IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2018-000162
Trial Court Case No. 2016-CP-400-7647

Freeland Construction Company, Inc., and the South Carolina Military Department.....,.....Respondent,

v.

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

MOTION AND PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT

Appellant Meritage Asset Management, Inc., d/b/a Century Glass Company, respectfully moves and petitions this Court pursuant to Rule 221, SCACR, for rehearing of the above-captioned matter.

SUMMARY

This Court's Opinion of February 10, 2021 ("February 10 Opinion") perpetuates a judicially created remedy for a provision of the South Carolina Subcontractors' and Suppliers' Payment Protection Act which was not contemplated by the General Assembly and which does not comport with the intent of the statute. This Court additionally seeks from Appellant authoritative support for a principle which does not exist in the applicable statutory scheme, nor for which guidance is provided by the Supreme Court. Further, this Opinion creates a manifestly

unjust result, the furtherance of which undermines the integrity of contracts with the government for improvements to real property. Because the Opinion of this Court applies factually distinguishable precedent to this end, Appellant respectfully petitions for a rehearing and for this matter to be reheard by this Court.

ARGUMENT

A manifest injustice has occurred as a result of the application of *Sloan* to the facts of this case:

- Respondent failed to comply with the requirement of the Subcontractors' and Suppliers' Payment Protection Act ("SPPA") by not requiring its contractor to obtain a Payment Bond;[1]
- Freeland accepted the full benefit of its subcontractors' work, received full payment from the Respondent and failed to pay Appellant;[2]
- Appellant fully performed on all its obligations and is left holding the (empty) bag.[3]

This is the type of injustice that occurred prior to enactment of the SPPA and is the very injustice that the SPPA was enacted to avoid – ensuring that subcontractors working on government projects had assurance of payment from general contractors. The holding in *Sloan* should not be applied here.

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

I. THIS COURT SHOULD RECONSIDER ITS OPINION UPHOLDING THE TRIAL COURT'S DECISION THAT THE SUBCONTRACTOR WAS NOT ENTITLED TO RELIEF WHERE IT WAS NOT AFFORDED ANY OPPORTUNITY TO GIVE NOTICE OF NONPAYMENT

A. The holding in *Sloan* purporting to limit government liability should not be applied to the facts at hand.

The plain language of the SPPA does not limit the liability of the Government for failing to comply with the SPPA. Instead, the limitation is entirely of judicial creation through *dicta* in the *Sloan* opinion, later briefly adopted without further analysis by the Court in *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013).

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

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

Sloan, 377 S.C. at 112, 659 S.E.2d at 161. Thus, the Court undertook the task of answering "whether a subcontractor may bring a private right of action against a government entity for failure to comply with statutory bond requirements." *Id.* at 111, 659 S.E.2d at 160. Notably, the Court was not asked to review the limits of liability. After an extensive look into the history of the Miller Acts and the SPPA, the Court answered the lone question before it in the affirmative. *Id.* at 120, 659 S.E.2d at 165. The *Sloan* Court then undertook, in a solitary paragraph, to limit the remedy, stating:

> Given the similar purposes behind the SPPA bond requirements for public projects and the subcontractors mechanics' lien on private work, we hold that in tort or contract action arising under the SPPA, the government entity's liability is limited to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment.

Id. at 121, 166-67.

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

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

Based on these facts, and applying the holding of *Sloan*, the trial court held that the Department had no liability to Meritage and granted judgment. But, Meritage could not have given notice of nonpayment prior to the Department's payment because the nonpayment had not yet occurred. Nonpayment did not occur until *after* liability was extinguished by payment.

This cannot be the intended result of *Sloan*. The holding in *Sloan* should be distinguished from the facts present here, because no payment was due, and no "liability" had yet attached to the Department at the time payment was made to Freeland. In turn, because no liability had attached, no liability could be "limited" or, in this case, extinguished. In other words, Meritage did not yet

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

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

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

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

In this regard, South Carolina finds itself as the only state that establishes a governmental duty, only to limit that recovery such that the duty does not come with any remedy. The facts of

this case are analogous to those in the Texas and Florida cases above and are squarely in the center of the public policy the General Assembly sought to promote when it enacted the SPPA. With *Sloan* as a shield, the government's failure to follow the law is of no consequence because the holding in *Sloan* subverts each of the protections afforded to small businesses by the legislature in enacting the Little Miller Act and the SPPA. Thus, *Sloan* would defeat the very purpose of the statute. The limitation on recovery by the *Sloan* Court ensures that the outcome for subcontractors is the same as it would be without either piece of legislation. The Court's holding in *Sloan* should be clarified because it undermines the very purpose for which the SPPA was created: to protect subcontractors that choose to provide labor and/or materials on government projects.

II. THIS COURT SHOULD RECONSIDER APPLYING *SLOAN* TO THE FACTS OF THIS CASE BECAUSE THE SPPA DOES NOT IMPOSE A NOTICE REQUIREMENT OR A TIMING REQUIREMENT.

A. The Supreme Court assumed a notice requirement where one did not exist, and provided no direction for a timing requirement.

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

- The SPPA imposes a specific duty on the part of the government owner to take action to protect subcontractors;[4] the mechanic's lien statutes create no such duty on the part of the owner.[5]

[4] S.C. Code Ann. § 29-6-250(1).
[5] S.C. Code Ann. § 29-5-20.

- The mechanic's lien statutes create a property interest (lien) that is enforced by foreclosure;[6] the SPPA creates a duty on the part of the government that is enforced by an action for breach of contract.[7]

- The mechanic's lien statutes impose strict deadlines for providing notice and taking action to foreclose;[8] the SPPA has no deadlines.[9]

- The mechanic's lien statutes strictly define notice requirements—what it must contain, to whom it is given, and how it must be delivered;[10] the SPPA contains no notice provision.[11]

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

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

Unlike the mechanic's lien statute, the SPPA gives no warning to the subcontractor that its right of recovery may be limited by a failure to give notice, or by the payments made to a general contractor. Also, the SPPA gives no instruction to assist the subcontractor in protecting these rights. The *Sloan* holding creates these limitations by analogy to the detriment of the statutory rights of recovery specifically granted by the SPPA.

Further, the holdings in *Sloan* and *Shirley's* do not tell subcontractors *when* they ought to give notice of nonpayment by a general contractor, they simply relay what happens once subcontractors *do* give such notice. This frames the rights of subcontractors within the circumstances existing at the time of notice, rather than within the bounds of either the sole statute designed to protect them or within the contract under which they can bring suit. The failure of the Supreme Court to prescribe a timing requirement in conjunction with its notice requirement indicates that neither the remedy carved out by the *Sloan* court nor the effects of such remedy were given due consideration in evaluating the kinds of outcomes the decision would create – outcomes in which the one party who does everything they are supposed to is ultimately unable to recover for its performance from the party who failed to do the one thing they were statutorily required to.

While it is true that when a legislature disagrees with an interpretation of its statutory prescriptions, "[c]hanging a statute, after all, is completely within the authority of the General Assembly," (Brief of Respondent at p. 11), the attempt to deflect the correction of this injustice to the General Assembly is misplaced. Courts enforce statutes in accordance with the terms, purpose, and intent of the statute. The lack of action by the legislature here need not be interpreted as evidence of consent, as the SPPA does not need to be changed because the SPPA does not contain the problematic limitation. Thus, we ask this Court that the injustice be resolved in the same way it was created – judicially.

B. This Court asks Appellant to provide authority to refute a timing requirement that is not imposed by the statute nor provided for in *Sloan* or *Shirley's*.

In its February 10th Opinion, this Court stated that:

> Meritage additionally argues it could not notify the Department of Freeland's nonpayment because payment was not yet overdue. However, neither the SPPA nor *Sloan* impose a requirement that payment be past due before providing notification of nonpayment, and Meritage fails to provide any supporting authority for this assertion.

(February 10 Opinion, footnote 6). The SPPA does not contain any provision requiring notice of nonpayment be given to the government. In *Sloan,* the Court referred to notice as a point of fact from the record, not as a statutory or necessary requirement. *Sloan,* at 111, 659 S.E.2d at 160. This Court's footnote criticizes Appellant for failure to provide case law to refute an additional extension of a fictional notice requirement—the necessary timing. Because this is a question of first impression, no court has spoken to this issue. The absence of judicial decisions on the timing of a notice requirements not included in the statute does not provide firm footing for establishing a timing requirement. The remedies of an aggrieved party under the SPPA should not turn on its failure to comply with non-existent notice requirements; but rather the government's failure to comply with explicit, mandatory bonding requirements.

III. THIS COURT'S HOLDING FAILS TO RECOGNIZE THE FULL MEASURE OF INJUSTICE AND REINFORCES A JUDICIAL CONSTRUCT INCONSISTENT WITH THE INTENT OF THE GENERAL ASSEMBLY

A. The imposition of a notice requirement absent in the statutory framework creates a right without a remedy.

In the landmark United States Supreme Court decision in *Marbury v. Madison*, 5 U.S. 137, 164 (1803), Chief Justice John Marshall, writing for the majority, stated "[t]he government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested

legal right." However, after discussing the clear statutory scheme intended to enhance the rights of subcontractors on government projects, stating that remedial statutes should be liberally construed to effectuate their purpose, and discussing that the legislature intended to accomplish something and not to do a futile thing, the South Carolina Supreme Court's holding in *Sloan* then purports to limit the government's liability "to the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment." *Sloan*, 377 S.C. at 121, 659 S.E.2d at 165-66. As a result, Meritage has a right without a remedy.

B. This Court's decision furthers an undermining of the protections sought to be afforded to those who elect to do business with the government.

This Court's affirmation that "[t]he limit of government entity liability is never more than the remaining unpaid balance on the contract" highlights the very issue with the limitation in *Sloan*: if the government never pays more than the amount of the contract, what incentive does it have to comply with its duty and what penalty does it face if it does not? What, then, is the purpose of requiring the payment bond? Extending *Sloan's* and Respondent's analysis, no incentive or penalty exists. If a payment bond had been in place, Appellant could have been paid. Yet, if the government's exposure for breaching its statutory duty to ensure there is a payment bond, i.e., that subcontractors will get paid, is extinguished by paying the general contractor, then the government has no incentive to obey the statute. This logic explains why Respondent did not ensure Freeland had a payment bond in place: *Sloan* eliminates any penalty Respondent may have faced for failing to comply with its duty. Surely, if this complies with the legislature's intent, the SPPA would have never been enacted.

To extend *Sloan* to apply in this context effectively eliminates the duty assigned to the government by the SPPA. This does not comport with the purposes of the SPPA – providing

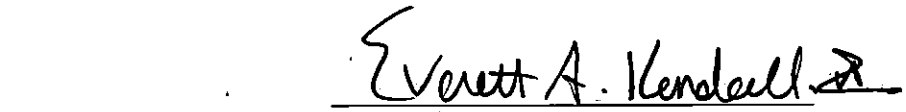
protections to subcontractors working with the government comparable to those working in the private sector. It defeats the purpose of the statute. *Sloan*, at 114, 659 S.E.2d at 162. Additionally, this Court's Opinion encourages a relationship between subcontractors and already over-burdened government agencies which is tinged with uncertainty, and incentivizes subcontractors to harangue government agencies daily throughout the course of major long-term construction projects with notices of nonpayment for work they have performed in the last week, or day, or hour in fear of not being able to rely upon the protections afforded them by the SPPA.

CONCLUSION

Under this Court's application of *Sloan*, a subcontractor is without remedy for failing to do what no statute requires it to do, while the government has no liability for failing to do what a statute specifically requires it to do. While *Sloan* rightly provides a right to the subcontractor to sue the government for this breach of duty, the application of this doctrine has deprived the subcontractor of any effective remedy. This thwarts the clear legislative purpose of the SPPA and therefore this Court should decline to extend *Sloan* to the facts of this case. The application of *Sloan* to the facts of this case put subcontractors in a situation as though the SPPA had never been enacted. As a result, *Sloan* serves as a judicial veto of what was clearly intended by the General Assembly. This unfortunate and unforeseen result can and should be corrected. For these reasons, Appellants respectfully petition for a rehearing, for withdrawal of this Court's February 10 Opinion, for an entry overturning the Trial Court's grant of Summary Judgment in favor of the Respondent and its denial of the Summary Judgment in favor of the Appellant, and for remand of the case for consideration of the amount due to the Appellant.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



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PROOF OF SERVICE

I certify that I have served one copy of the Petition for Rehearing on Appellant via AIS electronic mail, on February 25, 2021, pursuant to The Supreme Court of South Carolina Order of 2020-03-20-01, number 2020-000447(g)(3), addressed to their attorneys of record as follows:

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February 25, 2021

HAND DELIVERED
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Re: Meritage Asset Management, Inc. v. Freeland Construction
Appellate Case No.: 2018-000162
Our File No.: 6030-0001

Dear Clerk Kitchings,

Enclosed please find herewith for filing with the Court the original and one (1) copy of the Motion and Petition for Rehearing and Memorandum in Support, along with our check in the amount of $50.00. I would appreciate your filing the original and returning the clocked copy to me in the envelope provided. By copy of this letter I am serving the same on opposing counsel.

I remain,

Very truly yours,

Everett A. Kendall, II

EAK/jcd
Enclosures
cc: David Leggett
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Alan Wilson
W. Jeffrey Young

SC Court of Appeals
Clerk's Office