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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

Appellate Case No. 2018-000162
Trial Court Case No. 2016-CP-40-07647

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

v.

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

Of which South Carolina Military Department is the.....Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

The Court of Appeals issued its opinion in this case on February 10, 2021. (App. p. 114). Counsel for the Petitioner certifies that the Petition for Rehearing was filed and served fifteen (15) days later on February 25, 2021. (App. p. 120). The Court of Appeals ruled on the Petition for Rehearing by an order filed on May 25, 2021. (App. p. 136). This Petition for Writ of Certiorari is timely served and filed.

QUESTIONS PRESENTED

1. **With respect to the private cause of action created by the Subcontractors' and Suppliers' Payment Protection Act, whether the limitations placed on such cause of action by the *Sloan* Court should be eliminated as inconsistent with the purpose and language of the Act.**

2. **In the alternative, whether such limitations should apply when the general contractor's nonpayment occurs after the governmental entity pays the general contract balance, thereby leaving the subcontractor with a cause of action but no remedy.**

SUMMARY

Petitioner Meritage Asset Management, Inc., d/b/a Century Glass Company ("Meritage") respectfully moves and petitions this Court, pursuant to Rule 242, SCACR, as well as other applicable law, for the issuance of a writ of certiorari to review the final decision of the Court of Appeals in this case.

Section 29-6-250 of the Subcontractors' and Suppliers' Payment Protection Act (the "SPPA") 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.

S.C. Code § 29-6-250(3). According to the Court in *Sloan Const. Co. v. Southco Grassing, Inc.*, a "private right of action by a subcontractor against the government exists under the SPPA" when the government fails to comply with this payment bond requirement. 377 S.C. 108, 659 S.E.2d

158 (2008). Respondent South Carolina Military Department failed to comply with the SPPA's payment bond requirement, never requiring that its general contractor obtain a payment bond. Meritage is a subcontractor who performed work on Respondent's project and was paid nothing for its work.

Despite Respondent's admitted failure to comply with the SPPA's bond requirement, the Court of Appeals held that Meritage had no viable cause of action against Respondent. The Court of Appeals based its holding on the court-created limitations in *Sloan*. In a digression from the question presented in that case, the *Sloan* Court stated that the governmental entity's liability is: (1) "limited to the remaining unpaid balance on the contract with the general contractor", (2) "when the subcontractor notifies the government of the general contractor's nonpayment." *Id.* at 121, 659 S.E.2d at 165–66.

This case presents a "special and important circumstance" justifying certiorari review because the private cause of action created by the SPPA is undermined by the judicially-created limitations in *Sloan*. The Court in *Sloan* stated that: "In placing an affirmative duty on the government,...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 [the SPPA] enacted for their special benefit." *Id.* at 116, 659 S.E.2d at 163. However, as exemplified by this case, this legislative intention is undermined by the court-created limitations in *Sloan*, which foreclose subcontractors' ability to vindicate their rights under the statute enacted for their special benefit. Such limitations are contrary to the purpose of the "Subcontractors' and Suppliers' Payment Protection Act," are not found within the language of the Act, and leave subcontractors like Meritage without any effective remedy. Moreover, the continued enforcement of such limitations is likely to reduce those subcontractors willing to do business with the State government. *See id.* at 120, 659 S.E.2d at 165

(stating that "protecting[ing] subcontractors' payment rights on government projects encourages competitive bidding, which results in the most economically efficient use of tax dollars and other sources of public funding"). Therefore, Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari to address this judicially-created issue.

STATEMENT OF THE CASE

A. Facts

On September 19, 2014, Respondent awarded Freeland Construction Company, Inc. ("Freeland") the general contract for the Saluda Armory Project. (App. p. 115). As Respondent admitted, it did not ensure that Freeland had a payment bond in place prior to awarding the contract or at any phase of the project. (*Id.*). On January 21, 2016, Meritage submitted a subcontract proposal to Freeland for the Saluda Armory Project. (App. p. 4). On January 27, 2016, Freeland accepted Meritage's proposal, and thereafter, Meritage properly completed all work due under the subcontract. (App. pp. 4, 115). On May 20, 2016, Meritage submitted a final invoice to Freeland for the total amount of its subcontract – $50,600.00 – with payment due June 20, 2016. (App. p. 52, line 19-p. 53, line 10).

Before Meritage's payment was due, Freeland finalized work on the project and submitted its final invoice to Respondent on June 3, 2016. (App. p. 4). Without verifying that all subcontractors had been paid, Respondent paid Freeland's final invoice on June 7, 2016. (App. p. 4). Since Meritage's payment was not due until **June 20, 2016**, it had no opportunity to inform Respondent of non-payment prior to Respondent paying Freeland the full general contract amount on **June 7, 2016**. However, when the June 20, 2016 due date for Meritage's payment arrived, Meritage was not paid. (App. p. 115). On August 8, 2016, Meritage notified Respondent that it

had not been paid for its work. (App. p. 5). To date, Meritage has received no compensation for the work it preformed on the Saluda Armory. *See* (App. p. 115).

B. Procedural History

On January 2, 2018, the Circuit Court issued an Order granting Respondent's Motion for Summary Judgment and denying Meritage's cross-motion for summary judgment. (App. pp. 3-8). In doing so, the Circuit Court recognized that Respondent "did not ensure Freeland obtained a labor and material bond pursuant to Section 29-6-250" of the SPPA. (App. p. 4). The Circuit Court held that Meritage could pursue a third-party beneficiary breach of contract claim against Respondent but was left without a remedy because the court was bound to apply the limitations created in *Sloan*. (App. p. 5). The Circuit Court stated: "Meritage wants this court to extend liability beyond the current limit and, in doing so, overturn the Supreme Court's ruling in Sloan and Shirley's Iron Works. As stated above, this court does not have the authority to do that...." (App. p. 7).

Meritage timely appealed. By Order filed February 10, 2021, the Court of Appeals affirmed the Circuit Court's decision. (App. p. 114). In its Order, the Court of Appeals also recognized that Respondent "failed to require Freeland to obtain a payment bond as required under the SPPA." (App. p. 115). Like the Circuit Court, the Court of Appeals held that Meritage had no remedy because of the limitation created in *Sloan*. (App. p. 119). Meritage then filed a Petition for Rehearing, which was denied. (App. p. 136).

ARGUMENT

Rule 242 of the Appellate Court Rules states that a writ of certiorari will only be granted "where there are special and important reasons." Rule 242(a), SCACR. As this Court has recognized repeatedly in the past decade, the rights and remedies the SPPA creates for

subcontractors working on government projects are issues for which certiorari is appropriate. In 2008, this Court granted certiorari to determine whether the SPPA created a private cause of action in favor of subcontractors. *Sloan*, 377 S.C. 108, 659 S.E.2d 158 (2008). In 2013, this Court granted certiorari to modify the holding in *Sloan* and specify what private cause of action was created by the SPPA. *Shirley's Iron Works, Inc.*, 403 S.C. 560, 743 S.E.2d 778. Meritage now respectfully requests that this Court grant certiorari to address the remaining issue – whether under the SPPA-created private cause of action the government's entity's liability is dually limited by a non-payment notice requirement and the remaining unpaid general contract balance.

Such limitations should not be applied to the SPPA-created cause of action because: (1) they undermine the purpose of the Act; (2) they are not expressed or implied in the language of the Act; and (3) in cases such as this one, they result in manifest injustice. As this case demonstrates, such limitations allow the governmental entity to shirk its duties under the Act without consequence and leave an innocent subcontractor shouldering the consequences of its non-compliance. This case presents an opportunity for the Court to undo the *Sloan* Court's judicially-created limitations and restore the effectiveness of the private cause of action created by the SPPA. Therefore, Petitioners respectfully request that this Court grant the Petition.

I. The Court-Created Limitations in *Sloan* are Inconsistent with the Purpose and Provisions of the SPPA and should be eliminated.

In *Sloan*, the Court gave a comprehensive explanation of the history and reasoning behind the Legislature enacting the SPPA:

> Prior to the year 2000, South Carolina law afforded limited protection to subcontractors and suppliers providing labor and materials on public projects. *See* S.C.Code Ann. § 11–30–3030 (Supp.2006) (outlining a bonding scheme applicable to projects under the direction of governmental bodies generally) and S.C.Code Ann. § 57–5–1660 (outlining a bonding scheme specific to highway projects under the direction of SCDOT). Known as "Little Miller Acts," these provisions are the state counterpart to the federal Miller Act legislation enacted to address the problem

> of subcontractors who may not use liens on public property to secure payment for work performed on public projects and must otherwise rely on the financial solvency of prime contractors. Consistent with the federal Miller Act, the bonding schemes contained in the Little Miller Acts require both a performance bond to ensure the timely performance of the contract by the general contractor and a payment bond to cover payment of subcontractors and suppliers in the event of the general contractor's default.
>
> In 2000, the South Carolina legislature enacted the Subcontractors' and Suppliers' Payment Protection Act (SPPA), S.C.Code Ann. §§ 29–6–210 et. seq. (Supp.2006). The SPPA is specifically applicable to subcontractors and suppliers on government projects and outlines a detailed bonding scheme that significantly expands the protections already afforded these parties under the Little Miller Acts.
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> ***
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> [T]he SPPA takes the Little Miller Acts' bond requirement one step further by establishing both a duty on the part of the governmental body to require payment bonding, as well as a standard of care for overseeing the issuance of a proper payment bond. *See* S.C.Code Ann. § 29–6–250 (providing that "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"). 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.**

Id. at 114–16, 659 S.E.2d at 161–62 (emphasis added). Thus, the SPPA goes beyond the Little Miller Acts and puts the oneous on the government to ensure that a proper payment bond is in place.

As the very title of the Act – "Subcontractors' and Suppliers' Payment Protection Act" – makes clear, its purpose is to ensure that subcontractors get paid. *See* S.C. Code Ann. § 29-6-210 (stating title of Act); *Sloan*, 377 S.C. at 115, 659 S.E.2d at 162 (stating "the very title of the SPPA clearly indicates the General Assembly intended to provide stronger payment protection"). The court-created limitations are counter to this purpose. Although the Act requires the governmental entity to ensure that a proper payment bond is in place, the court-created limitations strip away any consequences for non-compliance with that duty. *See* S.C. Code § 29-6-250(3) (stating duty). Under those limitations, regardless of whether or not the governmental entity complies with its

statutorily-created duty, it pays the general contract price and nothing more. Therefore, what is the incentive to do the extra work necessary to comply? As a result, the private cause of action impliedly created by the SPPA is nothing more than an idle threat. The limitations the *Sloan* Court created undermine the effectiveness of the private cause of action that Court stated the SPPA created. Such limitations are contrary to the purpose of the Act and should be eliminated.

A. The *Sloan* Court's reasoning for such limitations is inconsistent with the statutory provisions of the SPPA.

In *Sloan*, the Court 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?

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 the above-described extensive look into the history of the Miller Acts and the SPPA, the Court answered the lone question before it in the affirmative. *Id.* at 120, 659 S.E.2d at 165. The *Sloan* Court then undertook, in a solitary paragraph, to limit the remedy. *Id.* They stated:

> 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, 659 S.E.2d at 166-67.

The limitations created in *Sloan* are the result of an over-extension of the analogy between the SPPA and traditional mechanic's lien statutes. That analogy fails to take into account that the

SPPA and the mechanic's lien statutes have very different statutory provisions. As this Court recently admonished:

> It is the responsibility of this Court to construe statutes; we have no power to legislate[.] Once the Legislature has made that choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy. Rather, the General Assembly establishes the public policy...and enacts statutes to let the public and the courts know what that policy is....

Nationwide Ins. Co. of Am. v. Knight, – S.E.2d –, No. 2020-000026, 2021 WL 1900120, at *2 (S.C. May 12, 2021) (citations omitted).

While it is clear from the statutory language that the General Assembly intended to provide similar protections to subcontractors on public projects as those afforded on private projects, there is no indication that the General Assembly intended the entire mechanic's lien rubric to apply. In fact, the statutory language indicates 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;[1] the mechanic's lien statutes create no such duty on the part of the owner.[2]

- The mechanic's lien statutes create a property interest (lien) that is enforced by foreclosure;[3] the SPPA creates a duty on the part of the government that is enforced by an action for breach of contract.[4]

- The mechanic's lien statutes impose strict deadlines for providing notice and taking action to foreclose;[5] the SPPA has no deadlines.[6]

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[1] S.C. Code Ann. § 29-6-250(1).
[2] S.C. Code Ann. § 29-5-20.
[3] S.C. Code Ann. § 29-5-10(a).
[4] S.C. Code Ann. § 29-6-250(1).
[5] S.C. Code Ann. § 29-5-20(B).
[6] S.C. Code Ann. § 29-6-250.

- The mechanic's lien statutes strictly define notice requirements—what it must contain, to whom it is given, and how it must be delivered;[7] the SPPA contains no notice provision.[8]

Thus, there is no evidence that the General Assembly intended to transfer the mechanic's lien statutes' limitations 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' inclusion of explicit limitations and liberally construing the SPPA to effectuate its purpose, the *Sloan* Court's holding is at odds with this Court's own principles for interpreting statutes and undermines the clear legislative intent of the SPPA.

Moreover, 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 general contractor. Also, the SPPA gives no instruction to assist the subcontractor in protecting these rights. The *Sloan* limitations created by analogy are detrimental to the duties and rights specifically granted by the SPPA. Unlike the mechanic's lien statutes, the language of the

[7] S.C. Code Ann. § 29-5-20(B).
[8] S.C. Code Ann. § 29-6-250.

SPPA does not contain the notice and general contract amount limitations. Consequently, the public policy limitations created through that improper analogy should be eliminated the same way they were created – judicially.

C. 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. *See 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. 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 it 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 statutorily establishes a governmental duty only to judicially limit the recovery such that no remedy exists. 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. 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. The limitations on recovery by the *Sloan* Court ensure 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. The limitations created by *Sloan* should not be applied to the facts of this case because such limitations create manifest injustice that could not have been intended by the General Assembly.

Even if this Court determines that the *Sloan*-created limitations remain, such limitations should not be applied where the governmental entity fully pays the general contractor before payment is due to the subcontractor. Under such circumstances, a subcontractor is at the mercy of a derelict general contractor and governmental entity. The limitations completely foreclose the subcontractor's ability to protect itself. This could not have been the intention of the *Sloan* Court or the General Assembly. 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 subcontractors working on government projects had assurance of payment from general contractors.

In *Sloan*, 14 months before the Department of Transportation ("DOT") paid the general contractor, the subcontractor gave the DOT notice that it was owed money by the general

contractor. 377 S.C. at 112, 659 S.E.2d at 160. Furthermore, payment was made after the general contractor directly represented to the DOT that all of the subcontractors had been paid in full. *Id.* Therefore, the judicially-created limitations did not foreclose the subcontractor's ability to recover from the DOT. The subcontractor had an opportunity to provide the required non-payment notice before the general contract funds were distributed to the general contractor.

Here, Meritage did not give notice of non-payment to Respondent prior to Respondent's final payment to the general contractor because Meritage's payment had not become due. Meritage submitted an invoice for its work on May 20, 2016, with payment due in 30 days. (App. p. 52, line 19-p. 53, line 10). On June 3, 2016, the general contractor submitted its final invoice to the Respondent, which was paid in 4 days. (App. p. 4). Thus, Respondent paid the general contractor *13 days before* the general contractor's payment to Meritage was due. There is nothing Meritage could have done to protect itself from this unfortunate situation. Moreover, here, there is no indication that Respondent ever even inquired if the subcontractors had been paid before issuing final payment to the general contractor.

Based on these facts, and applying the holding of *Sloan*, the trial court held that Respondent had no liability to Meritage and granted judgment in Respondent's favor. However, Meritage could not have given notice of non-payment prior to Respondent's payment because the general contractor's non-payment had not yet occurred. Non-payment did not occur until *after* Respondent's liability was extinguished by Respondent's payment.

This cannot be the intended result of *Sloan*. Because no payment to Meritage was due, no "liability" had yet attached to Respondent at the time it paid the general contractor. Thus, 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 Respondent at the time the payment purporting to limit Respondent's liability was made.

Under the limitations created in *Sloan*, the governmental entity's liability is never more than the remaining unpaid balance on the contract. If the government never pays more than the amount of the contract, what incentive does it have to comply with its statutory duty and what penalty does it face if it does not? The obvious answer to both questions is none. This logic explains why Respondent did not ensure the general contractor had a payment bond in place: *Sloan* eliminates any penalty Respondent may have faced for failing to comply with its duty. Surely, if this complies with the legislature's intent, the SPPA would have never been enacted. To extend *Sloan* to apply in this context would effectively eliminate the duty assigned to the government by the SPPA.

CONCLUSION

The SPPA creates an enforceable duty giving rise to a private cause of action. However, the limitations the *Sloan* Court placed on such cause of action undermine the enforceability of that statutory duty. Such limitations are not found within the statutory provisions of the SPPA, are inconsistent with the purposes of the SPPA, and, as here, perpetuate the very injustice the SPPA was enacted to avoid. Therefore, this case presents an important opportunity for this Court to eliminate these improper limitations. Alternatively, these limitations should not be applied where, as here, they work to foreclose the subcontractor's ability to protect itself, thereby resulting in manifest injustice. For the above-stated reasons, Meritage respectfully requests that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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