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**Mar 12 2021**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

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Case No. 2016-CP-40-07647

Appellate Case No. 2018-000162

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

v.

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

Of which South Carolina Military Department is the Respondent.

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**RESPONSE AND OPPOSITION TO MOTION FOR REHEARING**

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Respondent, by and through the undersigned counsel, hereby moves this Court to deny Appellant's Motion for Rehearing.

**SUMMARY**

Throughout this case Appellant has argued it was entitled to summary judgment because it was undisputed Respondent failed to comply with the Subcontractors' and Suppliers' Payment Protection Act (the "SPPA"). On February 10, 2021, this Court entered an Opinion holding that the limitation on governmental liability, announced in *Sloan Construction Company, Inc. v. Southco Grassing, Inc.* ("Sloan")<sup>1</sup> and affirmed in *Shirley's Iron Works, Inc. v. City of Union*

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<sup>1</sup> 377 S.C. 108, 659 S.E.2d 158 (2008).

(“*Shirley*”),<sup>2</sup> applied in this case. As a result, the Court affirmed the Trial Court’s grant of summary judgment and held for Respondent. In its Motion for Rehearing, Appellant renews its arguments but does so without proffering any novel or persuasive reasons for the Court to reach a different conclusion. Therefore, the Court should deny Appellant’s Motion.

### ARGUMENT

The arguments in Appellant’s Motion for Rehearing are neither novel nor persuasive. Appellant’s arguments are: (1) *Sloan* and *Shirley* were incorrectly decided and should be overturned and (2) the limitation on governmental liability from *Sloan* and *Shirley* should not apply in this case. Both of these arguments were raised and addressed in the original briefing for this case and at oral arguments. Thus, in the interest of judicial economy, Appellant’s Motion should be denied.

Regarding Appellant’s first argument, against the limitation on government liability from *Sloan* and *Shirley*, any suggestion that the holding in *Sloan* was merely *dicta*, and can therefore be ignored, was completely repudiated when the Supreme Court affirmed the liability limitation in *Shirley*. Additionally, any argument that the outcome in *Sloan* was either unforeseen by the General Assembly or undermines the intent of the General Assembly belies the fact that in May, 2013, five years after *Sloan*, the General Assembly amended the SPPA without addressing *Sloan*. See 2013 S.C. Acts 31. Lastly, Appellant’s arguments against *Sloan* and *Shirley* are not only unpersuasive but misplaced. Appellant’s disagreement with those decisions does nothing to alter their status as binding precedent in this State. See S.C. Const. art. V, § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”); *Freeman v. Freeman*, 323 S.C. 95, 105, 473 S.E.2d 467, 473 (Ct. App. 1996) (“[The court of appeals is] bound by the decisions

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<sup>2</sup> 403 S.C. 560, 743 S.E.2d 778 (2013).

of the South Carolina Supreme Court.”). The Court did not err in its Opinion regarding this argument; therefore, the Motion should be denied.

Regarding Appellant’s second argument, that the facts of this case are distinguishable from *Sloan* and *Shirley*, Appellant again offers neither new facts nor a novel interpretation of the facts involved in this case. It is, and has been, undisputed that Respondent hired Freeland Construction, and Freeland Construction in turn hired Appellant. Respondent failed to ensure a proper payment bond was in place. On May 20, 2016, Appellant submitted a final invoice to Freeland Construction. On June 3, 2016, Freeland Construction submitted a final invoice to Respondent. On June 17, 2016, Respondent paid Freeland Construction in full. When Respondent paid Freeland Construction, Appellant had not notified Respondent of nonpayment by Freeland Construction. Appellant did not notify Respondent of Freeland Construction’s nonpayment until August 8, 2016.

The SPPA was created to protect subcontractors performing work for the government; however, *Sloan* and *Shirley* both place a cap on governmental liability. Both cases limit governmental liability to the amount outstanding on the contract when the government is notified of nonpayment. Under the undisputed facts of this case, namely that amount outstanding on the contract when Respondent was notified of Freeland Construction’s nonpayment was \$0.00, Respondent’s liability to Appellant was capped at \$0.00.

None of the material facts *sub judice* differ from *Sloan* and *Shirley*. The government had a responsibility to ensure the issuance of a bond. A bond was not in place. The subcontractor was not paid in full. And yet, both *Sloan* and *Shirley* are clear that governmental liability is capped at the amount outstanding when the government was notified, which in this case is \$0.00. Appellant’s assertion that *Sloan* and *Shirley* creates a right without a remedy is mistaken. *Sloan* and *Shirley* both expressly acknowledge a subcontractor’s remedy, in fact *Shirley* is a case almost entirely

about the nature of that remedy; however, both *Sloan* and *Shirley* held that the remedy has limitations. Placing limits on the remedy is distinct from destroying it.

Finally, Appellant has not been left without a remedy in this case. Appellant has always had, and continues to have, a claim against Freeland Construction for breach of contract. In fact, Appellant has already received a judgment for Fifty-Seven Thousand Two Hundred Ninety-Six and 18/100 (\$57,296.18) Dollars against Freeland Construction. Any argument of manifest injustice resulting from the Court's Opinion is dramatically undercut by the fact of Appellant's remaining claim, and judgment, against Freeland Construction.

Appellant's vehement claims of injustice do nothing to change the facts of this case, the application of *Sloan* and *Shirley* to these facts, or the correctness of the Court's February 10, 2021, Opinion. The Court did not err in its Opinion regarding this argument; therefore, the Motion should be denied.

### CONCLUSION

For these reasons, Respondent, by and through the undersigned counsel, hereby moves this Court to deny Appellant's Motion for Rehearing.

Respectfully submitted,

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COLUMBIA, SOUTH CAROLINA