellants were free to appeal all interlocutory orders, including the orders by Judges Short and John. The Appellants simply failed to do so.

Moreover, relying on the case of *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000), the Appellants seem to be arguing that the "law of the case" doctrine applies *only* to matters decided in a *prior appeal*. The *Charleston Lumber* case did involve the application to the "law of the case" doctrine to a prior appeal, but the Supreme Court did not limit the doctrine's application to issues or claims decided on a prior appeal. Indeed, the Supreme Court reiterated that "an unappealed ruling is the law of the case." 525 S.E.2d at 871. There are, as this Court well knows, many cases where the "law of the case" doctrine is applied to an unappealed ruling regardless of whether there was a prior appeal or not. *See e.g., Normandy Corp. v. South Carolina Dept. of Transportation*, Op. No. 4640 (S.C. Ct. App. decided December 17, 2009) (unappealed ruling "is the law of the case regardless of its correctness"); *Campbell v. Jordan*, 382 S.C. 445, 675 S.E.2d 801 (Ct. App. 2009); *Floyd v. C.B. Askins & Co. Contractors*, 382 S.C. 84, 675 S.E.2d 450 (Ct. App. 2009). In short, contrary to the Appellants' suggestion, to become the "law of the case," a ruling need not have been the subject of a prior appeal.

The Appellants also suggest that the *Charleston Lumber* case supports this Court's decision to reverse Judge John's order despite the fact that that order was unappealed and – right or wrong – should have been treated as the law of the case. The Appellants point to footnote #3 in the *Charleston Lumber* opinion that suggests that an appellate court may reexamine a former appellate decision in the same litigation as part of a subsequent or second appeal. In other words, Court suggested that the Court could have corrected an error in *Charleston Lumber I* while the Court was adjudicating *Charleston Lumber II*.² That footnote does not suggest that an appellate court has the inherent right to correct an unappealed ruling of a circuit court. To the contrary, the Supreme Court has spoken to this issue, and in *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997), the 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.

Thus, the analysis of the "law of the case" doctrine proffered by the Appellants is deeply flawed and should be rejected outright. The Court is respectfully requested to vacate its finding that Judge John's unappealed order was in error. The Court is also requested to apply the law of the case as established by both Judge Short's and Judge John's unappealed orders, and by doing so, the Court is asked to find that the Appellants' tort claim for the breach of a duty under the SPPA is controlled by the Tort Claims Act and is further asked to dismiss the Appellants' third-party beneficiary contract claim.

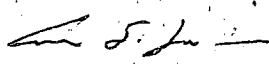
² The Court was not particularly definite on this issue in that contrary authority for this proposition was also cited. See, *Huggins v. Winn-Dixie Greenville, Inc.*, 252 S.C. 353, 166 S.E.2d 297 (1969).

CONCLUSION

Based on the foregoing discussion, the Respondent City of Union respectfully renews its request that the Court rehear its decision reversing in part the order of Circuit Judge John C. Few granting summary judgment to the City of Union. The Respondent requests that, upon rehearing, this Court affirm summary judgment in toto in favor of the City.

Respectfully submitted,

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January 15, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

John C. Few, Circuit Court Judge

Case No. 03-CP-44-171(B)

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

v.

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

**APPELLANTS' JOINT PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC***

Pursuant to Rules 219 and 221, SCACR, the Appellants hereby petition the Court to rehear the above-captioned appeal with the original Panel and/or alternatively suggest that the entire Court rehear these matters *en banc*. This Petition relates to that Opinion entered February 11, 2010 (hereinafter the "Opinion") and Appellants certify that this Petition is timely pursuant to Rule 221(a), SCACR. This Petition is made upon the grounds set forth in the Appellants' Supporting Memorandum, which grounds include the following:

(1) The Court misapprehended the Supreme Court's holding in Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 659 S.E.2d 158 (S.C. 2008) which holds in part that a public owner's liability under the Subcontractor's Payment and Protection Act is limited to the amount of the contract balance at the time when a subcontractor makes a claim for non-payment. 377 S.C. at 121, 659 S.E.2d at 165-66 ("we hold that in a tort or contract action arising under the SPPA, the government entity's liability is limited to the

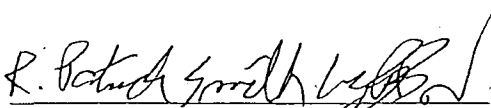
remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment.”). In this case, the Court’s Opinion allows the public owner to take advantage of this defense by paying out monies to others even after it has received notice of the subcontractor’s claim for payment. This holding contravenes the Supreme Court’s holding in Sloan v. Southco, contravenes South Carolina mechanics’ lien law, and would, in effect, abrogate many of the protections that the General Assembly sought to give subcontractors in the Subcontractor’s Payment and Protection Act. This holding also ignores the fact that in Sloan v. Southco the SCDOT did exactly what the City of Union (“City”) did here – it paid the entire contract balance to another after receiving the subcontractor’s notice of non-payment. Sloan v. Southco, 377 S.C. 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.”)

(2) The Court misapprehended the law in South Carolina concerning an owner’s payment defense under the South Carolina Mechanics’ Lien Statute, S.C. Code Ann. § 29-5-10, *et seq.* As set forth in interpretative cases, which the South Carolina Supreme Court has incorporated by reference pursuant to Sloan v. Southco, 377 S.C. at 121, 659 S.E.2d at 165-66, the owner’s payment defense does not apply when the owner pays out money for alleged claims after valid claim holders have already made their claims to the owner.

(3) The Court overlooked the fact that the allegations for which it based its holding – that the City paid out all of the contract balance for the project in question after receiving notice of non-payment from the Appellants – was neither plead by the City nor ruled upon by the Trial Court.

These grounds, as discussed more fully in the Appellants' Memorandum in Support of Petition for Rehearing and Suggestion for Rehearing *En Banc*, warrant that this case be reheard, and/or alternatively, that the Court rehear these cases *en banc*. Moreover, upon rehearing the Court should reinstate its original ruling in this case dated December 9, 2009 and reverse and remand the Trial Court's grant of summary judgment with respect to the Appellants' tort and breach of third-party beneficiary contract claims. In addition to the foregoing this Motion is based upon the Record on Appeal and the Appellants' Memorandum in Support of Petition for Rehearing and Suggestion for Rehearing *En Banc*, which Memorandum is incorporated herein and filed herewith.

Respectfully submitted this 24th day of February, 2010.


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February 24, 2010
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

John C. Few, Circuit Court Judge

Case No.: 03-CP-44-171(B)

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

v.

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

**APPELLANTS' MEMORANDUM IN SUPPORT
OF JOINT PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC***

INTRODUCTION

The Appellants have petitioned that the Court rehear the above-captioned actions suggesting that the Court also rehear the case *en banc*. For the reasons set forth below, the Appellants respectfully request that the Court grant this motion and that upon rehearing the Court reverse the Trial Court's rulings consistent with the Court's earlier Opinion dated December 9, 2009 (the "Withdrawn Opinion").

BACKGROUND AND ISSUES PRESENTED

The Appellants sued the Respondent City of Union (the "City") in this action over the City's admitted failure to obtain payment bonds as required by the Subcontractor's Payment and Protection Act ("SPPA"), S. C. Code Ann. § 29-6-250. As the Court's Withdrawn Opinion held, and indeed even as the Court's February 11, 2010 Opinion (the

“Opinion”) holds, there is no dispute that the City violated the SPPA and that the Appellants have private rights of action to assert claims against the City arising in tort and a third-party beneficiary contract. The Court’s Opinion, however, states that summary judgment should still have been affirmed for the City given the fact that the City allegedly paid out its contract balance to others after receiving notice from the Appellants of their payment claims.

The Appellants assert that the Court should rehear this case and reinstate its Withdrawn Opinion because the Court misapprehended the relevant law with respect to this issue and because the Court overlooked that there are facts that have not been plead, developed or ruled upon below. With respect to these issues, the Court should rehear the case for the following reasons:

(1) The Court misapprehended the Supreme Court’s holding in Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 659 S.E.2d 158 (S.C. 2008), which holds in part that a public owner’s liability under the Subcontractor’s Payment and Protection Act is limited to the amount of the contract balance at the time when a subcontractor makes a claim for non-payment. 377 S.C. at 121, 659 S.E.2d at 165-66 (“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.”). In this case, the Court’s Opinion allows the public owner to take advantage of this defense by paying out monies to others even after it has received notice of the subcontractor’s claim for payment. This holding contravenes the Supreme Court’s holding in Sloan v. Southco,

contravenes South Carolina mechanics' lien law, and would, in effect, abrogate many of the protections that the General Assembly sought to give subcontractors in the Subcontractor's Payment and Protection Act. This holding also ignores the fact that in Sloan v. Southco the SCDOT did exactly what the City did here – it paid the entire contract balance to another after receiving the subcontractor's notice of non-payment. Sloan v. Southco, 377 S.C. 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.”)

(2) The Court misapprehended the law in South Carolina concerning an owner's payment defense under the South Carolina Mechanics' Lien Statute, S.C. Code Ann. § 29-5-10, *et seq.* As set forth in interpretive cases, which the South Carolina Supreme Court has incorporated by reference pursuant to Sloan v. Southco, 377 S.C. at 121, 659 S.E.2d at 165-66, the owner's payment defense does not apply when the owner pays out money for alleged claims after valid claim holders have already made their claims to the owner.

(3) The Court overlooked the fact that the allegations for which it based its holding – that the City paid out all of the contract balance for the project in question after receiving notice of non-payment from the Appellants – was neither plead by the City nor ruled upon by the Trial Court.

ARGUMENT

I. The Court Misconstrued and Misapplied the Supreme Court's Opinion in Sloan v. Southco.

In Sloan v. Southco the Supreme Court held that while a governmental body may be liable in tort and contract for failing to make sure that a payment bond is provided for a public project, "the government's liability for failure to ensure compliance with statutory bond requirements is not open-ended." Sloan v. Southco, 377 S.C. 108, 121, 659 S.E.2d 158, 165 (2008). The Supreme Court held very plainly that 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 non-payment.**" Id. at 121, 659 S.E.2d at 165-66, emphasis added. The Supreme Court's holding also very clearly provides that the relevant point in time in establishing the contract balance is when a claim for payment is made. The Court's Opinion in this case, however, moves that time frame forward significantly, and in essence changes the Supreme Court's holding to say that the relevant time frame for determining contract balance could be anytime.

Under the Supreme Court's analysis, the absolute lowest the contract balance could have been in this case was the \$111,270.00 figure set forth in the Court's Opinion when the Appellant's claims for non-payment were made. When these claims were made the contract balance was set, and no subsequent action by the City could change that fact. In Sloan v. Southco, supra, the SCDOT paid out the remaining contract balance to the general contractor after Sloan gave notice to the SCDOT. Under the Court's Opinion, the SCDOT would have been entitled to judgment. Obviously, such was not the case, as the

Supreme Court reversed the grant of summary judgment to the SCDOT. This Court's Opinion allows the City to move past that time the Appellants gave notice and to look at the contract balance at some point after the point in time when the Appellants made their claim of non-payment. The Supreme Court's Opinion in Southco, however, does not support this holding. Appellants respectfully submit that the Court misconstrued the Supreme Court's holding in Southco and improperly altered the method of analyzing the contract balance.

II. The Court Misapprehended and Misapplied Many Years of South Carolina Jurisprudence Concerning Mechanics' Liens and, in Doing So, Severely Undermines the General Assembly's Purpose in Enacting the Subcontractor's Payment and Protection Act.

In Sloan v. Southco the Supreme Court incorporated by reference the South Carolina's Mechanics' Lien Statute's owner payment defense. Indeed, the Supreme Court stated as much, holding as follows:

The purpose of the SPPA is similar to that underlying the subcontractor's lien outlined in the mechanics' lien statute, see S.C. Code Ann. § 29-5-20 (1991), which is to protect a party who provides labor or materials for the improvement of property but does not have a contractual relationship with the property owner. Stoudenmire Heating & Air Conditioning Co., Inc. v. Craig Bldg. P'ship, 308 S.C. 298, 302, 417 S.E.2d 634, 637 (Ct. App. 1992). The subcontractor's lien, however, is not intended to create a windfall to the subcontractor. The mechanics' lien statute provides that when a subcontractor seeks to enforce a mechanics' lien against the owner of the improved property due to the general contractor's nonpayment, the owner's liability is limited 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.** S.C. Code Ann. § 29-5-40 (1991); Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 630, 93 S.E.2d 855, 860 (1956). 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.

377 S.C. at 121, 659 S.E.2d at 165-66 (emphasis added).

In a mechanic's lien action, the liability of the owner is limited to the amount the owner owes the general contractor at the time the subcontractor gives notice of the lien. S.C. Code Ann. § 29-5-40. Maddux Supply Co., Inc. v. Safhi, Inc., 316 S.C. 404, 450 S.E.2d 101 (Ct. App. 1994); Stovall Bldg. Supplies, Inc. v. Mottet, 305 S.C. 28, 406 S.E.2d 176 (Ct. App. 1990). However, any payment made by the owner to the general contractor after receipt of the mechanic's lien notice will not reduce or otherwise effect the amount recoverable pursuant to the lien. S.C. Code Ann. § 29-5-50; Maddux Supply Co., 450 S.E.2d at 105. Thus, if the owner "pays over" a lien he or she will pay twice. In Charleston Lumber Co. v. GPT, 303 S.C. 350, 400 S.E.2d 508 (Ct. App. 1991), the plaintiff, a subcontractor, was the only contractor to perfect its lien. Before the end of the filing period for mechanics' liens for the project, the owner settled many claims with other subcontractors and suppliers who had not perfected their liens. The Court of Appeals refused to give the owner "credit" for voluntarily settling with the non-perfected lien holders. The Court held that since the plaintiff was the only perfected lien holder, he was entitled to 100% of his claim. 400 S.E.2d at 510-11. See also Taylor Cotton & Ridley, Inc. v. Okatie Hotel Group, LLC, 372 S.C. 89, 641 S.E.2d 459 (S.C. Ct. App. 2007) (the Mechanics' Lien Statute does not give credit to owners who settle claims with lienholders who did not perfect their lien by filing suit).

In essence, therefore, South Carolina mechanics' lien law holds that any owner who makes a payment after receiving notice of a subcontractor's mechanics' lien makes

that payment at its peril. The mechanics' lien law rewards those subcontractors who follow the statute and properly file their claims for payment. The Supreme Court has incorporated these protections into the SPPA, and this makes complete sense. Under the Court's Opinion, a public owner could defeat the claim of the subcontractor complying with the law by simply paying out money to the owner's friends and any one else who had a "claim" for money, with no determination as to the validity of same. Whether this occurred in the present case is unknown. Facts will need to be developed to determine whether or not this occurred. The record is silent, and remand is appropriate.

III. The Court Erred in Relying Upon Disputed Facts and Arguments Which Were Not Even Made to the Trial Court.

Remand is an appropriate remedy on appeal when the record is incomplete or factual determinations must be made in keeping with the law as announced on appeal. See, e.g., Ex Parte Foster, 350 S.C. 238, 565 S.E.2d 290 (S.C. 2002) (reversal and remand appropriate when an appeal contains insufficient factual findings to support its determinations); In re: Treatment & Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (S.C. 2002) (when the trial court fails to find on a material issue and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made); Rogers v. Salisbury Brick Corp., 299 S.C. 141, 382 S.E.2d 915 (S.C. 1989) (remand to resolve alleged discrepancies appropriate); Micheau v. Micheau, 285 S.C. 527, 331 S.E.2d 348 (S.C. 1985) (remand for factual findings to determine whether an attorneys' fees award is appropriate). The facts relied upon here were not even plead as a defense to Appellants' tort and third-party beneficiary contract claims, and the Trial Court did not address them. Moreover, the record is silent on who

received the money, whether it was truly owed and whether the City was correct in paying it.

Respondent's Brief at 10 states that "The City's liability is limited to the unpaid balance owed to the general contractor." Respondent argues in its Brief at 11 that such analysis confines itself to "the point that the City learned that said contractors had not been paid." This is an inherently factual determination which is not settled by an examination of the Record. Indeed, Sloan v. Southco states that its holding is limited to (1) the remaining unpaid contract balance on the contract with the general contractor, (2) at the time the owner received notice from the subcontractor of the general contractor's nonpayment. Such is a dually factual determination based on Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (S.C. 1956) and its progeny. The exact point at which the City learned of Gilbert Group, LLC's nonpayment is not established in the Record. What is known is that there was at least a contract balance of \$111,270.00 when the Appellants made their claims for non-payment. Such is the basis for Appellants' request that this Court reverse and remand for purposes of determining the remaining unpaid contract balance on the contract between the Respondent and Gilbert Group, LLC as of the time the Appellants notified Respondent of Gilbert Group, LLC's nonpayment.

Facts which are outside the record should not be considered by appellate courts. See, e.g., Davis v. Davis, 356 S.C. 132, 588 S.E.2d 102 (S.C. 2003); SCACR 210(h). Further, a party prevailing at trial may only raise additional sustaining grounds for an appellate court to affirm when the grounds appear in the record on appeal. I'on, LLC v.

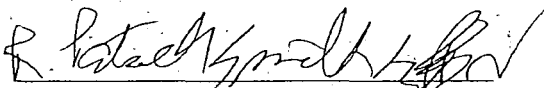
Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). This doctrine by its terms applies to a third party “prevailing at trial.” Id. There was no trial in the instant case, and the Respondent is attempting to argue points, based loosely on the uncited deposition testimony of William Gilbert, which are disputed.

The City did not make these arguments below. Counsel for the City casually mentioned that “at that point in time there was a hundred and eleven thousand dollars that had not been paid on the contract price to Gilbert Group” but such date has not been definitively established or proved. R., p. 119. All parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling. Id., 338 S.C. 406, 421. An appellate court is less likely to rely on such a ground when a respondent has failed to present it to the lower court. In such cases, appellate courts consider it unwise to resolve a case on a ground never mentioned by a respondent prior to appeal. Id. Stated another way, a respondent may raise an additional sustaining ground not presented to the lower court, but the appellate court is likely to ignore it. Id., 338 S.C. 402, 421. Appellants submit that the City waived such factual argument by failing to establish the factual predicate for same as of the motions hearing below. At the very least, the need to develop these facts warrants a remand.

CONCLUSION

For the foregoing reasons, the Appellants respectfully request that the Court rehear the above case, and/or in the alternative that it hear this case *en banc*. Upon rehearing the Appellants respectfully request that the Court reinstate its prior Opinion and reverse and remand the Trial Court’s decision.

Respectfully submitted this 24th day of February, 2010.



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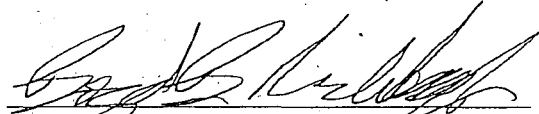
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February 24, 2010

Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Op. No. 4637
(S.C. Ct. App. re-filed February 11, 2010)

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SC 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.

**RETURN TO APPELLANTS'
PETITION FOR REHEARING**

The Appellants have jointly petitioned this Court for a rehearing of its recent substituted opinion in *Shirley's Iron Works, Inc. v. City of Union*, Op. No. 4637 (S.C. Ct. App. re-filed February 11, 2010). In response, the Respondent City of Union submits that this Court properly ruled on the issues challenged by the Appellants in their joint petition for rehearing.

I.

As a first ground, the Appellants argue that this Court's ruling is inconsistent with and misapplies the Supreme Court's decision in *Sloan Construction Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008). The City disagrees.

In *Sloan*, the Supreme Court limited the extent of the government's liability for a violation of the Subcontractors' and Suppliers' Payment Protection Act (SPPA). The Court explained "that the government's liability for failure to ensure compliance with statutory bond requirements is not open-ended." *Sloan Construction Co.*, 659 S.E.2d at 165. The Supreme Court specifically ruled that "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).

The Appellants argue that this Court's decision changes the date on which the governmental entity's monetary liability is established. That is not the case. This Court followed the decision in *Sloan* and does not rule that "the relevant time frame for determining contract balance could be anytime" as the Appellants claim. *See*, Appellants' Memorandum, p. 4.

The Appellants suggest that, under the analysis set forth in this Court's decision, Sloan Construction Company would have been barred from recovering because SCDOT had paid out its remaining contract balance after being placed on notice of Sloan's claim. However, there is a significant difference. 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 Appellants 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. In fact, that is the very purpose and intent of the statutory scheme as construed and applied in *Sloan*.

In sum, the City submits that this Court's decision is consistent with the dictates of *Sloan* and properly applies the holdings by the Supreme Court in that case.

II.

The Appellants also argue that the Supreme Court in *Sloan* instructed that the mechanic's liens statutes be followed in applying the limitation on an owner's liability as recognized in *Sloan*. That is not necessarily accurate. The Supreme Court recognized that "[t]he purpose of the SPPA is similar to that underlying the subcontractor's lien outlined in the mechanics' lien statute," but the Court did not hold that any particular provisions from the mechanic's lien statutes are to be applied in enforcing the SPPA or that the case law construing the mechanic's lien statutes controls in any particular respect. *Sloan Construction Co.*, 659 S.E.2d at 165.

Nonetheless, the Appellants suggest that this Court's decision "misapplies" the mechanic's lien laws because the owner – City of Union -- is not penalized for using the remaining unpaid balance to pay other unpaid subcontractors. The Appellants cite to mechanic's lien cases which hold that the owners is not entitled to a "credit" for sums paid to other subcontractors who had not filed or perfected their mechanic's liens or who otherwise did not have "just claims." *Charleston Lumber Co., Inc. v. GPT, a Florida Partnership*, 303 S.C. 350, 400 S.E.2d 508 (Ct. App. 1991); *Taylor, Cotton & Ridley, Inc. v. Okatie Hotel Group, LLC*, 372 S.C. 89, 641 S.E.2d 459 (Ct. App. 2007).

Of course, under the SPPA, there is no lien nor such thing as a "just claim" nor such thing as a perfected or unperfected claim. Therefore, relief under the SPPA is not limited to any particular type of unpaid subcontractor. There are no specific requirements for an unpaid subcontractor to perfect its claim in any particular manner. Therefore, the fact that the City paid out the retainage amount to the unpaid subcontractors who notified the City that they had not been paid extinguishes any further liability, and this Court was correct in so ruling. Quite simply, the Appellants were offered to share in that retainage amount and refused. There is no basis for any argument that the holdings in *Sloan* were not properly applied by this Court in the present case. The petition for rehearing should be denied.

III.

Finally, the Appellants contend that this Court relied on disputed facts. However, the Appellants have failed to show a single disputed fact that served as the basis for this Court's decision.

For instance, the Appellants explain that under *Sloan*, the Court must determine the remaining unpaid balance owed to the general contractor at the time the owner received notice from the Appellants of the general contractor's nonpayment. The Appellants describe this as "a dually factual determination" and insist that this information is not contained in the appellate record. The City disagrees. In their Amended Complaint, the Appellants allege that they sent a certified letter providing notice of non-payment on April 8, 2003. *See*, Amended Complaint, para. 37. (R. 43). The record also reflects that the \$111,270.00 was the remaining unpaid balance or retainage as far back as December 23, 2002, which was the date of the final pay application submitted by the Gilbert Group. (R. 278). Thus, it is undisputed that the unpaid balance was no greater than \$111,270.00 on the date (April 8, 2003) that the Appellants by their

own admission sent a certified letter to the City.

The Appellant similarly suggest that the appellate record does not reflect to whom the \$111,720.00 was paid or whether it was owed. The City again disagrees. The record includes a letter from William Gilbert that sets forth the amount of the retainage that was paid to each of the unpaid subcontractors. (R. 279). Gilbert also testified that the retainage was paid to subcontractors who were still owed money. (R. 250).

In sum, the Appellant has not shown that there are any material factual questions that are not answered in the appellate record. They have no shown that this Court has relied on disputed facts in affirming summary judgment on an alternative basis.¹ The petition for rehearing should

The Appellants also complain that the application of the *Sloan* holding was not raised in the lower court. Of course, in *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court explained that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 526 S.E.2d at 723. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* See also, Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record").

The Appellants also curiously argue that the holding in *I'On* with respect to additional sustaining grounds applies only to parties "prevailing at trial." The Appellants point out that there was no trial in this case but rather a decision on a summary judgment motion. The City is unaware of any such limitation contained in the *I'on* decision. Instead, the Supreme Court explained as follows:

[I]t is not always necessary for a *respondent* -- as the winning party in the lower court -- to present his issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review. This approach is in keeping with the view, as expressed in Rule 220(c), SCRCR, that an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal. An affirmance promotes judicial economy and finality in private and public affairs, which are important public policies.

I'on, 526 S.E.2d at 723.

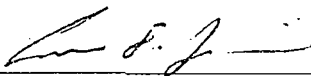
therefore be denied.

CONCLUSION

Based on the foregoing discussion, the Respondent City of Union respectfully requests that this Court deny the Appellants' joint petition for rehearing.

Respectfully submitted,

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March 15, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

John C. Few, Circuit Court Judge

Case No. 03-CP-44-171(B)

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

v.

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

APPELLANTS' REPLY MEMORANDUM IN SUPPORT
OF JOINT PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC*

I. The Supreme Court's Opinion in Sloan v. Southco Expressly Adopted the
Mechanic's Lien Statute as a Framework for Violations of the
Subcontractors' and Suppliers' Payment Protection Act.

The City's Return indicates that it is "not necessarily accurate" that Sloan v. Southco, 377 S.C. 108, 659 S.E.2d 158 (2008) instructed the mechanic's lien statute be followed in applying the limitation on an owner's liability. The City's statement is in contravention of the language of Southco:

The purpose of the SPPA is similar to that underlying the subcontractor's lien outlined in the mechanics' lien statute, see S.C. Code Ann. § 29-5-20 (1991) ... The mechanics' lien statute provides that when a subcontractor seeks to enforce a mechanics' lien against the owner of the improved property due to the general contractor's nonpayment, the owner's liability is limited 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. **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.**

377 S.C. at 121, 659 S.E.2d at 165-66 (emphasis added, internal citations omitted). This Court's Opinion allows the City to move past the "snapshot" of the unpaid contract balance as of the time Appellants gave notice and to look at the contract balance at some un-defined, later point. This works a forfeiture to Appellants and is legal error.

The City argues in its Return that in Southco, the owner paid the retainage to the general contractor rather than the subcontractor. This is a distinction without a difference, especially when one considers that the alleged "share" the unpaid subs were "offered" in this case was apparently determined in the sole discretion of Gilbert Group and/or the City. (R. p. 279). The record is devoid of any evidence as to what monies were actually paid, what services were actually performed, why certain subcontractors were favored over others (some subcontractors were paid one hundred cents on the dollar, while the Appellants were "offered" a "take-it-or-leave-it" amount that was not even twenty percent of their outstanding invoices¹), and who made such determination. For these reasons a remand as to such issues is appropriate, as the Court's initial decision of December 9, 2009 correctly determined.

¹ The City and Gilbert offered the Appellants \$25,000.00 each. (R. p. 281). Shirley's unpaid invoices total \$132,782, and Tindall's unpaid invoices total \$165,500.00. (R. p. 43).

Any payment made by the owner after receipt of a notice of mechanic's lien will not reduce or otherwise affect the amount recoverable pursuant to the lien. S.C. Code Ann. § 29-5-50. Interpretative cases draw no distinction between subsequent payments to the general contractor and subsequent payments to subs, both of which are made by an owner at its peril. Taylor Cotton & Ridley, Inc. v. Okatie Hotel Group, LLC, 372 S.C. 89, 641 S.E.2d 459 (Cl. App. 2007) (quoting S.C. Code Ann. § 29-5-60(a): "[i]n the event the amount due the contractor by the owner is insufficient to pay all the lienors ... it is the duty of the owner to prorate among all just claims."); Charleston Lumber Co. v. GPT, 303 S.C. 350, 400 S.E.2d 508 (Cl. App. 1991) (Court of Appeals refused to give the owner "credit" for voluntarily settling with the non-perfected lien holders). Under this Court's Opinion, however, a public owner could defeat the claim of a subcontractor complying with the law by simply offering a "share" as defined by the owner, however small and arbitrary. Such a result runs afoul of legal precedent and is contrary to public policy, as it would greatly diminish, if not completely eviscerate, the protections the General Assembly intended when it adopted the Subcontractors' and Suppliers' Payment Protection Act.

II. The Court Erred in Relying Upon Disputed Facts Not Fully Developed Before the Trial Court.

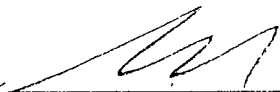
The City continues to cite documents for the truth of the matter asserted therein as though such documents had been introduced at trial through appropriate witnesses subject to cross-examination. See Return, p. 5 ("The record includes a letter from William Gilbert that sets forth the amount of the retainage that was paid to each of the unpaid subcontractors."). The date of payment by the City has not been definitively

established or proved. (R. 119). The letter from William Gilbert simply recites certain amounts owed. (R. 279). The record does not reflect if these amounts were actually owed, what services were rendered, or if the amounts were actually paid. The record is incomplete and the City is arguing issues that have not been subject to the adversarial fact-finding process envisioned by our courts. At the very least, the need to develop these facts warrants a remand, which is the appropriate remedy when factual determinations must be made in keeping with the law as announced on appeal. See, e.g., Ex Parte Foster, 350 S.C. 238, 565 S.E.2d 290 (S.C. 2002).

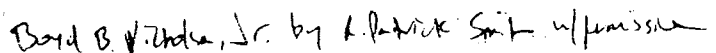
CONCLUSION

For the foregoing reasons, the Appellants respectfully reiterate that the Court rehear the above case, and/or in the alternative that it hear this case *en banc*. Upon rehearing the Appellants request that the Court reinstate its prior Opinion and reverse and remand the Trial Court's decision.

Respectfully submitted this 19 day of March, 2010.



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Works, Inc.*

Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Op. No. 4637
(S.C. Ct. App. refiled May 20, 2010)

RECEIVED
JUN 04 2010
SC 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.

PETITION FOR REHEARING

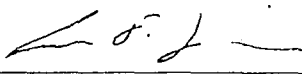
The Respondent City of Union petitions the South Carolina Court of Appeals for a rehearing of the Court's most recent re-filed opinion in *Shirley's Iron Works, Inc. v. City of Union*, Op. No. 4637 (S.C. Ct. App. re-filed May 20, 2010).

The grounds for the Respondent's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Respondent's petition for rehearing is based on the Court's re-filed opinion in *Shirley's Iron Works, Inc. v. City of Union*, Op. No. 4637 (S.C. Ct. App. re-filed May 20, 2009),

the previous opinions filed on December 9, 2009 and February 11, 2010; the supporting memorandum filed herewith; the previous Petition for Rehearing filed by the Respondent City of Union; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

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MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING

The Respondent City of Union has petitioned this Court for a rehearing of the most recent re-filed opinion in *Shirley's Iron Works, Inc. v. City of Union*, Op. No. 4637 (S.C. Ct. App. re-filed May 20, 2010), specifically with respect to the portions of the decision where the Court reversed in part the summary judgment granted by the Circuit Court. The Respondent City

respectfully submits that the following points were overlooked or misapprehended by this Court:¹

I.

This Court erred in failing to hold that the Appellants' tort cause of action is not governed by the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* Specifically, the Court 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).² Likewise, the Court overlooked the numerous cases holding 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).

¹ The Court's latest opinion is the third opinion that has been filed in this case. The May 20, 2010 re-filed opinion is a reversal of the Court's rulings contained in the February 11, 2010 opinion and reinstates in part certain of the Court's rulings contained in the December 9, 2009 opinion. However, the current opinion also makes several changes from the December 9, 2009, including a reversal of summary judgment on the quantum meruit cause of action. Thus, the current opinion is not merely a reinstatement of the December 9, 2009 opinion.

² 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.

While this Court properly ruled that a violation of Section 29-6-250, which is part of the Subcontractors' and Suppliers' Payment Protection Act (SPPA), is a tort, the Court erred in finding that such a tort falls outside of the Tort Claims Act. To the contrary, 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,³ 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, this Court had to totally ignore Section 15-78-200, which is what has occurred.⁴ Quite simply, there is no basis in the Tort Claims Act or the SPPA or any other statutory or constitutional provision for this Court to circumvent the bar of sovereign immunity and provide for a tort remedy against a governmental entity where sovereign immunity has not been expressly and explicitly waived.

On rehearing, this Court is urged to give effect to Section 15-78-200, Section 15-78-20(b), and the supporting case law. The Court is respectfully requested to find that the tort

³ The SPPA does not expressly provide for a cause of action that falls outside of the scope of the Tort Claims Act.

⁴ The City called the Court's attention to this error in its original petition for rehearing filed on December 29, 2009. In response, the Court reversed its earlier ruling and affirmed the summary judgment as modified. With the most recent re-filed opinion, the Court has again reversed summary judgment on the tort claim but does not address this critical and threshold issue. The City submits that the Court must provide an explanation as to how a tort against a governmental entity is not controlled by the Tort Claims Act when the Act provides the exclusive civil remedy for a tort "notwithstanding any provision of law."

alleged by the Appellants is governed by the Tort Claims Act. Further, the Court is urged to then conclude that the Appellants' tort claim is barred by sovereign immunity, specifically Section 15-78-60(4), consistent with footnote five in *Sloan Construction Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008).⁵

Nonetheless, if the Court chooses to rule that the tort alleged by the Appellants is *not* governed by the Tort Claims Act, the Court is respectfully requested to explain how a tort against a governmental entity is not controlled by the Tort Claims Act when the Act provides the exclusive civil remedy for a tort "notwithstanding any provision of law." The City is entitled to have this critical issue of law discussed and decided.⁶

II.

The Court also failed to properly apply the law of the case doctrine. 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.

⁵ In footnote number five, the Supreme Court ruled that a claim for failure to enforce the bonding requirements of the SPPA would be barred by 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." *Sloan Construction Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158, 164, n.5 (2008).

⁶ In addition, as argued below, Judge Paul Short in an unappealed order ruled that the Appellants' tort claim is governed by the Tort Claims Act. That ruling is unappealed and thus is the law of the case. As such, it cannot be disregarded by this Court.

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

The Appellants have also not appealed 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), the Supreme 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. The Supreme 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 – this Court is bound to find that the Appellants' tort cause of action is governed by the Tort Claims Act. On rehearing, this Court is respectfully requested to give effect to the unappealed rulings of

Judges Short and John finding without equivocation that the Appellants' tort claim for the breach of a duty under the SPPA is controlled by the Tort Claims Act.

III.

This Court also misapplied the law of the case doctrine in its ruling on the third-party beneficiary contract claim.⁷ In its latest opinion filed May 20, 2010, this Court ruled that unappealed orders from Judges Short and John are not the law of the case "because [their] statements that the Appellants' 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 Appellants could pursue their case on a breach of contract theory."

The Court, however, errs in reaching this conclusion because certainly Judge John had before him the purported third-party breach of contract claim. That claim – assuming such was even pled – was contained in the Appellants' amended complaint.⁸ There can be no dispute that Judge John's order was issued *after the amended complaint*.⁹ Contrary to this Court's 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 Appellants 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

⁷ The Court's current analysis of this issue differs substantially from the analysis contained in the December 9, 2009 opinion. The Court has eliminated much of the earlier discussion on this issue and in a summary fashion has rejected the City's position.

⁸ The Appellants' amended complaint was the final pleading filed in this case and was the operative pleading at the summary judgment stage.

⁹ The Appellants' 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).

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, this Court is incorrect in concluding that Judge John's order does not address the purported third-party breach of 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 this Court.

Therefore, on rehearing, this Court is respectfully requested to apply the law of the case as established by both Judge Short's and Judge John's unappealed orders and affirm the dismissal of the Appellants' third-party beneficiary contract claim.

IV.

The Court also erred in concluding that the Appellants specifically pled a third-party beneficiary breach of contract claim. The Court concluded that such a claim was pled because the Appellants were described as third-party beneficiaries in the "Facts" section of their amended complaint. *See*, Amended Complaint, para. 21. (R. 41). The Court then held that that was sufficient to plead a contract claim. The City disagrees and asks the Court to rehear its ruling in this regard. A single paragraph in the "facts" of a complaint does not comport with the requirements of Rule 8(a), SCRCP. 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 claim. Nowhere in the amended complaint is it alleged that the City breached its agreement with the Gilbert Group, LLC.

Furthermore, the Court erred in concluding that "Appellants further discussed this theory under the section of the amended complaint discussing their cause of action for violation of

section 29-6-250." 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 Appellants 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. 23-34 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 "negligence" claim and may only be construed as alleging a tort. Judge John also so found, which 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. On rehearing, the Court is thus requested to conclude that no third-party breach of contract claim was pled.

V.

In this Court's original opinion filed December 9, 2009, the Court affirmed the lower court's grant of summary judgment on the Appellants' quantum meruit claim. In the most recent re-filed opinion, the Court now reverses summary judgment on the quantum meruit claim. The

Court issued its opinion re-filed May 20, 2010, as a result of the joint petition for rehearing filed by the Appellants. It is important to recognize that in that petition the Appellants did *not* take issue with this Court's affirmance of summary judgment on the quantum meruit claim. Instead, the only relief requested by the Appellants was the reinstatement of the December 9, 2009 opinion and the remand of the SPPA claims only. *See*, Appellants' Joint Petition for Rehearing, p. 3 ("upon rehearing the Court should reinstate its original ruling in this case dated December 9, 2009 and reverse and remand the Trial Court's grant of summary judgment with respect to the Appellants' tort and breach of third-party beneficiary contract claims").

In addition, it is important for this Court to recognize that, after this Court issued its December 9, 2009 opinion, the Appellants *took no issue with that opinion*. The Appellants did not file any petitions for rehearing nor argued that this Court committed any errors in that opinion. The Appellants had the opportunity then to challenge this Court's affirmance of summary judgment on the quantum meruit claim and did not do so.

Consequently, the Respondent City submits that this Court erred in reversing that portion of the Court's December 9, 2009 opinion. Given the absence of any challenge by the Appellants – no petition for rehearing filed with respect to the December 9, 2009 opinion and later a request that the Court reinstate that December 9, 2009 opinion and remand the SPPA claims only – it is respectfully submitted that this Court exceeded its authority on rehearing by granting the Appellants relief they had not sought on rehearing and were beyond the time deadline to seek. *See, Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001).

VI.

In this Court's original opinion filed December 9, 2009, the Court affirmed the lower court's grant of summary judgment on the Appellants' quantum meruit claim. In the most recent

re-filed opinion, the Court now reverses summary judgment on the quantum meruit claim and fails to provide any analysis directed at that specific claim. In addition, the Court 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). This Court's latest opinion fails to address either of these grounds. Without question, this Court's latest opinion 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), the Supreme 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), the Supreme Court clarified the standard applicable to quantum meruit claims. The 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 Appellants did not even discuss in their briefs, to this Court and which this Court does not address in its latest opinion, the Appellants cannot prevail on their claim for quantum meruit.

The Court has erroneously treated the quantum meruit claim as the same as the SPPA claims brought by the Appellants. The Court finds 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 Construction* case when Judge Few issued his summary judgment order. As the latest re-filed opinion suggests, however, the Court is ordering a remand because of the *Sloan Construction* case, but *Sloan Construction* was not a quantum meruit case. The burden of proof in a quantum meruit claim is different from the SPPA claims. The elements of the claims are different. The Court cannot simply reverse the quantum meruit claim because the SPPA claims should be reversed.

Furthermore, if the facts on quantum meruit were not "fully developed," that is no basis for reversing summary judgment. The Appellants 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 Appellants could not support their quantum meruit claim factually at that point, then summary judgment was obviously appropriate. In short, the Appellants have

presented no evidence – as this Court correctly noted in its December 9, 2009 opinion – that the City failed to pay out the entire contract price. There is no disputing that fact – the contract balance has been paid.¹⁰ Hence, as 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 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

¹⁰ This Court 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." That finding is not disputed by the Appellants.

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.

On rehearing, this Court is respectfully requested to address Judge Few's ruling on sovereign immunity and to affirm on that basis. In reversing summary judgment, this Court cannot simply disregard a basis for summary judgment and summarily reverse and remand. The City is entitled to a ruling on its sovereign immunity defense.

VII.

This Court erred in reversing summary judgment on the quantum meruit claim on an additional basis that was not addressed in the Court's latest re-filed opinion. In its brief, the City had also argued that the Appellants never even appealed Judge Few's sovereign immunity ruling. As the City pointed out in its brief,

[T]he words "sovereign immunity" do not appear in the quantum meruit section of the Appellants' Brief. In *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), this Court held that "[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845. Such a ruling becomes the law of the case. *Id.* See also, *Eagles v. South Carolina National Bank*, 301 S.C. 402, 392 S.E.2d 187 (Ct. App. 1990); *Jones v. Lott*, 379 S.C. 285, 665 S.E.2d 642 (Ct. App. 2008). Because the Appellants have not challenged Judge Few's sovereign immunity ruling, the dismissal of the quantum meruit claim may be affirmed on that basis alone.

See, Brief of Respondent, p. 13. Thus, the failure of the Appellants to even challenge the sovereign immunity ruling by Judge Few is an additional basis for the affirmance of summary judgment on the quantum meruit claim. If the Court intends to reverse summary judgment on the quantum meruit claim, the City is entitled on rehearing for a ruling on this preservation issue.

VIII.

This Court also erred in denying relief on the additional sustaining ground raised by the City with respect to the Appellants' SPPA claims. The City argued that the dismissal of the Appellants' claims should be affirmed because the City complied with the SPPA by distributing the \$111,270.00 that remained to be paid to the general contractor when the City learned that subcontractors were not paid in full. This Court 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's analysis of the issue contained in the February 11, 2010 opinion was correct and should be reinstated on rehearing.

In *Sloan Construction Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008), the Supreme Court limited the extent of the government's liability for a violation of the SPPA. The Court explained "that the government's liability for failure to ensure compliance with statutory bond requirements is not open-ended." 659 S.E.2d at 165. Specifically, the Supreme 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, the Supreme 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 Construction* 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 Appellants. (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 Appellants -- accepted a share of the \$111,270.00 in exchange for releasing the City from further liability. The Appellants refused any portion of the \$111,270.00. After the Appellants 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 Construction* 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 Appellants; who rejected the offer and insisted on full payment from the City. However, the City is not liable to the Appellants under *Sloan Construction* for the full amounts owed by the Gilbert Group to the Appellants. By rejecting the share of the \$111,270.00 offered to them, the Appellants 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 Appellant a share of the \$111,270.00 and cannot be held liable given that the Appellants rejected those amounts.

In the latest opinion filed May 20, 2010, this Court was persuaded that the result in *Sloan Construction* requires a reversal and remand of summary judgment on the SPPA claims. The Court is respectfully requested to reconsider the impact of *Sloan Construction*. In particular, *Sloan Construction* is factually distinguishable from the present case – a point overlooked in this Court's latest opinion. In *Sloan Construction*, 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 Construction*, 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 Appellants were offered but refused a share of that retainage amount. The City therefore would agree 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. In fact, that is the very purpose and intent of the statutory scheme as construed and applied in *Sloan Construction*. And that is what occurred in the present case. Therefore, the fact that the Supreme Court remanded in *Sloan Construction* does not dictate that this Court must remand in this case. The cases are factually dissimilar in this critical respect.

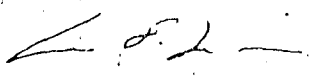
In sum, based upon the holding in *Sloan Construction* and the City's attempt to satisfy its liability under the SPPA, judgment in the City's favor on both the SPPA claims should be affirmed. On rehearing, this Court is respectfully requested to reinstate its rulings on the SPPA claims as contained in the February 11, 2010 opinion.

CONCLUSION

Based on the foregoing discussion, the Respondent City of Union respectfully requests that the Court rehear its latest re-filed opinion reversing in part the order of former Circuit Judge John C. Few granting summary judgment to the City of Union. The Respondent requests that, upon rehearing, this Court affirm summary judgment in toto in favor of the City.

Respectfully submitted,

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June 4, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

John C. Few, Circuit Court Judge

Op. No. 4637
(S.C. Ct. App. refiled May 20, 2010)

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

v.

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

APPELLANTS' JOINT RETURN TO PETITION FOR REHEARING

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Pursuant to Rules 221 and 224, SCACR, Appellants Shirley's Iron Works, Inc. ("Shirleys") and Tindall Corporation ("Tindall") hereby respond to the Petition for Rehearing filed by Respondent City of Union (the "City") on or about June 4, 2010. In its Petition for Rehearing, the City simply repeats arguments that have been fully considered by this Court. Appellants will address such arguments in the order presented by the City.

In order to prevail on a Petition for Rehearing, the City must demonstrate that the Court overlooked or misapprehended its argument. Rule 221(a), SCACR; *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (S.C. 2001). Such a petition is not a vehicle for re-argument of questions which were considered and decided by the Court. *Huggins v. Atlantic C. L. R. Co.*, 96 S.C. 267, 283, 79 S.E. 406 (S.C. 1913). If the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, there is no basis for granting a rehearing, and such petition should be denied. *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 64, 620 S.E.2d 86 (Cl. App. 2005). As discussed below, there is no basis for granting the City's Petition for Rehearing filed in this matter, as the issues raised therein have been considered and decided by the Court.

I.

The City re-argues that the Court should find that the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 et. seq. (the "SCTCA") provides the "exclusive and sole remedy" and governs any tort remedy against a governmental entity. The City made this same argument in its Respondent's Brief. Respondent's Brief, p. 5, footnote 2. The Court neither misapprehended nor overlooked this argument. Rather, the Court expressly

considered and properly rejected this argument. Specifically, in addressing and rejecting this argument by the City, this Court stated:

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).

Decision, p. 7. Therefore, this Court properly determined that the tort claims of the Appellants against the City for breach of its duty created by § 29-6-250 was proper and falls within the exception to the SCTCA codified in § 15-78-60(4).

The City urges that footnote 5 of *Sloan Constr. v. Southern Grassing, Inc.*, 373 S.C. 108, 659 S.E.2d 158 (2008) mandates that the Appellants' claims for violation of § 29-6-250 are barred by sovereign immunity. Memorandum in Support of Petition for Rehearing, p. 4. The City previously made this argument in its appellate Brief. Respondent's Brief, pp. 7-8. The City likewise made this argument in its previous Memorandum in Support of Petition for Rehearing. See previous Memorandum, pp. 2-3. The Court has explicitly considered this argument and rejected it, agreeing with the Appellants that the latter portion of footnote 5 indicates that the SCTCA is not relevant to

the government's liability for failure to comply with a duty under the SPPA. Decision, p. 8. In so ruling, this Court was expressly adopting and applying the Supreme Court's analysis in *Southco*. *Id.* at 118 n. 5, 659 S.E.2d at 164 n. 5. Therefore, these arguments have been neither overlooked nor disregarded, but fully considered and ruled on by this Court.

The City has also requested that the Court explain how a tort against a government entity is not controlled by the Tort Claims Act when the Act provides the exclusive civil remedy for a tort "notwithstanding any provision of law." Memorandum in Support of Petition for Rehearing, p.4. The Court has already done so in the passage quoted above. As such, the Court should deny the City's Petition for Rehearing as it relates to such arguments.

II. and III.

The City incorrectly asserts that this Court misapplied the "law of the case" doctrine, by rejecting the City's assertions that this doctrine precludes Appellants' negligence claims for breach of the duty created by § 29-6-250 and/or the Appellants' third-party beneficiary breach of contract claim. These assertions lack merit. Properly characterized, the City once again asserts that the Appellants and this Court are barred from correcting the acknowledged legal error at issue in this appeal - the trial Court's ruling that the Appellants have no private right of action against the City for breach of any duties created by the SPPA.

The City asserts that prior orders of Judge Short dated April 19, 2004 and Judge John dated December 12, 2005 determined that the Appellants' cause of action is a tort claim governed by the SCTCA, that Appellants failed to appeal such orders, and that such

orders are now binding on Appellants as the law of the case, thus preventing them from taking advantage of *Sloan v. Southco, supra*. The City already made these arguments and this Court has rejected them. Respondent's Brief, pp. 6-8; Respondent's prior Memorandum in Support of Petition for Rehearing, pp. 3-6; Decision, pp. 10-11.

Importantly, at the time Judge Short issued his April 19, 2004 Order, the case was in a completely different posture. Judge Short's Order addressed the City's Motion to Strike and was filed prior to the Appellants' Motion to Amend their Complaint, which was filed in August of 2005. Appellants' Motion to Amend sought to add a third-party beneficiary of a contract claim against the City. The trial Court below was aware of this. R. pp. 130-131. Indeed, the trial Court remarked "I read [Judge Short's] Order as a leaving open question [sic] of what is the nature of the [Appellants'] theory against the [City]. [Judge Short's] Order is intended to address a motion on the part of the City to strike the cause of action for the recovery of attorneys' fees under a specific statute I don't read it as expressly forbidding the assertion of a breach of contract theory in this case." R. p. 131. The City's counsel remarked, "I recognize that [Appellants' third-party beneficiary theory] was not a cause of action at the time Judge Short ruled on that..." R. p. 131.

Similarly, Judge John's Order addressed the issue of whether "the Plaintiffs' claims for the recovery of attorney's fees under S.C. Code Ann. § 15-77-300 and pre-judgment interest as sought in their Amended Complaint are barred by the law of the case as established by an earlier order by then Circuit Court Judge Paul E. Short, Jr." R. p. 40. Although Judge John's Order purports to utilize the law of the case doctrine, in actuality it simply relies on precedent that one Circuit Court Judge cannot reverse, overrule or

disregard the rulings of another Circuit Court Judge. R. p. 11. The City states "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." Respondent's Memorandum in Support of Petition for Rehearing, pp. 6-7. Judge John's Order in no way determines that the first and third causes of action of Appellants' Amended Complaint allege a tort as City suggests. Judge John states 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" (R. p. 10) and "... one Circuit Court judge cannot reverse, overrule or disregard the rulings by another Circuit Court judge" (R. p. 11). Judge John's Order simply does not say what the City represents it says, and Judge John did not rule that the Appellants' Amended Complaint does not allege a third-party breach of contract claim.

As the trial Court ruled, Judge Short did not have before him at the time the question of whether Appellants could properly assert the breach of a contractual obligation. So "he couldn't have foreclosed it if it wasn't before him." R. p. 132. Similarly, Judge John's determination that Judge Short's order was the law of the case is erroneous. This Court stated that "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 Appellants could pursue their case on a breach of contract theory." Decision, p. 11. Thus, Judge Short's Order is not the law of the case, and Judge John's Order finding that Judge Short's Order is the law of the case, it naturally follows, is likewise erroneous. Judge Short's analysis, Judge John's analysis, and the trial Court's analysis in

the Order under appeal, is incorrect in light of the Supreme Court's decision in *Sloan v. Southco*, *supra*. This Court has correctly so decided.

Further, the rule of the "law of the case" doctrine means that what was decided on a former appeal is, if evidence is the same in another trial, controlling on the trial court and appellate court on another appeal, **unless on re-examination the appellate court is convinced that the first decision was wrong**. *Charleston Lumber Company, Inc. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d 869 (S.C. 2000), footnote 3, emphasis added. By its literal terms, this doctrine cannot apply to Judge Short's Order or Judge John's Order for two reasons. First, the doctrine only applies to matters decided "on former appeal." The instant matter is being appealed for the first time and there have, therefore, been no issues decided on former appeal. The "law of the case" doctrine flows downward from superior to inferior courts, and operates to bind a lower court by the prior ruling of an appellate court. Second, even if the doctrine applied, which it does not, the appellate court may "on re-examination" determine that the initial decision was wrong. Judge John's Order, just like the orders of Judge Short and Judge Few, were all issued prior to the analysis mandated by the Supreme Court in *Sloan Constr. Co. v. SouthCo Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (S.C. 2008).

The City's entire argument regarding the law of the case doctrine, aside from having already been argued and ruled on by the Court, assumes that such orders were "final" so as to give rise to appeal rights. Appellants submit that both such orders are interlocutory, do not fully and finally resolve Appellants' claims so as to be final orders, and characterize (or, in light of the precedent giving rise to this appeal, mischaracterize) Appellants' claims in *dicta*. The Court has neither overlooked nor disregarded the City's

arguments as to the law of the case doctrine, but has fully considered and ruled on them. As such, the Court should not entertain the City's Petition for Rehearing as it relates to such arguments.

IV.

The City argues that the Court erred in concluding that the Appellants specifically pled a third-party beneficiary breach of contract claim. Memorandum in Support of Petition for Rehearing, p. 7. The City has taken this position before (Respondent's Brief, p. 8) and the Court has rejected it. The City took the position that "[o]n appeal, it is now incumbent upon this Court to address whether the Amended Complaint can be or should be construed as alleging a third-party beneficiary claim. The City submits that it does not." Respondent's Brief, p. 8. Such is in contravention of the legal maxim that pleadings are to be construed liberally in favor of the pleader. See, e.g., *Gambrell v. Cox*, 250 S.C. 228, 157 S.E.2d 233 (1967); *Lofitis v. Eck*, 288 S.C. 154, 341 S.E.2d 641 (Ct. App. 1986). The Court properly utilized binding caselaw indicating the Court should liberally construe pleadings. Decision, pp. 9-10.

Further, such position regarding the alleged "failure to plead" is nonsensical in light of the very holding that the City acknowledges controls: namely, the *Sloan* Court's ruling that a subcontractor may sue a governmental entity on a third-party beneficiary theory pursuant to S.C. Code Ann. § 29-6-250. A plain reading of the Appellants' Amended Complaint in the underlying matter reveals that the Appellants did, in fact, plead a third-party beneficiary claim against the City. R. pp. 41-43, ¶¶ 21, 23, 28-35. Judge Few ruled that the third-party beneficiary breach of contract claim be dismissed pursuant to the appellate precedent which has now been reversed by the Supreme Court.

The third-party beneficiary claim was discussed extensively during oral argument before the trial Court. R. pp. 121-132, 134-135, 143, 152-154, 162-171, 173-185, 227-228. The trial Court realized that one of the threshold issues was "how this thing fits into either a breach of contract claim or some sort of tort claim or both." R. p. 121. Based on the foregoing, the Court should not entertain the City's Petition for Rehearing to the extent it relies on such "failure to plead" argument.

V, VI and VII.

The trial Court dismissed Appellants' claims for quantum meruit based on the doctrine of sovereign immunity. R. p. 19. The City argues that the Court erred in reversing the quantum meruit determination below. Memorandum in Support of Petition for Rehearing, p. 9.

Appellants' unjust enrichment claim or implied by law contract claim lies in equity. *Myrtle Beach Hospital, Inc., d/b/a Grand Strand Regional Medical Center v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000). To recover for unjust enrichment, Appellants must show "(1) benefit conferred upon defendant by plaintiff; (2) realization of that benefit by defendant; and (3) retention by defendant of benefit under conditions that make it unjust for him to retain it without paying its value...." *Id.*, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000).

Appellants have conferred a nongratuitous benefit on the City in the form of a 50,000 sq. foot building. R. p. 41, ¶ 25; R. p. 42, ¶ 27; R. p. 45, ¶¶ 46-50; R. p. 298. The City clearly realized a benefit. It would be inequitable for Appellants to have provided over two hundred thousand dollars in construction services, and for the City to enjoy the benefit of those services, without Appellants being paid for their work. The City's

position that the TCA vitiates such quantum meruit claim, agreed with by the trial court, has been rejected by the Supreme Court in *Sloan*, 377 S.C. 108.

A restitution/unjust enrichment claim is proper if the law implies a promise to pay based on the facts of the case. *Ellis v. Smith Grading and Paving, Inc.*, 294 S.C. 470, 474, 366 S.E.2d 12, 15 (Cl. App. 1988). As explained above, S.C. Code Ann. §29-6-250, as interpreted by the Supreme Court in *Sloan*, creates the implied promise because the Legislature determined that the City must guarantee Gilbert's payments by requiring a payment bond. Because the City neglected to require a bond the City itself must now pay for Appellants' work. *Woodfield Lanes, Inc. v. Village of Schaumburg*, 168 Ill. App. 3d 763, 767, 523 N.E.2d 36, 38-39 (1988).

A claim for quantum meruit is proper if the law implies a promise to pay based on the facts of the case. *Ellis v. Smith Grading and Paving, Inc.*, 294 S.C. 470, 474, 366 S.E.2d 12, 15 (Cl. App. 1988). As explained above, S.C. Code Ann. § 29-6-250, as interpreted by the Supreme Court in *Sloan*, creates the implied promise because the Legislature determined that the City must guarantee Gilbert Group, LLC's payments by requiring a payment bond. Because the City neglected to require a bond the City itself must now pay for Appellants' work. *Woodfield Lanes, Inc. v. Village of Schaumburg*, 168 Ill. App. 3d 763, 767, 523 N.E.2d 36, 38-39 (1988). The Decision of this Court properly reverses the Circuit Court as to Appellants' claim for quantum meruit.

In response to Appellants' position in regard to quantum meruit, the City previously took the position that "there was no evidence that the City retained any amount of the contract price or failed to pay the full contract price." Respondent's Brief, p. 12. The City went on to take the position that "it is undisputed that the City has paid

the full contract price and hence cannot be held liable for quantum meruit.” Respondent’s Brief, p. 14. Such assertion is, simply put, untrue. It is very much disputed that the City has fully paid the value of the benefit by paying the entire contract price. This is another in a series of factual determinations that should properly be made by a trial court upon remand by this Court, as this Court has now properly ruled. Decision, pp. 11-12.

Additionally, the City continues to make the untenable assertion that Appellants did not include in their Appellants’ brief any discussion of the appeal of the trial Court’s ruling as to sovereign immunity, even going so far as to state “the words ‘sovereign immunity’ do not appear in the quantum meruit section of the Appellants’ Brief.” Respondent’s Brief, p. 12; see also Respondent’s Memorandum in Support of Petition for Rehearing, pp. 10-11. In actuality, the doctrine of sovereign immunity is mentioned in the first sentence of Appellants’ Brief addressing quantum meruit. Appellants’ Brief, p. 13. The City’s position that the TCA vitiates such quantum meruit claim based on the doctrine of sovereign immunity, agreed with by the trial Court, has been rejected by the Supreme Court in *Sloan*. The Decision recognizes this. Decision, p. 12 (“...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.”).

Remand is an appropriate remedy on appeal when the record is incomplete or factual determinations must be made in keeping with the law as announced on appeal. See, e.g., *Ex Parte Foster*, 350 S.C. 238, 565 S.E.2d 290 (S.C. 2002) (reversal and remand appropriate when an appeal contains insufficient factual findings to support its

determinations); *In re: Treatment & Care of Luckabaugh*, 351 S.C. 122, 568 S.E.2d 338 (S.C. 2002) (when the trial court fails to find on a material issue and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made); *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 382 S.E.2d 915 (S.C. 1989) (remand to resolve alleged discrepancies appropriate); *Micheau v. Micheau*, 285 S.C. 527, 331 S.E.2d 348 (S.C. 1985) (remand for factual findings to determine whether an attorneys' fees award is appropriate). The Court has properly exercised its discretion to remand the quantum meruit claim, as it will be affected by *Sloan v. Southco.*, *supra*. The City's Petition for Rehearing related to quantum meruit should be denied.

VIII.

The City argues that the Court erred in denying relief on the additional sustaining grounds raised by the City that the dismissal of the Appellants' claims should be affirmed "because the City complied with the SPPA by distributing the \$111,270.00 that remained to be paid to the general contractor when the City learned that subcontractors were not paid in full." Memorandum in Support of Petition for Rehearing, p. 15. This is not the analysis mandated by *Sloan v. Southco.*, *supra*, which limits the governmental entity's liability for failure to comply with the SPPA's bonding requirements to the remaining balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's non-payment. Decision, p. 6, citing *Sloan*, 377 S.C. 108, 121, 659 S.E.2d 158, 165-166.

The City argued in its appellate Brief at 10 that "The City's liability is limited to the unpaid balance owed to the general contractor." The City argued in its Brief at 11

that such analysis confines itself to "the point that the City learned that subcontractors had not been paid." Such are inherently factual determinations which are not settled by an examination of the Record. Indeed, *Sloan* states that its holding is limited to (1) the remaining unpaid contract balance on the contract with the general contractor, (2) at the time the owner received notice from the subcontractor of the general contractor's nonpayment. Such is a dually factual determination based on *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 93 S.E.2d 855 (S.C. 1956) and its progeny. The point at which City learned of Gilbert Group, LLC's nonpayment is not established in the Record. Such was the exact basis for Appellants' request that this Court reverse and remand for purposes of determining the remaining unpaid contract balance on the contract between the City and Gilbert Group, LLC as of the time the Appellants notified City of Gilbert Group, LLC's nonpayment.

While it appears that the City may have paid all the unpaid contract balance to certain subcontractors, it appears to have chosen its amounts at random (R. p. 279). More importantly, the City made these payments after receiving notice of the Appellants' claims of non-payment. R. pp. 244-48 and 279-81. In *Sloan v. Southco*, the SCDOT likewise made payments to the general contractor of the full contract balance after receiving notice of non-payment. 377 S.C. 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."). SCDOT

could not avail itself of a payment defense in its case; and for the same reasons the City may not avail itself of the payment defense in this case.

Sloan v. Southco instructed that the mechanic's lien statute be followed in applying the limitation on an owner's liability. Specifically, the *Southco* Court remarked:

The purpose of the SPPA is similar to that underlying the subcontractor's lien outlined in the mechanics' lien statute, see S.C. Code Ann. § 29-5-20 (1991) ... The mechanics' lien statute provides that when a subcontractor seeks to enforce a mechanics' lien against the owner of the improved property due to the general contractor's nonpayment, the owner's liability is limited 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. **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.**

377 S.C. at 121, 659 S.E.2d at 165-66 (emphasis added, internal citations omitted).

The City argues in its Memorandum in Support of Petition for Rehearing that an owner may pay the remaining contract balance to unpaid subcontractors to avoid the "snapshot" analysis. This is a distinction without a difference, especially when one considers that the alleged "share" the unpaid subs were "offered" in this case was apparently determined in the sole discretion of Gilbert Group and/or the City. R. p. 279. The City's argument would allow the City to move past the "snapshot" of the unpaid contract balance as of the time Appellants gave notice and to look at the contract balance at some un-defined, later point. This works a forfeiture to Appellants and would be legal error. The record is devoid of any evidence as to what monies were actually paid, what services were actually performed, why certain subcontractors were favored over others

(some subcontractors were paid one hundred cents on the dollar, while the Appellants were "offered" a "take-it-or-leave-it" amount that was not even twenty percent of their outstanding invoices¹), and who made such determination. For these reasons a remand as to such issues is appropriate, as the Court's Decision correctly determines.

Any payment made by the owner after receipt of a notice of mechanic's lien, will not reduce or otherwise affect the amount recoverable pursuant to the lien. S.C. Code Ann. § 29-5-50. Interpretative cases draw no distinction between subsequent payments to the general contractor and subsequent payments to subcontractors, both of which are made by an owner at its peril. *Taylor Cotton & Ridley, Inc. v. Okatie Hotel Group, LLC*, 372 S.C. 89, 641 S.E.2d 459 (Ct. App. 2007) (quoting S.C. Code Ann. § 29-5-60(a): "[i]n the event the amount due the contractor by the owner is insufficient to pay all the lienors ... it is the duty of the owner to prorate among all just claims."); *Charleston Lumber Co. v. GPT*, 303 S.C. 350, 400 S.E.2d 508 (Ct. App. 1991) (Court of Appeals refused to give the owner "credit" for voluntarily settling with the non-perfected lien holders). Under the reasoning of the City, however, a public owner could defeat the claim of a subcontractor complying with the law by simply offering a "share" as defined by the owner, however small and arbitrary. Such a result runs afoul of legal precedent and is contrary to public policy, as it would greatly diminish, if not completely eviscerate, the protections the General Assembly intended when it adopted the Subcontractors' and Suppliers' Payment Protection Act.

Facts which are outside the record should not be considered by appellate courts. See, e.g., *Davis v. Davis*, 356 S.C. 132, 588 S.E.2d 102 (S.C. 2003); SCACR 219(h).

¹ The City and Gilbert offered the Appellants \$25,000.00 each. R. p. 281. Shirley's unpaid invoices total \$132,782, and Tindall's unpaid invoices total \$165,500.00. R. p. 43.

Further, a party prevailing at trial may only raise additional sustaining grounds for an appellate court to affirm when the grounds appear in the record on appeal. *T'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). This doctrine by its terms applies to a third party "prevailing at trial." *Id.* There was no trial in the instant case, and the City is attempting to argue points, based loosely on the deposition testimony of William Gilbert, which are disputed.

The date of payment by the City has not been definitively established or proved. R. p. 119. The letter from William Gilbert simply recites certain amounts owed. R. p. 279. The record does not reflect if these amounts were actually owed, what services were rendered, or if the amounts were actually paid. The record is incomplete and the City is arguing issues that have not been subject to the adversarial fact-finding process envisioned by our courts. At the very least, the need to develop these facts warrants a remand, which is the appropriate remedy when factual determinations must be made in keeping with the law as announced on appeal. *See, e.g., Ex Parte Foster*, 350 S.C. 238, 565 S.E.2d 290 (S.C. 2002). The Decision properly remands so as to determine such issues.

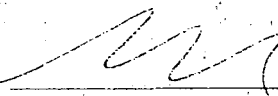
Further, the City did not make these arguments below. *See generally*, R. pp. 114-234. Counsel for City casually mentioned that "at that point in time there was a hundred and eleven thousand dollars that had not yet been paid on the contract price to Gilbert Group" but such date has not been definitively established or proved. R. p. 119. All parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling. *Id.*, 338 S.C. 406, 421. Appellants submit that the City has waived such argument by failing to establish the factual predicate for same as of the motions hearing

below. In any event, this argument was neither overlooked nor disregarded, but fully considered and ruled on by the Court. The Court should not entertain the City's Petition for Rehearing as it relates to such argument.

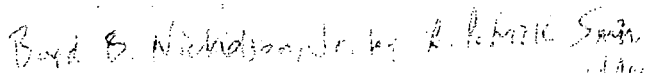
CONCLUSION

Based on the foregoing, this Court should deny the City's Petition for Rehearing.

Respectfully submitted,



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June 13, 2010
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Op. No. 4637
(S.C. Ct. App. refiled May 20, 2010)

RECEIVED

JUL 16 2010

SC 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.

REPLY MEMORANDUM IN SUPPORT OF
PETITION FOR REHEARING

The Respondent City of Union has petitioned this Court for a rehearing of the most recent re-filed opinion in *Shirley's Iron Works, Inc. v. City of Union*, Op. No. 4637 (S.C. Ct. App. re-filed May 20, 2010), specifically with respect to the portions of the decision where the Court reversed in part the summary judgment granted by the Circuit Court. The Appellants have filed a joint return to that Petition for Rehearing, to which a brief reply is warranted as to only certain arguments.

DLSCN 16/07/10

As a first ground for rehearing, the City pointed out that this Court erred in failing to hold that the Appellants' tort cause of action is and must be governed by the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* The City argued specifically that this Court overlooked and failed to 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 The Court also overlooked the numerous cases holding 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).

In their joint return, the Appellants have once again dodged this critical and dispositive issue. To be fair, the Appellants either dodged the issue or misapprehended it. Instead of addressing how a tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty – which is precisely what is at play in this case – falls outside the scope of the Tort Claims Act, the Appellants argued that their tort claim "falls within the exception to the SCTCA codified in § 15-78-60(4)." *See*, Appellants' Joint Return, p. 2. Frankly, that makes no sense. Section 15-78-60(4) is one of numerous exceptions to the waiver

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.

of sovereign immunity. They are not "exceptions to the Tort Claims Act." Section 15-78-60(4) does not allow or justify this Court's conclusion that the Appellants' tort claim arising from a breach of the duty created by Section 29-5-60 is not governed by the Tort Claims Act. It does not override or nullify Sections 15-78-200 and 15-78-20(b) which make clear the legislative intent that the Tort Claims Act is the "exclusive and sole remedy" for *any and every* tort committed by a governmental employee acting within his official duties and not constituting an intent to harm, actual malice, actual fraud or a crime of moral turpitude. In other words, the Appellants clearly fail to comprehend that Section 15-78-60(4) is not an exception to Tort Claims Act jurisdiction but is in actuality a sovereign immunity defense that bars their tort claim as long as that tort claim falls within the scope of the Act, which it clearly does.

On rehearing, the Court is asked to address this critical issue. To rule as it has, this Court has failed to give any meaning or application to Sections 15-78-200 and 15-78-20(b). This Court has failed to explain how the Appellants' tort claim is not governed by the Tort Claims Act when the Act is the "exclusive and sole remedy" for *any and every* tort committed by a governmental employee acting within his official duties and not constituting an intent to harm, actual malice, actual fraud or a crime of moral turpitude. That is the issue that the City is again requesting be addressed on rehearing. Contrary to the Appellants' claim, that issue has not been addressed in the Court's latest re-filed opinion and needs to be.

II and III:

In the second and third grounds for rehearing, the City argued that the Court failed to properly apply the "law of the case" doctrine. The City contends that the unappealed orders of Judges Short and John concluded that the Appellants' causes of action seeking relief under

Section 29-6-250 were tort claims and are controlled by the Tort Claims Act. Because those orders are unappealed – they establish the law of the case, right or wrong.

The Appellants attempt to have this Court simply ignore the "law of the case" doctrine. Although it is indisputable that the orders of Judges Short and John were not appealed, the Appellants counter the City's arguments by now arguing that the rulings by Judges Short and John were erroneous. *See e.g.*, Appellants' Joint Return, p. 5 ("Judge Short's Order is not the law of the law, and Judge John's Order finding that Judge Short's Order is the law of the case, it naturally follows, is likewise erroneous"). However, they cannot do that because they never appealed those rulings. Under the "law of the case" doctrine, it is immaterial whether the rulings were erroneous. If not appealed, prior rulings -- *whether right or wrong* – establish the law of the case. The impact of the "law of the case" doctrine cannot be overcome by belatedly arguing that the unappealed rulings are wrong and should therefore be disregarded.

Furthermore, the Appellants offer an explanation of the "law of the case" doctrine that is simply incorrect. Relying on the case of *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000), the Appellants seem to argue that the "law of the case" doctrine applies *only* to matters decided in a *prior appeal*. The *Charleston Lumber* case did involve the application to the "law of the case" doctrine to a prior appeal, but the Supreme Court did not limit the doctrine's application to issues or claims decided on a prior appeal. Indeed, the Supreme Court reiterated that "an unappealed ruling is the law of the case." 525 S.E.2d at 871. There are, as this Court well knows, many cases where the "law of the case" doctrine is applied to an unappealed ruling regardless of whether there was a prior appeal or not. *See e.g.*, *Normandy Corp. v. South Carolina Dept. of Transportation*, 386 S.C. 393, 688 S.E.2d 136, 149 (Ct. App. 2009) (unappealed ruling "is the law of the case regardless of its correctness"); *Campbell v. Jordan*,

382 S.C. 445, 675 S.E.2d 801 (Ct. App. 2009); *Floyd v. C.B. Askins & Co. Contractors*, 382 S.C. 84, 675 S.E.2d 450 (Ct. App. 2009); *King v. James*, 388 S.C. 16, 694 S.E.2d 35 (Ct. App. 2010).

In short, contrary to the Appellants' suggestion, to become the "law of the case," a ruling need not have been the subject of a prior appeal.

The Appellants also suggest that the *Charleston Lumber* case allows an appellate court to "re-examine" and reverse an unappealed ruling in spite of the "law of the case" doctrine. That is incorrect. The Appellants point to footnote #3 in the *Charleston Lumber* opinion that suggests that an appellate court may reexamine a former *appellate* decision in the same litigation as part of a subsequent or second appeal. In other words, the Court suggested that the Court could have corrected an error in *Charleston Lumber I* while the Court was adjudicating *Charleston Lumber II*.² That footnote does not suggest that an appellate court has the inherent right to correct an unappealed ruling of a circuit court. To the contrary, the Supreme Court has spoken to this issue, and in *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997), the 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.

While it is unclear, the Appellants also seem to argue that the "law of the case" doctrine is not applicable to any unappealed interlocutory orders despite the fact that those orders become appealable after final judgment. See, *Link v. School District of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990). The Appellants suggest that the orders of Judges Short and John were not "final" and thus did not "give rise to appeal rights." See, Appellants' Joint Return, p. 6. However, after Judge Few granted summary judgment and dismissed the Appellants' amended

² The Court was not particularly definite on this issue in that contrary authority for this proposition was also cited. See, *Huggins v. Winn-Dixie Greenville, Inc.*, 252 S.C. 353, 166 S.E.2d 297 (1969).

complaints, the Appellants were free to appeal all interlocutory orders, including the orders by Judges Short and John. The Appellants simply failed to do so. They chose to appeal only Judge Few's summary judgment order, and in doing so, they allowed the unappealed orders of Judges Short and John to establish the law of the case.

In sum, the analysis of the "law of the case" doctrine proffered by the Appellants is deeply flawed and should be rejected outright. The Court is respectfully requested to apply the law of the case as established by both Judge Short's and Judge John's unappealed orders, and by doing so, the Court is asked to find that the Appellants' tort claim for the breach of a duty under the SPPA is controlled by the Tort Claims Act and is further asked to dismiss the Appellants' third-party beneficiary contract claim.

VII and VII.

The City has also sought a rehearing on the Court's reversal of summary judgment on the Appellants' quantum meruit claim. The Court reversed summary judgment in the most recent re-filed opinion despite the fact that the Court's original opinion filed December 9, 2009, affirmed summary judgment on that claim and the Appellants *have never sought rehearing on that ruling*. Moreover, in now reversing summary judgment on the quantum meruit claim, the Court has clearly overlooked and failed to address each of the lower court's separate rulings dismissing the quantum meruit claim.

In particular, the Court has given no consideration to the sovereign immunity defense. The record clearly shows that the Appellants never even appealed the finding that quantum meruit is barred by sovereign immunity. The Appellants never addressed this issue in its opening brief to this Court. Moreover, even now, they still offer no credible argument to suggest

that sovereign immunity is not an absolute bar.³ At best, the Appellants try to treat the SPPA claim and the quantum meruit claim as one and the same. It is not. Contrary to the Appellants' apparent contention, quantum meruit is *not* a tort. It is an equitable theory of recovery. See, *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 684 S.E.2d 756, 764 (2009) (quantum meruit is "equitable remedy"); *LandBank Fund VII, LLC v. Dickerson*, 369 S.C. 621, 632 S.E.2d 882, 887 (Ct. App. 2006) ("[a]n action based on a theory of quantum meruit recovery sounds in equity").

As a result, the Appellants' argument that the Supreme Court's decision in *Sloan Construction Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008), requires the reversal of summary judgment on the quantum meruit claim is flat wrong for several reasons. First, *Sloan Construction* was not even a quantum meruit case, and the Supreme Court did not address in that case whether sovereign immunity bars a quantum meruit claim against a governmental entity. Second, because quantum meruit is not a tort, the claim is not controlled by the Tort Claims Act or the limited waiver of sovereign immunity under the Act. There has been no waiver of sovereign immunity by the General Assembly for equitable causes of action seeking monetary relief against governmental entities.

In sum, on rehearing this Court is respectfully requested to address Judge Few's ruling on sovereign immunity and to affirm on that basis. The City respectfully submits that it is entitled at the very least to a ruling on its sovereign immunity defense.

³ The Appellants do not appear to understand the City's sovereign immunity defense or that portion of Judge Few's summary judgment order. The Appellants describes the City's position as follows: "The City's position that the TCA vitiates such quantum meruit claim based on the doctrine of sovereign immunity ..." See, Appellants' Joint Return, p. 10. As discussed below, the City does not take the position that the quantum meruit claim – which is not a tort claim – is controlled by the Tort Claims Act.

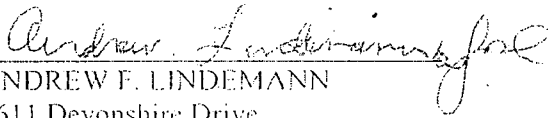
CONCLUSION

Based on the foregoing discussion, the Respondent City of Union respectfully renews its request that the Court rehear its latest re-filed opinion reversing in part the order of former Circuit Judge John C. Few granting summary judgment to the City of Union. The Respondent requests that, upon rehearing, this Court affirm summary judgment in toto in favor of the City.

Respectfully submitted,

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July 16, 2010

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

John C. Few, Circuit Court Judge

Case No.: 2003-CP-44-171(B)

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

v.

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

JOINT FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in granting summary judgment in favor of Respondent City of Union as to Appellants' tort cause of action?
- II. Did the trial court err in granting summary judgment in favor of Respondent City of Union as to Appellants' cause of action for third party beneficiary of contract between Respondent City of Union and Gilbert Group, Inc.?
- III. Did the trial court err in granting summary judgment in favor of Respondent City of Union as to Appellants' cause of action for quantum meruit?
- IV. Did the trial court err in granting summary judgment in favor of Respondent City of Union as to Appellants' cause of action for violation of S.C. Code Ann. § 27-1-15?

STATEMENT OF THE CASE

This case involves claims asserted by Appellants Shirley's Iron Works, Inc. ("Shirley's") and Tindall Corporation ("Tindall") in tort, contract, and equity against the Respondent City of Union ("City") for failure to take reasonable steps to ensure that its contractor, Gilbert Group, LLC ("Gilbert"), obtained and furnished a payment bond in connection with a certain construction project as required by the Subcontractors Payment Protection Act ("SPPA"), S.C. Code Ann. § 29-6-210, *et. seq.* The City moved for summary judgment on several grounds, including the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-10, *et seq.* (the "TCA"). Appellants moved for partial summary judgment as to the liability of the City. The trial court granted the City's motion by Order filed September 26, 2007. The Order denied Appellants' motion for summary judgment. Appellants received written notice of the entry of the order on October 5, 2007, and on October 23, 2007, Appellants timely served and filed their notice of appeal.

The trial court granted summary judgment for the City based on the decision in *Sloan Const. Co. v. SouthCo Grassing, Inc.*, 368 S.C. 523, 692 S.E.2d 372 (Ct. App. 2006). This Court previously entered an Order staying the instant appeal until such time as the Supreme Court ruled in *Sloan*. The South Carolina Supreme Court has now ruled in this case and reversed. *See Sloan Const. Co. v. SouthCo Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008).

STATEMENT OF FACTS

The facts upon which the Appellants and the City relied in support of their cross-motions for summary judgment were uncontroverted. On or about February 26, 2002, the City issued a Request for Proposals ("RFP") for the design and construction of a spec

building (the “Project”). R. p. 39, ¶ 6; R. p. 49, ¶ 6. The City chose the proposal of Gilbert. R. p. 49, ¶ 7. On June 4, 2002 the City and Gilbert entered into a general contract (the “Contract”) for the Project. R. p. 41, ¶ 25; R. p. 51, ¶ 23. The Contract totaled approximately \$875,000.00. Gilbert, in turn, entered into various subcontract agreements, including subcontract agreements with the Appellants. R. p. 41, ¶ 26.

The City took no steps to assure that Gilbert obtained and furnished a payment bond in connection with the Project. At the hearing related to the cross-motions for summary judgment (“hearing”), the City acknowledged that it owed a duty to the Appellants, pursuant to S.C. Code Ann. §29-6-250, to “take reasonable steps to assure” that a payment bond had been issued. R. pp. 140-141, 185. The City also acknowledged that it breached this statutory duty. R. p. 185. The City, however, contended that it was exempted from liability to the Appellants under the “private counterpart” exception to the TCA. R. pp. 128-129, 140-143.

After the hearing, this Court issued its opinion in *Sloan Const. v. SouthCo*. Based upon this opinion, the trial court held that the Appellants had no private right of action against the City under either a tort or a contract cause of action. R. pp. 15-18. The Court also held as a matter of law that the Appellants’ quantum meruit cause of action had no validity. R. pp. 18-21.

SUMMARY OF ARGUMENT

The City concedes that it owed a duty to the Appellants under the SPPA to assure that a payment bond had been obtained. The City also concedes that it breached that duty. The trial court granted summary judgment to the City on based on the holding of *Sloan Constr. Co. v. SouthCo Grassing, Inc.*, 368 S.C. 523, 692 S.E.2d 372 (Ct. App. 2006), which held that the SPPA does not create a private right of action against a governmental body.

The South Carolina Supreme Court reversed this decision. *Sloan Constr. Co. v. SouthCo Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (S.C. 2008). In reversing the Supreme Court has 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.” *Sloan*, 377 S.C. at 118, 659 S.E.2d at 164. This right of action, the Court has clarified, is not affected by the TCA. *See Sloan*, 377 S.C. at 118, 659 S.E.2d at 164 (TCA is “not relevant to the government's liability for failure to comply with a duty under the SPPA.”). The Supreme Court also held that “a government agency's failure to secure and maintain statutory bonding as required by the SPPA gives rise to a third-party beneficiary breach of contract action by a subcontractor.” 377 S.C. at 120, 659 S.E.2d at 165.

The Supreme Court’s decision requires reversal of the trial court’s order in this case. Specifically, the Court should reverse and remand this case for (1) the entry of partial summary judgment as to the City’s liability, and (2) to determine whether the Appellants are entitled to recover damages, attorneys fees, costs, and prejudgment interest.

SCOPE OF REVIEW

The jurisdiction of appellate courts extends to the correction of errors of law.

Erickson v. Jones St. Publr., 368 S.C. 444, 629 S.E.2d 653 (S.C. 2006).

ARGUMENT

I. The Trial Court Erred in granting Summary Judgment in favor of the City of Union as to Appellants' tort cause of action

The trial Court found that *Sloan Constr. Co. v. SouthCo Grassing, Inc.*, 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006) was dispositive of Appellants' tort claims and, based on that decision, granted summary judgment to the City. R. p. 14. Specifically, the trial Court ruled that "[b]ased on the Court of Appeal's reasoning in *Sloan Construction*, the [Appellants] have no private right of action against the City for breach of any duties created by Section 29-6-250. Likewise, the City is entitled to sovereign immunity. Consequently, the [Appellants'] claims must be dismissed." R. p. 15. The Supreme Court has now reversed this Court's decision in *Sloan Const.* As such, the trial court's ruling must be reversed to comply with *Sloan v. SouthCo Grassing*, 377 S.C. 108, 659 S.E.2d 158 (S.C. 2008).

In *Sloan, supra*, Sloan brought an action for negligence against the South Carolina Department of Transportation ("SCDOT") pursuant to the TCA, alleging that the SCDOT was negligent in failing to ensure that SouthCo was properly bonded in accordance with the bond requirements in S.C. Code Ann. § 29-6-250 and S.C. Code Ann. § 57-5-1660 (2006). Sloan also brought a breach of contract claim alleging that the SCDOT was obligated to Sloan as a third-party beneficiary to the contract between the SCDOT and SouthCo to ensure that SouthCo was properly bonded pursuant to these statutes. In its

answer, the SCDOT moved to dismiss Sloan's complaint under Rule 12(b)(6), SCRCP, arguing that the bond statutes did not create a duty giving rise to liability for negligence on the part of the SCDOT, and that the SCDOT owed no contractual duty to Sloan due to lack of privity. The trial court granted the SCDOT's motion to dismiss, finding that the TCA prohibited Sloan from bringing a negligence claim against a government entity for failing to enforce a statute, and noting that under the analogous federal government bonding scheme contained in the Miller Act, 40 U.S.C. §§ 3131-3134 (2005), similar claims were not permitted on the grounds that the Federal Tort Claims Act, like the TCA, prohibited claims for violation of a federal statute in the absence of a similar state law cause of action recognizing private liability. Additionally, the trial court in *Sloan* found that lack of privity prohibited Sloan's contract claim. 377 S.C. at 118, 659 S.E.2d at 164.

Sloan appealed and the Court of Appeals affirmed the trial court's decision, holding that Sloan's claims were prohibited under the TCA and that no other right of action otherwise existed under the bond statutes. The Court of Appeals never specifically addressed Sloan's contract claim. *Sloan Constr. Co., Inc. v. SouthCo Grassing, Inc.*, 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006).

The Supreme Court granted Sloan's petition for writ of certiorari. Sloan argued that the Court of Appeals erred in failing to find that the statutory bond requirements codified at, *inter alia*, S.C. Code Ann. § 29-6-250, give rise to a cause of action by a subcontractor against the government for failure to ensure that general contractors on government construction projects are properly bonded. The Supreme Court agreed, based on an analysis that squarely applies to the instant appeal and mandates reversal of the trial court's September 26, 2007 Order.

The statutory framework of Sloan's appeal and the instant appeal is as follows. In 2000, the South Carolina legislature enacted the SPPA, S.C. Code Ann. §§ 29-6-210 *et seq.* The SPPA is applicable to subcontractors and suppliers on government projects and outlines a bonding scheme that significantly expands the protections already afforded these parties under the Little Miller Acts. Section 29-6-250 of 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 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 political subdivisions.... (emphasis added)

Although the SPPA does not expressly provide for a right of action between the subcontractor and the contracting government body, the Supreme Court in *Sloan* first found that the title of the SPPA clearly indicated that the General Assembly intended to provide stronger payment protection specifically for subcontractors and suppliers on government projects. *Sloan*, 377 S.C. at 115, 659 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). The Supreme Court also found the placement of the SPPA within the South Carolina Code significant. *Sloan*, 377 S.C. at 115, 659 S.E.2d at 162. Instead of appearing in the Procurement Code, the SPPA appears in the context of payment security by virtue of its location in Chapter 6 of Title 26, entitled "Payments to Contractors, Subcontractors, and Suppliers." South Carolina appellate courts have long held that such remedial statutes should be liberally construed

in order to effectuate their purpose. *Sloan*, 377 S.C. at 115, 659 S.E.2d at 162 (citing *S.C. Dept. of Mental Health v. Hanna*, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978)).

The Court of Appeals in *Sloan* relied heavily on federal court interpretations of the Miller Act in holding that statutory bonding requirements under the SPPA do not establish a duty for which the government may be liable to a subcontractor. *Sloan*, 368 S.C. at 527, 629 S.E.2d at 162. The Supreme Court found, however, that the Court of Appeals improperly analyzed the SPPA bond statute under a Miller Act rubric in arriving at its conclusion. *Sloan*, 377 S.C. at 114, 659 S.E.2d at 162. Such “Miller Act rubric” is the exact analysis that the trial court appears to have engaged in herein. R. pp. 185-205; 15. The Supreme Court noted that the SPPA has neither ever been characterized as a Little Miller Act, nor does it otherwise appear to be patterned after the Miller Act, which seeks to protect both the owner/government entity and the subcontractor through its bonding requirements. Instead, the Supreme Court turned to jurisprudence which holds that when a statute defining a government duty does not specifically create a private cause of action for breach of that duty, a cause of action may be implied if the legislation was enacted for the special benefit of a private party rather than the public at large. *Sloan*, 377 S.C. at 115, 659 S.E.2d at 162 (citing *Adkins v. S.C. Dept. of Corr.*, 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004)). Accordingly, the Supreme Court found that the relevant determination is whether an implied right of action exists under the SPPA, and determined that it does. *Sloan*, 377 S.C. at 116, 659 S.E.2d at 163.

The SCDOT suggested that a suit on the bond in the event of nonpayment, a remedy expressly permitted under the statute, adequately serves any legislative purpose to protect subcontractors. Similarly, the City argued below that S.C. Code Ann. § 29-6-

250 provides a non-monetary remedy to subcontractors in the form of injunctive relief. R. p. 137. The Supreme Court has rejected this argument, noting that a right to sue on the bond provides absolutely no protection for the subcontractor where the government agency has altogether failed to secure or maintain proper bonding. The Supreme Court additionally noted that a suit on the bond gives the government entity no incentive to comply with the statute's bonding requirement when the governmental entity has no financial stake in the event of a contractor's nonpayment and no legal stake in its own noncompliance. *Sloan*, 377 S.C. at 116-117, 659 S.E.2d at 163. The Supreme Court reasoned that the legislative purpose of the SPPA is only served by permitting subcontractors and suppliers on government projects, which are the only parties with a financial interest in enforcing the bond requirements of the SPPA, to bring a claim under the statute. The Court stated:

In placing an affirmative duty on the government that is absent from the Little Miller Acts, we find 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.

377 S.C. at 115-16, 659 S.E.2d at 162-63. The Supreme Court thus found that the SPPA “in essence, pick[s] up where the Little Miller Acts left off by outlining a more extensive payment protection scheme dedicated specifically to subcontractors and suppliers.” 377 S.C. at 117-18, 659 S.E.2d at 163-64. Accordingly, the Court 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.” 377 S.C. at 118, 659 S.E.2d at 164. This right of action, the Court clarified, was not affected by the South Carolina Tort Claims Act, which the Court stated was “not relevant to the government's liability for

failure to comply with a duty under the SPPA.” 377 S.C. at 118, 659 S.E.2d at 164. This Court must reverse the trial court’s Order as to Appellants’ tort claims based on *Sloan*.

II. The Trial Court erred in granting Summary Judgment in favor of Respondent City of Union as to Appellants’ cause of action for third party beneficiary of contract between Respondent City of Union and Gilbert Group, Inc.

The trial court dismissed Appellants’ claims for relief based on their status as third-party beneficiaries of the contract between Respondent City of Union and Gilbert Group. R. p. 18. The trial court explicitly disagreed with the reasoning of *A.E.I. Music Network v. Business Computers, Inc.*, 290 F.3d 952 (7th Cir. 2002). R. pp. 16-17. The Supreme Court, however, cited this case with approval in *Sloan Constr. Co. v. SouthCo Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (S.C. 2008). As such, the trial court’s granting of summary judgment in favor of the City as to the Appellants’ breach of contract claim should also be reversed.

In *Sloan*, Sloan contended that failure to comply with statutory bonding requirements gave rise to a third party beneficiary breach of contract claim by the subcontractor against the government. The Supreme Court agreed, finding Judge Posner’s reasoning in *A.E.I. Music* instructive.

A.E.I. Music involved the Illinois Bond Act. Like South Carolina, Illinois requires a public entity to require its contractors to post payment bonds to protect the subcontractors. *Id.* at 953. In *A.E.I. Music*, the Chicago Board of Education hired Business Computers, Inc. (“BCI”) to install an audio-visual system in a high school. The Board did not comply with the Illinois Bond Act because it did not require BCI to post a bond and no bond was posted. BCI subcontracted a part of the job to A.E.I. A.E.I. did the work but BCI could not pay A.E.I.

A.E.I. sued the Board of Education arguing (1) that Illinois' statutory requirement of a bond was an implied-by-law term of the contract between the Board and BCI, and (2) that A.E.I. could enforce this implied-by-law term of the contract as a third-party beneficiary.

Although the Illinois statute did not provide an explicit remedy, Judge Posner stated that "[t]he natural remedy in such a case is a suit for breach of contract by the subcontractor against the public entity." *Id.* at 954. Judge Posner explained that:

[t]he requirement of posting a bond found in ... the Bond Act is read into every construction contract of a public entity, precisely to give the subcontractor a remedy; and thus it became a term of the contract between the Chicago Board of Education and BCI. Because the term is intended for the benefit of the prime contractor's subcontractors, the doctrine of third-party beneficiaries entitled A.E.I. to sue to enforce it in a suit for breach of contract.

Id. at 955. He also explained that the subcontractor was necessarily an intended third party beneficiary because the statute mandated the subcontractor to be an intended beneficiary.

A.E.I. is on point and its reasoning was adopted by our Supreme Court in *Sloan*. See 377 S.C. at 118-120, 659 S.E.2d at 164-166. In both cases, the government did not require the general contractor to post the bond required by the statute, the general contractor became unable to pay, and the subcontractor was unpaid for its work. As Judge Posner observed, the statute requiring a payment bond was enacted for the subcontractor's benefit. If the subcontractor cannot sue for violating the statute, then §29-6-250 has no enforcement mechanism and is essentially meaningless, as the Supreme Court in *Sloan* recognized. Because the statute was enacted for the subcontractor's benefit, the payment bond requirement is necessarily included in the government's

contract with the contractor, and the subcontractor is necessarily a third-party beneficiary of that provision. The incorporation of statutory language into a contract is nothing new in South Carolina. In *Unisys Corp. v. S.C. Budget and Control Bd.*, 346 S.C. 158, 551 S.E.2d 263 (2001), the Court of Appeals held that state government contracts incorporated into their contracts by reference the provisions of the State Consolidated Procurement Code, which governs virtually all contracts of governmental bodies. All state government contracts are governed by the State Procurement Code unless an exemption applies. See S.C. Code Ann. §11-35-40(2). Under the *Unisys* case, the provisions of the Procurement Code apply to all contracts covered by it. Similarly, all contracts for the improvement of publicly owned property that exceed \$50,000.00 are subject to S.C. Code Ann. § 29-6-250. Under the *Unisys* court analysis, it follows that the provisions of this section are incorporated by reference into all contracts that are governed by it. See *Sloan*, 377 S.C. at 120, 659 S.E.2d at 165 (discussing *Unisys* case).

The cardinal rule of statutory interpretation is to both ascertain and effectuate the intention of the Legislature. *Miller v. Aiken*, 364 S.C. 303, 613 S.E.2d 364 (2005). See also *State v. Cobb*, 355 S.C. 98, 102, 584 S.E.2d 371, 373 (2003) (the Court's "sole function is to determine and, within constitutional limits, give effect to the intention of the Legislature, with reference to the meaning of the language used and the subject matter and purpose of the statute."). The intent and purpose of § 29-6-250 is as clear as the title of the legislation in which it is located: to protect subcontractors from non-payment.

Through its adoption of the reasoning of *A.E.I.*, *supra*, the Supreme Court in *Sloan* found that under established contract law in South Carolina, subcontractors have enforceable rights as third-party beneficiaries to construction contracts incorporating the

SPPA. *Sloan*, 377 S.C. at 120, 659 S.E.2d at 165 (citing *Bob Hammond Constr. Co., Inc. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994)) (noting that where a contract between two parties is intended to create a direct benefit to a third party, the third party may enforce the contract). Because the legislature intended to protect contractors by creating bonding requirements, and because only subcontractors have a financial stake in enforcing the bond requirements, subcontractors are direct third-party beneficiaries to contracts between a government entity and a general contractor to which the SPPA applies. For this reason, the government may be liable to a subcontractor for breach of contract for failing to comply with the SPPA bonding requirements.

The Supreme Court held that a government agency's failure to secure and maintain statutory bonding as required by the SPPA gives rise to a third-party beneficiary breach of contract action by a subcontractor. This holding is in direct contravention of the trial court's analysis herein. R. pp. 17-18; 176-177, 180. Accordingly, the trial court's order dismissing the Appellants' breach of contract claim must be reversed.

III. The Trial Court erred in granting Summary Judgment in favor of Respondent City of Union as to Appellants' cause of action for quantum meruit.

The trial Court dismissed Appellants' claims for quantum meruit based on the doctrine of sovereign immunity. R. p. 19.

Appellants' unjust enrichment claim or implied by law contract claim lies in equity. *Myrtle Beach Hospital, Inc., d/b/a Grand Strand Regional Medical Center v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000). To recover for unjust enrichment, Appellants must show "(1) benefit conferred upon defendant by plaintiff; (2) realization of that benefit by defendant; and (3) retention by defendant of benefit under conditions

that make it unjust for him to retain it without paying its value....” *Id.*, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000).

Appellants have conferred a nongratuitous benefit on the City in the form of a 50,000 sq. foot building. R. p. 41, ¶ 25; R. p. 42, ¶ 27, R. p. 45, ¶¶ 46-50; R. p. 298. The City clearly realized a benefit. It would be inequitable for Appellants to have provided over two hundred thousand dollars in construction services, and for the City to enjoy the benefit of those services, without Appellants being paid for their work. The City’s position that the TCA vitiates such quantum meruit claim, agreed with by the trial court, has been rejected by the Supreme Court in *Sloan*, 377 S.C. 108.

A restitution/unjust enrichment claim is proper if the law implies a promise to pay based on the facts of the case. *Ellis v. Smith Grading and Paving, Inc.*, 294 S.C. 470, 474, 366 S.E.2d 12, 15 (Ct. App. 1988). As explained above, S.C. Code Ann. §29-6-250, as interpreted by the Supreme Court in *Sloan*, creates the implied promise because the Legislature determined that the City must guarantee Gilbert’s payments by requiring a payment bond. Because the City neglected to require a bond the City itself must now pay for Appellants’ work. *Woodfield Lanes, Inc. v. Village of Schaumburg*, 168 Ill. App. 3d 763, 767, 523 N.E.2d 36, 38-39 (1988). The trial court should likewise be reversed as to Appellants’ claim for quantum meruit.

IV. The Trial Court erred in Granting Summary Judgment in Favor of Respondent City of Union as to Appellants’ cause of action for violation of S.C. Code Ann. § 27-1-15.

Appellants also asserted claims pursuant to S.C. Code Ann. § 27-1-15 against the City. R. pp. 43-44, ¶¶ 36-40. On April 8, 2003, Appellants sent a certified letter to the Respondent City making demand for payment of the principal amount owed Appellant

Tindall of \$165,500.00 and of the principal amount owed Appellant Shirley's in the amount of \$132,782.00. R. p. 43, ¶ 37. The City made no payments. R. p. 44, ¶ 39. The trial court's order granting summary judgment had the practical effect of foreclosing the Appellants' 27-1-15 claims, and represents reversible error, based on the reasoning of the Supreme Court in *Sloan*. The Court in *Sloan* clarified that its holding did not preclude the additional recovery of attorneys' fees under any applicable statute. *Sloan*, 377 S.C. 108, 120. Therefore, a remand for the factual determination of the Appellants' right to attorneys fees, costs and prejudgment interest under S.C. Code Ann. § 27-1-15 is appropriate.

CONCLUSION

Simply put, *Sloan* is squarely on point and mandates reversal. Based on the foregoing, this Court should reverse the trial court's grant of summary judgment to the City on all causes of action and remand for purposes of determining damages as well as the Appellants' right to attorney fees, costs and prejudgment interest pursuant to S.C. Code Ann. § 27-1-15.

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December 17, 2008
Greenville, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 03-CP-44-0171

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

v.

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

BRIEF OF RESPONDENT CITY OF UNION

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ADDITIONAL SUSTAINING GROUNDS

- I. The law of the case holds that the Appellants' claim alleging that the City of Union violated Section 29-6-250 is a tort claim controlled by the Tort Claims Act, and as such, by the Supreme Court's own ruling, that claim is barred by operation of Section 15-78-60(4).
- II. The Appellants did not plead a third-party beneficiary breach of contract claim.
- III. The Appellants' third-party beneficiary breach of contract claim, if such a claim was even pled, is barred by the law of this case.
- IV. The Respondent City of Union is entitled to judgment as a matter of law because it complied with the Subcontractors' and Suppliers Payment Protection Act by distributing 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 City attempted to pay a share of the \$111,270.00 to the Appellants as well as other unpaid subcontractors, but the Appellants rejected the partial payment and insisted on full payment from the City to which they were not entitled under the Act.

STATEMENT OF THE CASE

The Appellants 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 Respondent City of Union. The Appellants 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 Appellants 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 Appellants have 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 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 Appellants' 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).

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

The Appellants then filed an appeal to this Court from the order of Judge Few granting the City's motion for summary judgment. Importantly, the Appellants did not appeal from any other pre-trial orders including the orders of Judge Paul E. Short, Jr., filed April 19, 2004.

ARGUMENTS

- I. The law of the case establishes that the Appellants' claims for the violation of the statutory duty created by Section 29-6-250 are tort claims governed by the Tort Claims Act, and as a result, those claims are barred by Section 15-78-60(4).

The Appellants have appealed from the lower court's grant of summary judgment in favor of the City of Union. Judge John Few found in part that this Court's opinion in *Sloan Construction Co. v. Southco Grassing, Inc.*, 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006), was dispositive and entitled the City to summary judgment. Specifically, Judge Few ruled that the Appellants have no private right of action against the City for breach of any duties created by Section 29-6-250 and that the City was entitled to sovereign immunity.

The Appellants are correct that this Court's decision in *Sloan Construction* was reversed by the Supreme Court. In *Sloan Construction Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008), the Supreme 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. The 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. Therefore, given the Supreme Court's decision in *Sloan Construction*, the City reluctantly concedes that the lower court's ruling that the Appellants have

no private right of action against the City for breach of any duties created by the SPPA was in error.

However, on the issue of sovereign immunity, the present case is distinguishable from *Sloan Construction*, and summary judgment should be affirmed on the basis of sovereign immunity under Section 15-78-60(4) of the Tort Claims Act.¹ In footnote number five, the Supreme Court agreed with this Court that a claim for failure to enforce the bonding requirements of the SPPA, if it were a tort claim, would be barred by 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." *Sloan Construction*, 659 S.E.2d at 164, n.5, *citing* S.C. Code Ann. § 15-78-60(4). To avoid the bar of sovereign immunity under the Tort Claims Act, the Supreme Court ruled that a violation of the SPPA is *not* a tort and therefore falls outside the Tort Claims Act entirely.²

¹ 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).

² The only interpretation of footnote five is that the Supreme Court ruled that a violation of the SPPA is not a tort. Otherwise, the Tort Claims Act must govern any cause of action against a governmental entity for the violation of the SPPA. Importantly, Section 15-78-200 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.

However, the law of this case clearly holds that the Appellants' cause of action for the City's violation of the SPPA sounds in tort. In an order filed April 19, 2004, 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 ruled that the Appellants' cause of action is a tort claim governed by the Tort Claims Act. (R. 2-3, 6). Importantly, the Appellants have not appealed from Judge Short's orders, and as a result his ruling that the Appellants' cause of action is a tort claim governed by the Tort Claims Act -- right or wrong -- is 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), the Supreme 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. The Supreme 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).³

This Court must, therefore, conclude that the Appellants' claim for a violation of Section 29-6-250, as determined by Judge Short, is a tort claim. As a tort claim against the City, it is governed by the Tort Claims Act. As the Supreme Court agreed in *Sloan Construction*, if a tort claim, the claim is barred by sovereign immunity, specifically the bar imposed by Section 15-78-60(4). *See, Sloan Construction*, 659 S.E.2d at 164, n.5. In short, the City submits that the Appellants' claim that the City breached Section 29-6-250 should be affirmed because it is a tort claim barred by sovereign immunity under the Tort Claims Act.

II. The Appellants cannot pursue a remedy in contract because they failed to plead a third-party beneficiary breach of contract claim and because the law of the case establishes that their remedy lies in tort.

The Appellants also contend on appeal that Judge Few erred in granting summary judgment on their third-party beneficiary breach of contract claim. The

³ The Appellants have also not appealed 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.

Appellants argue on appeal that the Supreme Court's decision in *Sloan Construction Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008), warrants a reversal of summary judgment on this claim as well. The City disagrees for two reasons.

First, the City submits that the Appellants did not plead a third-party beneficiary breach of contract claim against the City. Judge Few did not decide that issue. Instead, he simply decided the purported third-party beneficiary breach of contract claim "to the extent that the Amended Complaint may be construed as alleging a third party beneficiary breach of contract claim." (R. 16). On appeal, it is now incumbent on this Court to address whether the Amended Complaint can be or should be construed as alleging a third-party beneficiary breach of contract claim. The City submits that it does not. (R. 42-45).

Second and more importantly, Judge Few ruled that "the law of this case as established by Judge Paul Short's previous order filed April 19, 2004, establishes that the breach of a statutory duty of care constitutes a tort. Consequently, the Plaintiffs' remedy does not lie in contract." (R. 16). As discussed at length above, the Appellants have not appealed Judge Short's orders. Therefore, his ruling that the breach of the duty created by the SPPA constitutes a tort -- whether right or wrong -- is the law of this case. Consequently, the Appellants are precluded by the law of this case from pursuing a remedy in contract.

On these bases, the City submits that summary judgment on the purported third-party beneficiary breach of contract claim should be affirmed.

III. The dismissal of the Appellants' statutory and contract claims should be affirmed because the City complied with the requirements of the Subcontractors' and Suppliers' Payment Protection Act by attempting to pay the remaining contract balance to the Appellants and other unpaid subcontractors, an offer that the Appellants refused.

As an additional sustaining ground, the City submits that the dismissal of the Appellants' claims should be affirmed because the City complied with the SPPA by distributing the \$111,270.00 that remained to be paid to the general contractor when the City learned that subcontractors were not paid in full. As discussed below, the City attempted to pay a share of the \$111,270.00 to the Appellants as well as other unpaid subcontractors, but the Appellants rejected the partial payment and insisted on full payment from the City to which they were not entitled under the Act.

In *Sloan Construction Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008), the Supreme Court allowed a violation of the SPPA to be litigated as either a private right of action under the SPPA or as a third-party beneficiary breach of contract claim. However, the Supreme Court also greatly limited the extent of the government's liability for a violation of the SPPA. The

Court explained "that the government's liability for failure to ensure compliance with statutory bond requirements is not open-ended." 659 S.E.2d at 165.

Specifically, the Supreme 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, the Supreme 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, even if the Appellants are permitted to pursue a cause of action against the City for a violation of the SPPA, the City's liability is limited to the unpaid balance owed to the general contractor. Although City officials did not have the benefit of the *Sloan Construction* 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 Appellants. (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 Appellants -- accepted a share of the \$111,270.00 in exchange for releasing the City from further liability. The Appellants refused any portion of the \$111,270.00. After the Appellants 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).

In sum, it is undisputed 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 Construction* 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 Appellants, who rejected the offer and insisted on full payment from the City. However, the City is not liable to the Appellants under *Sloan Construction* for the full amounts owed by the Gilbert Group to the Appellants. By rejecting the share of the \$111,270.00 offered to them, the

Appellants 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 Appellant a share of the \$111,270.00 and cannot be held liable given that the Appellants rejected those amounts. Based upon the holding in *Sloan Construction* and the City's attempt to satisfy its liability under the SPPA, judgment in the City's favor on both the statutory and contract claims should be affirmed.

IV. The lower court ruled correctly in dismissing the Appellants' quantum meruit cause of action.

The Appellants also asserted a cause of action for quantum meruit. Judge Few granted the City's motion for summary judgment on that claim based on two distinct and independent grounds. First, Judge 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. Second, Judge Few ruled that the quantum meruit claim is barred by sovereign immunity. (R. 18-21).

While the Appellants appealed the first basis for summary judgment, they did not include in their brief any discussion or appeal of the sovereign immunity ruling. In fact, the words "sovereign immunity" do not appear in the quantum meruit section of the Appellants' Brief. In *Folkens v. Hunt*, 290 S.C. 194, 348

S.E.2d 839 (Ct. App. 1986), this Court held that "[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845. Such a ruling becomes the law of the case. *Id.* See also, *Eagles v. South Carolina National Bank*, 301 S.C. 402, 392 S.E.2d 187 (Ct. App. 1990); *Jones v. Lott*, 379 S.C. 285, 665 S.E.2d 642 (Ct. App. 2008). Because the Appellants have not challenged Judge Few's sovereign immunity ruling, the dismissal of the quantum meruit claim may be affirmed on that basis alone.

Nonetheless, if this Court disagrees and finds that the Appellants have appealed the sovereign immunity ruling, the City submits that both rulings by the lower court on the quantum meruit claim were correct and should be affirmed on the merits.

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), the Supreme 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), the Supreme Court clarified the standard applicable to quantum meruit claims. The 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 Appellants do not even discuss, the Appellants cannot prevail on their claim for quantum meruit.

In addition, as determined by Judge Few and ignored by the Appellants, the quantum meruit 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, on each of these procedural and substantive bases, summary judgment on the Appellants' quantum meruit claim should be affirmed.

V. The Appellants' claim for attorney's fees and interest pursuant to Section 27-1-15 is not preserved for appellate review and should likewise be denied on the merits.

The Appellants have alleged a claim for attorney's fees and interest pursuant to Section 27-1-15, which provides as follows:

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.

S.C. Code Ann. § 27-1-15. (Emphasis added).

The Appellants are not entitled to prevail on their Section 27-1-15 claim for several reasons. First, Judge Few never ruled on this claim, and the Appellants did not file a Rule 59(e) motion to request that the claim be adjudicated. As a result, this issue is not preserved for appellate review.

In *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the Supreme Court explained that "[i]ssues and arguments are

preserved for appellate review only when they are raised to and ruled on by the lower court." 602 S.E.2d at 779-780. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004), *citing I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." *Id.* "It is well settled that an appellate court cannot address an issue unless it was raised to, *and ruled upon by*, the trial court." *Id.* (Emphasis in original).

In *Elam, supra*, the Supreme Court also addressed at length when the need for a Rule 59(e) motion is required under South Carolina appellate procedure. In clear, concise, and *mandatory* terms, the Court explained that "[a] party *must* file a [Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam*, 602 S.E.2d at 780. (Emphasis in original).

Here, there is no question that the Appellants' entitlement to attorney's fees and interest pursuant to Section 27-1-15 was not addressed by Judge Few. It is equally clear that the Appellants did not file a Rule 59(e) motion requesting that

this issue be addressed. As a result, the Appellants' claim for attorney's fees and interest pursuant to Section 27-1-15 is not preserved for appellate review.

At any rate, should the Court reach the merits of the issue, the City maintains that when it learned that the Appellants and other subcontractors had not been paid by Gilbert Group, the City agreed to use the contract balance still owed to Gilbert Group to pay in part the debts owed by Gilbert Group to the Appellants and others. (R. 25-255). The Appellants were the only subcontractors who rejected this arrangement. Consequently, the evidence demonstrates that the City did make a fair and reasonable investigation of the Appellants' claims and the claims of other non-parties and attempted to pay a portion of those claims using the remaining contract balance of \$111,270.00. Importantly, although the City did not have the benefit of the Supreme Court's decision in *Sloan Construction* in 2003, the City's actions were consistent with what the Court required -- the City agreed to pay the remaining contract balance to the unpaid subcontractors, including the Appellants. Consequently, the City acted reasonably and satisfied its duties under Section 27-1-15.

As an additional defense, the City maintains that there is no clear and explicit waiver of sovereign immunity in Section 27-1-15 or its legislative history. As a result, the City is entitled to absolute sovereign immunity for the Appellants' Section 27-1-15 claim for attorney's fees and interest. Prior to the decision of the

South Carolina Supreme Court in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), governmental entities and their employees were protected by sovereign immunity. In *McCall*, the Supreme Court abolished sovereign immunity. However, in the following year, the General Assembly enacted the South Carolina Tort Claims Act "which reinstated sovereign immunity for the State and its political subdivisions with certain exceptions." *Jinks v. Richland County*, 349 S.C. 298, 563 S.E.2d 104, 108 (2002), *reversed on other grounds*, 538 U.S. 456 (2003). "The Tort Claims Act provides a limited waiver of governmental immunity and delineates the conditions upon which a claimant may pursue actions against the State and its political subdivisions." *Id.* The Tort Claims Act "removes the common law bar of sovereign immunity in certain circumstances, but only to the extent mandated by the Act." *Bayle v. South Carolina Department of Transportation*, 344 S.C. 115, 542 S.E.2d 736, 739 (Ct. App. 2001). In enacting Section 27-1-15, the General Assembly did not make it clear that the statute would be applicable to governmental entities. Certainly, the General Assembly did not clearly and explicitly provide for a waiver of sovereign immunity.⁴ There is no expression, let alone an unequivocal one, in Section 27-1-15 that the General

⁴ In *Reed v. Medlin*, 276 S.C. 604, 281 S.E.2d 125 (1981), the South Carolina Supreme Court explained that the waiver of sovereign immunity by the General Assembly must be "clear and explicit." 281 S.E.2d at 126. This is in accord with United States Supreme Court case law. In *Lane v. Pena*, 518 U.S. 187 (1996), the Court held that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." 518 U.S. at 192. See also, *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

Assembly intended to waive sovereign immunity and make that statute applicable to the State and its political subdivisions. Thus, the City enjoys sovereign immunity with respect to the Appellants' Section 27-1-15 cause of action.

Furthermore, to the extent Section 27-1-15 does apply to the State and its political subdivisions and it conflicts with the provisions of the Tort Claims Act, the Tort Claims Act governs. As Judge Short's unappealed ruling provides, the Tort Claims Act does not allow for a recovery of attorney's fees or pre-judgment interest. (R. 3). Thus, the Appellants cannot recover attorney's fees or pre-judgment interest under Section 27-1-15 based upon the law of the case.

VI. The Appellants are precluded from appealing the denial of their motions for summary judgment.

It is unclear from the Appellants' arguments whether they are appealing the denial of their motions for summary judgment. However, they are asking this Court to "remand for purposes of determining damages." That suggests that the Appellants are requesting that the denial of their motions for summary judgment be reversed and for this Court to find that they are entitled to judgment as a matter of law leaving only the issue of damages to be determined on remand.

In the event the Appellants are requesting a reversal of the denial of their motions for summary judgment, the City submits that an order denying summary

judgment is never appealable. In *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003), the South Carolina Supreme Court held that the denial of a motion for summary judgment is never immediately appealable nor even appealable after final judgment. 580 S.E.2d at 443. See also, *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994). Therefore, to the extent that the Appellants are appealing the denial of their motions for summary judgment, that appeal should be dismissed.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent City of Union respectfully requests that this Court affirm the lower court's dismissal of the Appellants' claims against the City of Union. In the alternative, the City requests that the Court deny the Appellants' appeal from the denial of their motions for summary judgment and remand for further proceedings.

Respectfully submitted,

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The undersigned counsel for the Respondent City of Union certifies that the Final Brief of Respondent City of Union complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

John C. Few, Circuit Court Judge

Case No.: 2003-CP-44-171(B)

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

v.

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

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SUMMARY OF ARGUMENT IN REPLY

To avoid the clear and unequivocal application of *Sloan Construction Co. v. SouthCo Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (S.C. 2008), to the facts of this case, Respondent City of Union (hereinafter "Respondent") strains to make the argument that Appellants are foreclosed of availing themselves of *Sloan* by the inapplicable doctrine of the "law of the case." Such doctrine operates, to paraphrase Respondent, in such a way herein so as to bind the Court of Appeals by a procedurally distinguishable prior lower court's order that misinterprets the nature of a S. C. Code Ann. § 29-6-250 claim. Like all the prior lower court orders in this case, such order is, in light of *Sloan*, erroneous. Respondent makes a series of impermissible factual arguments unsupported by the Record and outside the scope of materials submitted to the trial Court. Indeed, the Respondent's arguments regarding quantum meruit and S.C. Code § 27-1-15, in the guise of the doctrine of "additional sustaining grounds," lack a single cite to any portion of the Record. Such arguments, disputed by Appellants, represent the very reason Appellants are asking for a reversal and remand: so that such disputed factual issues may be determined in light of the analysis mandated by the newly enunciated appellate precedent of *Sloan, supra*.

ARGUMENT IN REPLY

I. The Respondent City of Union May Not Rely on the “Law of the Case” Doctrine

The Respondent repeatedly argues that the “law of the case” doctrine somehow precludes the Appellants from taking advantage of the acknowledged legal error at issue in this matter, the trial Court’s ruling that the Appellants have no private right of action against the Respondent for breach of any duties created by the Subcontractors’ and Suppliers’ Payment Protection Act (“SPPA”). Specifically, Respondent takes the position that because the Appellants have not appealed an April 19, 2004 Order of Judge Short, his purported ruling that the Appellants’ cause of action is a tort claim governed by the Tort Claims Act (“TCA”) is the law of this case. Such is a doubly flawed analysis: such Order is procedurally distinguishable, and the case law cited by Respondent does not support its argument.

At the time Judge Short issued his April 19, 2004 Order, the case was in a completely different posture. Such Order was entered in the context of a motion to strike and was prior to the Appellants’ Motion to Amend their complaint so as to add a theory for third-party beneficiary of a contract, which occurred in August of 2005. The trial Court below was aware of this. R. pp. 130-131. Indeed, the trial Court remarked “I read [Judge Short’s] Order as a leaving open question [sic] of what is the nature of the [Appellants’] theory against the [Respondent]. [Judge Short’s] Order is intended to address a motion on the part of the City to strike the cause of action for the recovery of attorneys’ fees under a specific statute I don’t read it as expressly forbidding the assertion of a breach of contract theory in this case...”. R. p. 131. Respondent’s counsel

remarked, "I recognize that [Appellants' third-party beneficiary theory] was not a cause of action at the time Judge Short ruled on that..." R. p. 131.

As the trial Court ruled, Judge Short did not have before him at the time the question of whether Appellants could properly assert the breach of a contractual obligation. So "he couldn't have foreclosed it if it wasn't before him." R. p. 132. Judge Short's analysis, like the trial Court's in the Order under appeal, is incorrect in light of newly issued appellate caselaw. Such is the precise basis for the instant appeal. Further, Respondent's counsel's above-quoted statement can certainly be read as an implied acknowledgement that the Appellants' Amended Complaint added a third-party beneficiary claim. Respondent's position on this point is plainly wrong.

Further, the rule of the "law of the case" doctrine means that what was decided on a former appeal is, if evidence is the same in another trial, controlling on the trial court and appellate court on another appeal, unless on re-examination the appellate court is convinced that the first decision was wrong. *Charleston Lumber Company, Inc. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d 869 (S.C. 2000), fn. 3. By its literal terms, this doctrine does not apply for two distinct reasons. First, the doctrine only applies to matters decided "on former appeal." The instant matter is being appealed for the first time and there have, therefore, been no issues decided on former appeal. The "law of the case" doctrine flows downward from superior to inferior courts, and operates to bind a lower court by the prior ruling of an appellate court. Second, even if the doctrine applied, which it does not, the appellate court may "on re-examination" determine that the initial decision was wrong. Such is precisely the scenario that would obtain in the instant matter, assuming that the doctrine applied. In other words, Judge Short's Order, as well

as the subsequent orders of Judge John and Judge Few, were all issued prior to the analysis mandated by the Supreme Court in *Sloan Constr. Co. v. SouthCo Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (S.C. 2008).

Significantly, Appellants took the position before Judge Short that their claim against Respondent pursuant to S.C. Code Ann. § 29-6-250 was not a tort, but sounded in contract. R. p. 3. This position has now been vindicated by the analysis of the South Carolina Supreme Court in *Sloan*. The appellate courts are not bound by the decisions of lower courts pursuant to the “law of the case” doctrine. Thus, Respondent’s argument that the Appellants’ claim against Respondent pursuant to S.C. Code Ann. § 29-6-250 is a tort claim barred by sovereign immunity under the TCA based on the “law of the case” doctrine is unsupported by legal authority.

II. The Respondent is Impermissibly Making Factual Arguments, Which Are Disputed, to the Court of Appeals.

The Respondent makes a series of impermissibly factual arguments to the Court of Appeals, and such arguments bolster the Appellants’ position that a remand is appropriate for purposes of various factual determinations in keeping with the new precedent of *Sloan, supra*. Remand is an appropriate remedy on appeal when the record is incomplete or factual determinations must be made in keeping with the law as announced on appeal. See, e.g., *Ex Parte: Foster*, 350 S.C. 238, 565 S.E.2d 290 (S.C. 2002) (reversal and remand appropriate when an appeal contains insufficient factual findings to support its determinations); *In re: Treatment & Care of Luckabaugh*, 351 S.C. 122, 568 S.E.2d 338 (S.C. 2002) (when the trial court fails to find on a material issue and an appeal is taken, the appellate court will normally vacate the judgment and remand the action for appropriate findings to be made); *Rogers v. Salisbury Brick Corp.*, 299 S.C.

141, 382 S.E.2d 915 (S.C. 1989) (remand to resolve alleged discrepancies appropriate); *Micheau v. Micheau*, 285 S.C. 527, 331 S.E.2d 348 (S.C. 1985) (remand for factual findings to determine whether an attorneys' fees award is appropriate).

Respondent argues in its Brief at 10 that "The City's liability is limited to the unpaid balance owed to the general contractor." Respondent argues in its Brief at 11 that such analysis confines itself to "the point that the City learned that said contractors had not been paid." Such is an inherently factual determination which is not settled by an examination of the Record. Indeed, *Sloan* states that its holding is limited to (1) the remaining unpaid contract balance on the contract with the general contractor, (2) at the time the owner received notice from the subcontractor of the general contractor's nonpayment. Such is a dually factual determination based on *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 93 S.E.2d 855 (S.C. 1956) and its progeny. The point at which Respondent learned of Gilbert Group, LLC's nonpayment is not established in the Record. Such is the exact basis for Appellants' request that this Court reverse and remand for purposes of determining the remaining unpaid contract balance on the contract between the Respondent and Gilbert Group, LLC as of the time the Appellants notified Respondent of Gilbert Group, LLC's nonpayment.

Facts which are outside the record should not be considered by appellate courts. *See, e.g., Davis v. Davis*, 356 S.C. 132, 588 S.E.2d 102 (S.C. 2003); SCACR 210(h). Further, a party prevailing at trial may only raise additional sustaining grounds for an appellate court to affirm when the grounds appear in the record on appeal. *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). This doctrine by its terms applies to a third party "prevailing at trial." *Id.* There was no trial in the instant case, and

the Respondent is attempting to argue points, based loosely on the uncited deposition testimony of William Gilbert, which are disputed.

The Respondent did not make these arguments below. See generally, R. pp. 114-234. Counsel for Respondent casually mentioned that “at that point in time there was a hundred and eleven thousand dollars that had not yet been paid on the contract price to Gilbert Group” but such date has not been definitively established or proved. R. p. 119. All parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling. *Id.*, 338 S.C. 406, 421. An appellate court is less likely to rely on such a ground when a respondent has failed to present it to the lower court. In such cases, appellate courts consider it unwise to resolve a case on a ground never mentioned by a respondent prior to appeal. *Id.* Stated another way, a respondent may raise an additional sustaining ground not presented to the lower court, but the appellate court is likely to ignore it. *Id.*, 338 S.C. 406, 421. Appellants submit that the Respondent has waived such argument by failing to establish the factual predicate for same as of the motions hearing below.

III. The Respondent’s Position with Regard to Quantum Meruit Relies on Disputed Facts, which Must be Resolved by the Trial Court on Remand.

A claim for quantum meruit is proper if the law implies a promise to pay based on the facts of the case. *Ellis v. Smith Grading and Paving, Inc.*, 294 S.C. 470, 474, 366 S.E.2d 12, 15 (Ct. App. 1988). As explained above, S.C. Code Ann. § 29-6-250, as interpreted by the Supreme Court in *Sloan*, creates the implied promise because the Legislature determined that the Respondent must guarantee Gilbert Group, LLC’s payments by requiring a payment bond. Because the Respondent neglected to require a bond the Respondent itself must now pay for Appellants’ work. *Woodfield Lanes, Inc. v.*

Village of Schaumburg, 168 Ill. App. 3d 763, 767, 523 N.E.2d 36, 38-39 (1988). The trial Court should likewise be reversed as to Appellants' claim for quantum meruit.

In response to Appellants' position in regard to quantum meruit, the Respondent takes the position that "there is no evidence that the City retained any amount of the contract price or failed to pay the full contract price." Respondent's Brief, p. 13. Respondent goes on to take the position that "it is undisputed that the City has paid the full contract price and hence cannot be held liable for quantum meruit." Respondent's Brief, p. 13. Such is, simply put, untrue. It is very much disputed that the City has fully paid the value of the benefit by paying the entire contract price. This is another in a series of factual determinations that should properly be made by a trial court upon remand by this Court.

Additionally, Respondent makes the untenable assertion that Appellants did not include in their brief any discussion of the appeal of the trial Court's ruling as to sovereign immunity, even going so far as to state "the words 'sovereign immunity' do not appear in the quantum meruit section of the Appellants' Brief." Respondent's Brief, p. 12. In actuality, the doctrine of sovereign immunity is mentioned in the first sentence of Appellants' Brief addressing quantum meruit. Appellants' Brief, p. 13. Respondent's position that the TCA vitiates such quantum meruit claim based on the doctrine of sovereign immunity, agreed with by the trial Court, has been rejected by the Supreme Court in *Sloan*.

IV. The Appellants' § 27-1-15 Argument is Preserved for Appellate Review.

Appellants also asserted claims pursuant to S.C. Code Ann. § 27-1-15 against the Respondent. R. pp. 43-44, ¶¶ 36-40. On April 8, 2003, Appellants sent a certified letter to the Respondent making demand for payment of the principal amount owed Appellant Tindall of \$165,500.00 and of the principal amount owed Appellant Shirley's of \$132,782.00. R. p. 43, ¶ 37. Respondent made no payments. R. p. 44, ¶ 39. The trial Court's order granting summary judgment had the practical effect of foreclosing the Appellants' S.C. Code Ann. § 27-1-15 claims, and represents reversible error, based on the reasoning of the Supreme Court in *Sloan*. The Supreme Court in *Sloan* clarified that its holding did not preclude the additional recovery of attorneys' fees under any applicable statute. *Sloan*, 377 S.C. 108, 120. Therefore, a remand for the factual determination of the Appellants' right to attorneys fees, costs and prejudgment interest under S.C. Code Ann. § 27-1-15 is appropriate.

In response to said argument, Respondent takes the position that the S.C. Code Ann. § 27-1-15 issue is not preserved for appellate review because of Appellants' failure to file a Rule 59(e) motion to request that such claim be adjudicated by the Court. Such argument willfully misconstrues the nature of Appellants' position with regard to a S.C. Code Ann. § 27-1-15 determination. Appellants are requesting that the Court of Appeals remand the entire matter for various factual determinations, including Appellants' right to interest pursuant to the newly enunciated appellate precedent of *Sloan, supra*. Appellants' right to interest pursuant to S.C. Code Ann. § 27-1-15 is one of several issues that must be addressed upon remand.

V. **The Appellants Properly Pled a Third-Party Beneficiary Breach of Contract Claim.**

Respondent takes the position that Appellants did not plead a third-party beneficiary breach of contract claim against Respondent. Respondent's Brief, p. 8. This position is nonsensical in light of the very holding that Respondent acknowledges controls: namely, the *Sloan* Court's ruling that a subcontractor may sue a governmental entity on a third-party beneficiary theory pursuant to S.C. Code Ann. § 29-6-250. A plain reading of the Appellants' Amended Complaint in the underlying matter reveals that the Appellants did, in fact, plead a third-party beneficiary claim against the City. R. pp. 41-43, ¶¶ 21, 23, 28-35. Judge Few ruled that the third-party beneficiary breach of contract claim be dismissed pursuant to the appellate precedent which has now been reversed by the Supreme Court. The third-party beneficiary claim was discussed extensively during oral argument. R. pp. 121-132, 134-135, 143, 152-154, 162-171, 173-185, 227-228. The trial Court realized that one of the threshold issues was "how this thing fits into either a breach of contract claim or some sort of tort claim or both." R. p. 121.

Respondent further takes the position that "[o]n appeal, it is now incumbent upon this Court to address whether the Amended Complaint can be or should be construed as alleging a third-party beneficiary claim. The City submits that it does not." Respondent's Brief, p. 8. Such is in contravention of the legal maxim that pleadings are to be construed liberally in favor of the pleader. *See, e.g., Gambrell v. Cox*, 250 S.C. 228, 157 S.E.2d 233 (1967); *Loftis v. Eck*, 288 S.C. 154, 341 S.E.2d 641 (Ct. App. 1986). Moreover, such position is at variance with the arguments below, which presumed such pleading and dealt extensively with the Appellants' third party beneficiary claims.

VI. Appellants Do Not Appeal the Denial of Their Motion for Summary Judgment.

The Appellants are not appealing the denial of their motion for summary judgment, but are appealing the trial Court's granting of the Respondent's motion for summary judgment. The matter below was a hearing based on cross-motions for summary judgment. The trial Court granted the City's motion for summary judgment and dismissed the Appellants' claims with prejudice. R. p. 13. The Appellants have asked that this Court reverse and remand for the purpose of determining the Appellants' rights to damages as well as the amount of such damages, Appellants' right to attorneys' fees, costs and prejudgment interest.

CONCLUSION

Simply put, *Sloan* is squarely on point and mandates reversal. Based on the foregoing, this Court should reverse the trial Court's grant of summary judgment to Respondent on all causes of action and remand for purposes of determining damages as well as the Appellants' right to attorney fees, costs and prejudgment interest pursuant to S.C. Code Ann. § 27-1-15.

Respectfully submitted this 17 day of December, 2008.



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