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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

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.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
AUG 01 2018
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-40-7647 - Appellate No.: 2018-000162

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

v.

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

Of which South Carolina Military Department is the Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	) FOR THE FIFTH JUDICIAL CIRCUIT
Meritage Asset Management, Inc. d/b/a Century Glass Company Plaintiff, v. Freeland Construction Company, Inc. and the South Carolina Military Department, Defendants.	) Civil Action No.: 2016-CP-40-07647 ORDER

RICHLAND COUNTY
FILED
2018 JAN -5 AM 8:35
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

This Court held a hearing concerning competing motions for Summary Judgment, filed by the Plaintiff, Meritage, and the Defendant, South Carolina Department of the Military (Department). The hearing took place on December 8, 2017. Mr. Yarbrough represented Meritage. Mr. Maroney represented the Department. After considering the arguments of both parties, the Court grants the Department's Motion for Summary Judgment.

STANDARD OF REVIEW

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." State Farm Fire & Casualty Co. v. Breazell, 324 S.C. 228, 230, 478 S.E.2d 831, 832 (1996) (citing Café Associates, Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991)). Both parties agree that the facts in this case are not in dispute, and each filed separate Motions for Summary Judgment, requesting the court rule on the legal issues in this case.

BACKGROUND

This case is about the extent of government entity liability to a subcontractor. The Department contracted with Freeland Construction Company, Inc. (Freeland), to perform construction work on one of the Department's properties, the Saluda Armory. Freeland engaged Meritage Asset Management, Inc. d/b/a Century Glass Company (Meritage) as a subcontractor to perform certain work. The work has been completed. The Department paid Freeland for the work performed. Almost two months after paying Freeland in full, Meritage informed the Department that Freeland had not paid Meritage. The relevant timeline is as follows.

19 September 2014: The Department and Freeland agree on a contract.

21 January 2016: Meritage submitted a subcontractor proposal to Freeland for subcontractor work on the Saluda Armory.

27 January 2016: Freeland accepted Meritage's proposal for the work on the Saluda Armory.

1 June 2016: Freeland completed the work on the Armory.

3 June 2016: Final invoice from Freeland was submitted to the Department.

7 June 2016: The final invoice for $93,973.69 was posted for payment to Freeland, completing the contract between the Department and Freeland.

17 June 2016: The final payment was deposited.

8 August 2016: The first time the Department learned of Freeland's failure to pay Meritage.

In its Motion for Summary Judgment, Meritage argued it is entitled to judgment on its third party beneficiary breach of contract claim, based on the fact the Department did not ensure that Freeland obtained a labor and material bond pursuant to Section 29-6-250, the Subcontractors' and Suppliers' Payment Protection Act (SPPA). The Department, in its Motion, argued that it is entitled to Summary Judgment because Meritage did not give the Department

notice of Freeland's nonpayment, before the Department paid Freeland in full.

THIRD-PARTY BENEFICIARY CONTRACT UNDER SPPA

"[A] governmental entity may be liable to a subcontractor only for breach of contract for failing to comply with the SPPA bonding requirements." Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 564, 743 S.E.2d 778, 780 (2013). Although Meritage may pursue a third-party beneficiary breach of contract claim against the Department, the law is clear: "[T]he 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." Sloan Const. Co. v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E.2d 158, 165–66 (2008). The only exception to this limitation on liability is the additional recovery of attorneys' fees under any applicable statue. Id., 377 S.C. 108, 121, 659 S.E.2d 158, 166.

Meritage informed the Department of Freeland's failure to pay on August 8, 2016. At that time, the Department did not owe any money to Freeland; it had paid Freeland in full on June 17, 2016. Under Sloan, because no outstanding balance existed between the Department and Freeland at the time of notice, the Department does not owe Meritage. Meritage's third party beneficiary breach of contract claim fails, consequently, as a matter of law.

Meritage gave three arguments opposing this conclusion. The first argument involves two cases, one from Texas and one from Florida. Meritage asserted that these cases involved statutes similar to the SPPA, and courts ruled, in those cases, that the government entity was liable to the subcontractor. Meritage asked this court to rule similarly. These cases are respectively construing a Texas and a Florida statute; they were not construing the South Carolina statute at issue in this case. Our State Supreme Court has construed the SPPA and expressly limited the liability of government entities as described above. What Meritage is asking, in effect, is for this court to

overrule the unequivocal decision of the South Carolina Supreme Court. That, however, is not within the authority of this court to do. *See* State v. Phillips, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) ("[I]t is incumbent upon the court of appeals to apply this Court's precedent") (*citing* S.C. Const. art. V, §9).[1]

Meritage's second argument is just as unavailing. The Court in Sloan compared the SPPA to Section 29-5-20, titled "Lien of Laborer, mechanic, subcontractor or materialman." The Court then concluded 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." Sloan, 377 S.C. 108, 121, 659 S.E.2d 158, 165–66 (2008). Meritage points to another mechanics' lien statute, Section 29-5-10, and asked this court to compare the SPPA to that statutory section rather than Section 29-5-20. Doing so, according to Meritage, may enable it to recover under the SPPA. This argument has no basis in law, for at least two reasons. First, the Supreme Court has already compared the SPPA to Section 29-5-20 and limited government entity liability in accordance with that comparison; this court may not effectively overrule the Supreme Court's determination by analyzing the issue of government liability in a different manner. Second, Section 29-5-10 does not give a lien to subcontractors, which makes any comparison between it and the SPPA inapposite. *See* Kelly v. Bank of State (1841) 16 S.C. Eq. 431; Murray v. Earle (1880) 13 S.C. 87; Gray v. Walker (1881) 16 SC 143; Geddes v. Bowden (1883) 19 S.C. 1; and Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 629-33, 93 S.E.2d 855, 860-62 (1956).

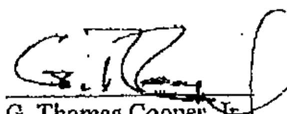
[1] What is true for the Court of Appeals is certainly also true for Circuit Courts.

In Lowndes Hill, the Court reviewed the history of South Carolina mechanics' lien statutes. While doing so, it considered the case of Gray v. Walker, 1881, 16 S.C. 143. The Court in Gray v. Walker, according to the Court in Lowndes Hill, made clear that Section 45-251 (the previous codification of Section 29-5-10) did not apply to laborers who performed work pursuant to a contract with the prime contractor. Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 632, 93 S.E.2d 855, 861 (1956).

Finally, Meritage argues that it was not due payment from Freeland until after the Department had paid Freedland in full and thus, Meritage had no opportunity to notify the Department of Freeland's nonpayment. But that does not obviate the governing law: "[T]he 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. In this case, when Meritage gave notice, the Department had already paid Freeland in full. Because the extent of government entity liability is reached once the government entity pays the general contractor in full, Meritage has no viable claim against the Department. Meritage would like to distinguish the facts in this case from those in Sloan and Shirley's Iron Works. Its efforts are misguided because those cases erected a limit on government entity liability, regardless of the facts in any particular case. 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, and will not.

CONCLUSION

In conclusion, Meritage's only legal recourse is against Freeland. **THEREFORE**, the Department's motion for summary judgment is **GRANTED**.



G. Thomas Cooper, Jr.
Presiding Judge
Fifth Circuit

January 2, 2018

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4007647

Meritage Asset Management Inc
Century Glass Company
PLAINTIFF(S)

Freeland Construction Company Inc
South Carolina Military Department
DEFENDANT(S)

Submitted by: ____________ | Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other ____________

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other ____________

☐ STAYED DUE TO BANKRUPTCY

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other ____________

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

2018 JAN -8 PM 3: 11 RICHLAND COUNTY C.C.P. FILED

ORDER INFORMATION

This order ☐ ends ☐ does not end the case. Additional Information for the Clerk: ____________

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge ____________ Judge Code 2126 Date ____________

For Clerk of Court Office Use Only

This judgment was entered on the 8 day of ______, 20 ___ and a copy mailed first class or placed in the appropriate attorney's box on this 8 day of January, 2018 to attorneys of record or to parties (when appearing pro se) as follows:

William Harley Yarborough Jr.

Thomas Parkin C. Hunter

Kevin Desmond Maroney

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter ____________

Clerk of Court [signature]

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2016CP4007047

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

Plaintiff(s)

vs.

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

Defendant(s)

Submitted By: William H. Yarborough
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Post Office Box 12129
Columbia, SC 29211

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Other:
E-mail: why@swblaw.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

2016 DEC 29 PM 2:42
RICHLAND COUNTY
FILED
JEANETTE W. MCBRIDE
C.C.P.&G.S.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.

☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.

☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.

☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached).

NATURE OF ACTION (*Check One Box Below*)

Contracts	Torts - Professional Malpractice	Torts — Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	Previous Notice of Intent Case #	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☒ Breach of Contract (140)	20__-NI-____	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)	☐ Notice/ File Med Mal (230)	☐ Personal Injury (350)	☐ Possession (450)
	☐ Other (299)	☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)

Inmate Petitions	Administrative Law/Relief	Judgments/Settlements	Appeals
☐ PCR (500)	☐ Reinstate Drv. License (800)	☐ Death Settlement (700)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Judicial Review (810)	☐ Foreign Judgment (710)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Relief (820)	☐ Magistrate's Judgment (720)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Permanent Injunction (830)	☐ Minor Settlement (730)	☐ Municipal (930)
	☐ Forfeiture-Petition (840)	☐ Transcript Judgment (740)	☐ Probate Court (940)
	☐ Forfeiture—Consent Order (850)	☐ Lis Pendens (750)	☐ SCDOT (950)
	☐ Other (899)	☐ Transfer of Structured Settlement Payment Rights Application (760)	☐ Worker's Comp (960)
			☐ Zoning Board (970)
			☐ Public Service Comm. (990)
		☐ Confession of Judgment (770)	☐ Employment Security Comm (991)
		☐ Petition for Workers Compensation Settlement Approval (780)	☐ Other (999)
		☐ Other (799)	

Special/Complex /Other

☐ Environmental (600)	☐ Pharmaceuticals (630)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)
☐ Medical (620)	☐ Out-of State Depositions (650)
☐ Other (699)	☐ Motion to Quash Subpoena in an Out-of-County Action (660)
	☐ Sexual Predator (510)

Submitting Party Signature: [signature] Date: December 27, 2016

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, B. erg, Barnwell, Beaufort, Berkeley, Calho Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
   a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
   b. Requests for temporary relief;
   c. Appeals
   d. Post Conviction relief matters;
   e. Contempt of Court proceedings;
   f. Forfeiture proceedings brought by governmental entities;
   g. Mortgage foreclosures; and
   h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

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

Defendants.

Civil Action No.:

SUMMONS

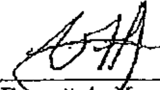
RICHLAND COUNTY
FILED
2016 DEC 29 PM 2:42
JEANNETTE W. McBRIDE
C.C.P. & G.S.

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint upon the subscribers at 1515 Lady Street, Columbia, South Carolina 29201, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, Plaintiffs will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

~Signature Page to Follow~

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.



Everett A. Kendall, II
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Columbia, SC 29211
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ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina

December 27, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
Meritage Asset Management, Inc. d/b/a Century Glass Company	)	Civil Action No.:
Plaintiff,	)	
v.	)	COMPLAINT (Jury Trial Demanded)
Freeland Construction Company, Inc. and the South Carolina Military Department	)	
Defendants.	)	

RICHLAND COUNTY FILED
2016 DEC 29 PM 2:42
JEANETTE W. MCBRIDE C.C.P. & G.S.

Plaintiff Meritage Asset Management, Inc. d/b/a Century Glass Company ("Plaintiff") brings this action against Defendants Freeland Construction Company, Inc. ("Freeland") and the South Carolina Military Department (the "Department").

PARTIES

1. Plaintiff is a South Carolina Corporation located in Irmo, South Carolina.

2. Freeland is a South Carolina corporation located in Charleston, South Carolina.

3. The Department is an agency of the State of South Carolina headquartered in Columbia, South Carolina.

JURISDICTION

4. The Court has subject matter jurisdiction over the claims in this lawsuit under Article V § 11 of the South Carolina Constitution and South Carolina Code § 14-5-350.

5. Plaintiff submits to personal jurisdiction of the Court for purposes of this matter by filing this action.

6. The Court has personal jurisdiction over Freeland because it is a South Carolina corporation.

7. The Court has personal jurisdiction over the Department because it is an agency of the State of South Carolina.

VENUE

8. Venue is proper in this circuit because Defendant Department is headquartered in Richland County, South Carolina.

FACTS

9. Freeland submitted bids to the Department for the construction of the National Guard Armory ("Saluda Armory") in Saluda, South Carolina.

10. Freeland did not secure payment bonds for the Saluda Armory projects or submit any proof of adequate bonding in its bid submission to the Department.

11. The Department failed to reject Freeland's bid on the Saluda Armory project despite the lack of payment bonds securing subcontractor payment for work on the project.

12. The Department ultimately selected Freeland's bid to act as the general contractor on the Saluda Armory project.

13. On January 21, 2016, Plaintiff submitted a subcontractor proposal to Freeland for glass and aluminum work on the Saluda Armory.

14. Freeland signed and accepted this proposal on January 27, 2016.

15. Plaintiff and Freeland subsequently executed an AIA Standard Form of Agreement Between Contractor and Subcontractor ("Contract").

16. The Contract incorporated Plaintiff's Saluda Armory proposal by which Plaintiff would be paid $50,600 for its work.

17. Plaintiff began and completed its work on the Saluda Armory and properly submitted applications for payment.

18. To date, Plaintiff has not received any payments for any work done on the Saluda Armory.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract - Freeland)

19. The allegations of paragraphs 1 – 16 above are hereby realleged as if set forth herein verbatim.

20. Freeland entered into a valid, binding contract with Plaintiff.

21. Plaintiff performed in accordance with the contract by completing all aluminum and glass work.

22. Freeland breached the contract by failing to timely pay Plaintiff after submission of payment applications.

23. As a direct and proximate result of Freeland's breach, Plaintiff has suffered damages in the amount of $55,027.50.

FOR A SECOND CAUSE OF ACTION
(Violation of S.C. Code § 29-6-250 – South Carolina Military Department)

24. The allegations of paragraphs 1 – 22 above are hereby realleged as if set forth herein verbatim.

25. Plaintiff, as a subcontractor, was a third-party beneficiary to the contract formed between Freeland and the Department for the construction of the Saluda Armory.

26. The Department violated South Carolina's Subcontractors' and Suppliers' Payment Protection Act ("SPPA") that requires a government agency secure and maintain statutory bonding.

27. As a direct result of the Department's violation, payment was not secured and Plaintiff was not able to collect for its work on the Saluda Armory after Freeland failed to pay; as a result, Plaintiff suffered damages in the amount of $55,027.50.

FOR A THIRD CAUSE OF ACTION
(Quantum Meruit – South Carolina Military Department)

28. The allegations of paragraphs 1 – 27 above are hereby realleged as if set forth herein verbatim.

29. Plaintiff conferred a benefit on the Department by completing aluminum and glass work on the Saluda Armory in accordance with the Contract between Plaintiff and Freeland.

30. The Department realized the benefit of Plaintiff's work by utilizing and continuing to utilize the Saluda Armory.

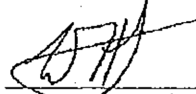
31. The Department continues to use the Saluda Armory and Plaintiff has not been paid the value of their work.

WHEREFORE, Plaintiff prays for judgment against Defendants and that Plaintiff be awarded: (1) actual damages; (2) prejudgment interest; (3) attorneys' fees and costs; and (4) such other and further relief as the Court and jury deem just and appropriate.

~Signature Page to Follow~

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.



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ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina

December 27, 2016

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	) FOR THE FIFTH JUDICIAL CIRCUIT
Meritage Asset Management, Inc. d/b/a Century Glass Company Plaintiff, v. Freeland Construction Company, Inc. and the South Carolina Military Department, Defendants.	) Civil Action No.: 2016-CP-40-07647 Answer and Cross Claim

2017 MAR 29 AM 8:37
RICHLAND COUNTY FILED

The South Carolina Military Department (the "Department") files and serves its Answer and Cross Claim on Meritage Asset Management, Inc. d/b/a Century Glass Company ("Meritage") and Freeland Construction Company, Inc. ("Freeland").

FOR A FIRST DEFENSE

1. Every allegation that is not admitted, qualified, or otherwise explained is denied.

2. Responding to the allegations of Paragraph 1 and Paragraph 2, the Department lacks knowledge or information sufficient to form a belief as to the truth of these paragraphs and therefore denies same.

3. Responding to the allegations of Paragraph 3 and Paragraph 4, the Department admits the allegations of these paragraphs.

4. Responding to the allegations of Paragraph 5 and Paragraph 6, the Department lacks knowledge or information sufficient to form a belief as to the truth of these paragraphs and therefore denies same.

5. Responding to Paragraph 7 through Paragraph 12, the Department admits the allegations of these paragraphs.

6. Responding to Paragraph 13 through Paragraph 18, the allegations are admitted in so far as the Department understands that Meritage was a subcontractor for Freeland but otherwise the Department lacks knowledge or information sufficient to form a belief as to the remaining allegations in these paragraphs and therefore denies same.

7. Responding to Paragraph 19, the allegations of Paragraph 1 through Paragraph 6 of this Answer are realleged as fully as if repeated verbatim herein.

8. Responding to Paragraph 20 through 23, the Department lacks knowledge or information sufficient to form a belief as to the truth of these paragraphs and therefore denies same.

9. Responding to Paragraph 24, the allegations of Paragraph 1 through Paragraph 8 of this Answer are realleged as fully as if repeated verbatim herein.

10. Responding to Paragraph 25, the Department denies these allegations.

11. Responding to Paragraph 26, the Department admits that, as of its knowledge, no bond or security was obtained for the construction of the Saluda Armory. The Department denies the remaining allegations of these paragraphs as written.

12. Responding to Paragraph 27, Department lacks knowledge or information sufficient to form a belief as to the truth of those allegations and therefore denies same.

13. Responding to Paragraph 28, the allegations of Paragraph 1 through Paragraph 12 of this Answer are realleged as fully as if repeated verbatim herein.

14. Responding to Paragraph 29, the Department admits that Plaintiff installed aluminum and glass at the Saluda Armory. As to the remaining allegations of this Paragraph, Department lacks knowledge or information sufficient to form a belief as to the truth of those allegations and therefore denies same. Department denies that any work performed by Plaintiff gives rise to a valid claim for *quantum meruit* or any other claim against the Department.

15. Responding to Paragraph 30, the Department admits that Plaintiff performed work on the Saluda Armory and that the Department continues to utilize the Saluda Armory. Department denies that any work performed by Plaintiff gives rise to a valid claim for *quantum meruit* or any other claim against the Department.

16. Responding to Paragraph 31, the Department admits that it continues to use the Saluda Armory. As to the remaining allegations, the Department lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding the payment status and therefore denies same.

FOR A SECOND DEFENSE

17. To the extent that a response is necessary to the Prayer for Relief, the Department denies that the Plaintiff is entitled to the requested relief as to the Department.

FOR A THIRD DEFENSE AND MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

18. The allegations of Paragraph 1 through Paragraph 17 of this Answer are realleged as fully as if repeated verbatim herein.

19. Meritage has failed to state facts sufficient to constitute a cause of action for a claim of relief under Section 29-6-250.

20. The Department prays that this cause of action be dismissed.

FOR A FOURTH DEFENSE AND MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

21. The allegations of Paragraph 1 through Paragraph 20 of this Answer are realleged as fully as if repeated verbatim herein.

22. Meritage has failed to state facts sufficient to constitute a cause of action for a claim of relief for *quantum meruit.*

23. There is an express contract between the Department and Freeland and between Freeland and Meritage. Therefore, there is no cause of action for *quantum meruit* and these claims should be dismissed.

24. The Department prays that the cause of action for *quantum meruit* be dismissed with prejudice.

FOR A FIFTH DEFENSE

25. The allegations of Paragraph 1 through Paragraph 24 of this Answer are realleged as fully as if repeated verbatim herein.

26. Department paid its obligations under its contract with Freeland on 7 June 2016.

27. Prior to making the aforementioned payment, Department had not received a demand for payment from Meritage.[1]

28. "[T]he 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." Sloan Const. Co. v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E.2d 158, 165–66 (2008) holding modified by Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013) (to clarify that there is not a recovery in tort under

[1] Personnel at the Department were copied on an email dated August 8, 2016, from Mr. Rando Motley of Century Glass to Mr. Vince Bell of Freeland telling Freeland that Meritage had not received payment.

the SPPA). Therefore, the Plaintiff is not entitled to relief from the Department pursuant to the South Carolina Subcontractors' and Suppliers' Payment Protection Act.

29. The Department prays that the Complaint be dismissed with prejudice.

FOR AN SIXTH DEFENSE

30. The allegations of Paragraph 1 through Paragraph 29 of this Answer are realleged as fully as if repeated verbatim herein.

31. Department is an agency of the State of South Carolina and is protected under the doctrine of sovereign immunity.

32. The Department prays that this case be dismissed with prejudice.

CROSS CLAIM AGAINST FREELAND CONSTRUCTION COMPANY, INC.

33. The allegations of Paragraph 1 through Paragraph 32 of this Answer are realleged as fully as if repeated verbatim herein.

34. Freeland was the general contractor for the improvements to the Saluda Armory, and, upon information and belief, Freeland engaged Meritage as a subcontractor to perform certain work at the Saluda Armory as a subcontractor for Freeland.

35. It was Freeland's duty, obligation, and responsibility to pay Meritage for whatever work Meritage performed in accordance to whatever agreement existed between Freeland and Meritage.

36. The Department has made all required payments under the contract to Freeland.

37. If Freeland has not paid Meritage for its work, Freeland has breached its duties and obligations and has retained funds it received from the Department that should have been paid to Meritage.

38. Freeland did not inform the Department prior to the Department's final payment to Freeland that Meritage had not been paid all it was due as a subcontractor for its work.

39. Meritage did not inform the Department prior to the Department's final payment to Freeland that Meritage had not been paid all it was due as a subcontractor for its work.

40. Should a judgment be entered against the Department for sums due to Meritage, the Department is entitled to indemnification from Freeland.

41. Wherefore, should this Court find that the Department owes any sums to Meritage, the Department prays for a judgement of indemnification against Freeland for such sums plus interest, costs, attorney fees, and any other appropriate relief.

WHEREFORE, having fully answered the Complaint in this matter, Department prays:

1. That all claims alleged against Department be dismissed with prejudice.
2. That Department be awarded attorney's fees and costs.
3. For such other and further relief as may be appropriate.

WHEREFORE, Department further prays for indemnification for any sums that may be found owing to Meritage plus interest, costs, attorney fees and any other appropriate relief.

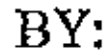
Respectfully submitted,

ALAN WILSON
Attorney General

T. PARKIN C. HUNTER
Senior Assistant Attorney General
S.C. Bar No. 2827

KEVIN DESMOND MARONEY
Assistant Attorney General

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549



BY: ______________________

March 24, 2017

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiff,

v.

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

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2016-CP-40-07647

CERTIFICATE OF SERVICE

(Answer and Cross Claim)

2017 MAR 29 AM 8:37
RICHLAND COUNTY
FILED
JEANETTE W. McBRIDE
C.C.P. G.S.

I hereby certify that I have served Meritage Asset Management, Inc. d/b/a Century Glass Company and Freeland Construction Company, Inc. the below listed documents by mailing to their attorneys or registered agents at the addresses below via the United States Mail, return receipt requested to Mr. Canty, this March 24, 2017.

William H. Yarborough
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211

Kenneth B. Canty
1629 Meeting Street Road
Charleston, South Carolina 29405

Documents served:

1. Answer and Cross Claim

THOMAS PARKIN C. HUNTER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3680
(803)734-3677 (Fax)

March 24, 2017

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-40-07647

Meritage Asset Management, Inc., d/b/a Century Glass Company
Plaintiff,
vs.
Freeland Construction Company, Inc. and the South Carolina Military Department
Defendant.

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Plaintiff's Attorney:	Defendant's Attorney:
William H. Yarborough, Jr., Bar No. 102868	T. Parkin Hunter Bar # 2827
Address:	Kevin D. Maroney, Bar No. 102545
Sweeny, Wingate & Barrow, P.A.	Address:
Post Office Box 12129	P.O. Box 11549, Columbia, SC 29211-1549
Columbia, SC 29211	Phone: 803.734.6151 Fax803.734.3677
Phone: 803-256-2233Fax _____	E-mail: phunter@sacg.gov
E-mail: why@swblaw.comOther: _____	kmaroney@scag.gov Other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

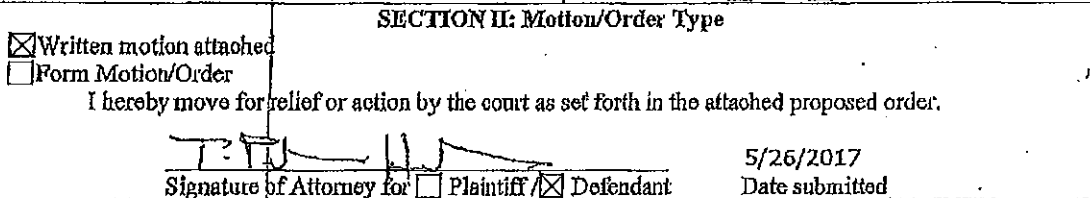
SECTION I: Hearing Information

Nature of Motion: Motion to For Summary Judgment
Estimated Time Needed: 15 min. Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.



Signature of Attorney for ☐ Plaintiff /☒ Defendant 5/26/2017 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ ________
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by: JM Date Filed: 5-26-17
☐ MOTION FEE COLLECTED: $ ____
☐ CONTESTED – AMOUNT DUE: $ ____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2016-CP-40-07647

South Carolina Military Department's Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment

MAY 26 AM 10: 54
C.C.P. & G.S.

This case is about claims for payment by a subcontractor. The South Carolina Military Department (the "Department") contracted with Freeland Construction Company, Inc. ("Freeland") as general contractor to perform work at the Department's Saluda Armory (the "Saluda Armory"). Freeland engaged Meritage Asset Management, Inc. d/b/a Century Glass Company ("Meritage") as a subcontractor to perform certain work. The work has been completed. The Department does not dispute that the work has been satisfactorily performed. The Department does not have any direct knowledge about the payment status of the accounts between Freeland and Meritage. The Department, however, has paid its general contractor, Freeland, in full for the work performed. Meritage never told the Department that Freeland had not been paying Meritage before the Department made its final payment to Freeland.

Meritage asserts that the Department failed to ensure that Freeland obtained a bond under § 29-6-250, the Subcontractors' and Suppliers' Payment Protection Act (SPPA). That assertion is correct. Nevertheless, any recovery by Meritage is limited to any amounts owed on the contract between the Department and Freeland, at the time Meritage either gave notice to or demanded

payment from the Department. The Department did not have notice of any claims by Meritage at the time the Department made its final payment to Freeland. Thus, any claim related to the bond is limited, and in this case is zero.

BACKGROUND

19 September, 2014: The Department and Freeland agree on a contract. (Affidavit in Support, ¶2)

21 January, 2016: Meritage submitted a subcontractor proposal to Freeland for subcontractor work on the Saluda Armory (Complaint, paragraph 13).

27 January, 2016: Freeland accepted Meritage's proposal for the work on the Saluda Armory (Complaint, paragraph 14).

1 June, 2016: Freeland completed the work on the Armory (Affidavit in Support, ¶3).

3 June, 2016: Final invoice from Freeland submitted to the Department (Affidavit in Support, ¶4).

7 June 2016: The final invoice for $93,973.69 was posted for payment to Freeland, completing the contract between the Department and Freeland. (Affidavit in Support, ¶5).

17 June 2016: The final payment was deposited. (Affidavit in Support, ¶6).

Meritage admits that it did not give the Department notice of Freeland's nonpayment prior to June 7, 2016. (Attached is Meritage's Responses to Request to Admit, Response #2).

The first time the Department learned of Freeland's nonpayment was August 8, 2016. (Affidavit in Support, ¶8).

Meritage has asserted a third party beneficiary breach of contract claim against the Department for the failure to require Freeland to obtain a bond under the SPPA, and a claim for quantum meruit. Meritage has also asserted a claim for breach of contract against Freeland.

There are not any disputed facts with regard to the matters between Meritage and Freeland and the Department. The claims against the Department fail as a matter of law.

TORT ACTION UNDER THE SPPA

Although Meritage asserts third party beneficiary and quantum meruit claims only, the Department would like to make the following clear: "[N]o tort action arises under the SPPA." Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 572, 743 S.E.2d 778, 784 (2013). Thus, if Meritage is asserting a tort action under the SPPA, such a claim fails as a matter of law.

THIRD PARTY BENIFICIARY CONTRACT UNDER SPPA

"[A] governmental entity may be liable to a subcontractor only for breach of contract for failing to comply with the SPPA bonding requirements." Id. 403 S.C. 560, 564, 743 S.E.2d 778, 780. Although Meritage may pursue a third party beneficiary breach of contract claim against the Department, the law is clear 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." Sloan Const. Co. v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E.2d 158, 165–66 (2008) holding modified by Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013) (to clarify that there is not a recovery in tort under the SPPA).

There was no outstanding balance owed to Freeland when Meritage made its claim for payment to the Department. Meritage, moreover, had not given the Department notice of Freeland's nonpayment when the Department paid Freeland in full. Because no outstanding balance existed between the Department and Freeland when Meritage notified the Department of Freeland's nonpayment, Meritage is not entitled to pursue recovery from the Department based on a third party beneficiary breach of contract claim. Thus, Meritage's third party beneficiary breach of contract claim against the Department fails as a matter of law.

QUANTUM MERUIT

"Quantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct.App.2012) (quoting QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 202, 600 WS.E.2d 105, 108 (Ct.App.2004)). Although modern case law utilizes terms such as "restitution" and "unjust enrichment," those terms are simply modern designations for the doctrine of quasi-contract. Id., 400 S.C. 320, 325, 734 S.E.2d 177, 180 (quoting Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct.App.1988)). Because unjust enrichment is a modern designation for the doctrine of quasi-contract, and because quasi contract and quantum meruit are equivalent terms for an equitable remedy, the term quantum meruit can be substituted for unjust enrichment in the following sentence. "Courts addressing a claim of unjust enrichment [or quantum meruit] by a subcontractor against a property owner have typically denied recovery where the owner in fact paid on its contract with the general contractor." Id., 400 S.C. 320, 326, 734 S.E.2d 177, 180 (quoting Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 262-63, 440 S.E.2d 129, 131 (1994)).

In Williams Carpet Contractors, Inc. v. Skelly, the court reviewed a case in which a jury awarded damages for the Plaintiff on his claim for quantum meruit. Notwithstanding the jury award, the Defendant filed a JNOV motion, which the trial court granted. The Plaintiff appealed. The Court of Appeals overturned the trial court's decision to grant a JNOV because the Plaintiff had presented some evidence that the general contractor had not been paid in full. Id., 400 S.C. 320, 326, 723 S.E.2d2d 177, 180. If the one reasonable inference that could have been drawn from the evidence supported the claim that the general contractor had been paid in full, the court would have affirmed the decision to grant a JNOV. *Cf.* Id., 400 S.C. 320, 325, 734 S.E.2d 177,

180 ("If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to a jury" (quoting Chaney v. Burgess, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965)).

In this case, the Department paid Freeland (the general contractor) in full on June 7, 2016. Meritage admits that it did not give the Department notice of Freeland's nonpayment prior to June 7, 2016. The Department confirms that it did not have notice prior to June 7, 2016. Because the Department has paid on its contract with the general contractor, Meritage is not entitled to pursue its claim for quantum meruit against the Department. Thus, Meritage's quantum meruit claim fails as a matter of law.

CONTRACT OR QUANTUM MERUIT

Although Meritage is careful to base its quantum meruit claim against the Department on the benefit that the Department received because of the contract between Meritage and Freeland rather than on the contract between the Department and Freeland, the Department would like to make a few points clear.

Quantum meruit is incompatible with the existence of a valid contract. Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 574-5, 743 S.E.2d 778, 785-6 (2013) (citing Sloan I, 377 S.C. 108, 659 S.E.2d 158 (holding the SPPA's bonding requirements are incorporated into all public works construction contracts); Strickland v. Coastal Design Assocs., 294 S.C. 421, 424, 365 S.E.2d 226, 228 (Ct.App.1987) ("The law is well settled in this nation that where an express contract has been rescinded or abandoned, one furnishing labor or materials in part performance may recover in quantum meruit *unless the original contract remains in force.*" (Emphasis added by the Court))). "If the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not

been abandoned or rescinded, the plaintiff may not recover under quantum meruit." Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 328, 734 S.E.2d 177, 181 (Ct.App.2012) (quoting Swanson v. Stratos, 350 S.C 116, 122, 564 S.E.2d 117, 120 (2002)).

Although courts have asserted that the existence of an express contract covering the issue of compensation is a defense to an action for quantum meruit, they have also said the following. "While recovery may be had in quantum meruit for services fully performed under an express contract, the plaintiff's recovery is limited to the amount the parties agreed should be paid for the services." Id., 400 S.C. 320, 328-29, 734 S.E.2d 177, 182 (quoting Johnston v. Brown, 290 S.C. 141, 148, 348 S.E.2d 391, 395 (Ct.App.1986, rev'd on other grounds, 292 S.C. 478, 357 S.E.2d 450 (1987)). Nevertheless, "[c]ase law bars recovering under both [a breach of contract theory and a quantum meruit theory]," Id., 400 S.C. 320, 329, 734 S.E.2d 177, 182, though both theories may be pled. Id., 400 S.C. 320, 328, 734 S.E.2d 177, 181 ("A breach of contract claim and quantum meruit claim can be alternative rather than inconsistent remedies") (quoting JASDIP Props. SC, LLC v. Estate of Richardson, 395 S.C. 633, 639, 720 S.E.2d 485, 488 (Ct. App.2011)).

In this case, the Department had an express contract with Freeland and Freeland had an express contract with Meritage. The contract between the Department and Freeland covering compensation for work on the Saluda Armory serves as the basis for Meritage's third party beneficiary breach of contract claim against the Department. Because Meritage uses that contract as the basis for its first cause of action against the Department, Meritage cannot and does not dispute the existence and validity of that contract. Just as importantly, Meritage does not argue that the contract was rescinded or abandoned. Consequently, the contract between the Department and Freeland must remain in force. Similarly, the contract between Meritage and

Freeland covering compensation for work on the Saluda Armory serves as the basis for Meritage's breach of contract claim against Freeland. Because Meritage uses that contract as the basis for its breach of contract claim against Freeland, Meritage cannot and does not dispute the existence and validity of that contract. Therefore, the contract between Meritage and Freeland must remain in force.

Because valid contracts covering compensation for work on the Saluda Armory exist and remain in force, the quasi-contractual claim of quantum meruit is inapplicable to this action, at least to the extent Meritage seeks recovery in an amount above the compensation agreed to for work on the Saluda Armory in those contracts. Thus, to that extent, Meritage's quantum meruit claim fails as a matter of law.

In its breach of contract claim against both Freeland and the Department, Meritage asserts that it suffered damages for $55,027.50. (Complaint ¶23 and ¶27). The amount that Meritage and Freeland agreed would be the compensation for Meritage's work on the Saluda Amory, however, is $50, 600. (Complaint ¶16). Meritage does not say how much money it seeks for its claim of quantum meruit. Meritage only asserts that it has not been paid the "value of [its] work," (Complaint ¶31), though Meritage still incorporates the damages amounts asserted in the breach of contract claims against the Department and Freeland. (Complaint ¶28). For the quantum meruit claim against the Department, any amount over the contracted for compensation of $50,600 fails as a matter of law.

FAILURE TO PURSUE A MECHANIC'S LIEN

The Department asked the court for leave to amend its answer to include the affirmative defense of the failure to pursue a mechanic's lien, though it believes that defense is contained within its Fourth Defense to this action (the failure to state facts sufficient to constitute a

quantum meruit claim). (Answer ¶¶21-24). The motion to amend is pending before the court. If the court grants the Department's motion to amend (which it requests as a precaution), the failure to pursue a mechanic's lien is an additional delineated ground for judgment in favor of the Department.

The South Carolina Supreme Court has stated that the failure to pursue a mechanic's lien "will not bar an action for quantum meruit recovery as a matter of law if a plaintiff can otherwise prove circumstances establishing unjust enrichment." Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 327, 734 S.E.2d 177, 181 (Ct.App.2012) (citing Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 263, 440 S.E.2d 129, 131-32 (1994) (citing Gee v. Eberle, 279 Pa.Super. 101, 420 A.2d 1050 (1980); Costanzo v. Stewart, 9 Ariz.App. 430, 453 P.2d 526 (1969) (failure to file a mechanic's lien no bar to recovery for unjust enrichment where owner paid no one).

Additionally, "[the mechanic's lien statute] limits the aggregate amount of subcontractor/materialmen mechanic's liens to the amount of the owner's contract with the general contractor." Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 262 n. 2, 440 S.E.2d 129, 131 n. 2 (1994). That statutory limit, moreover,

> "provides a framework for determining what recovery is proper in quantum meruit cases involving construction contracts. Where…a building owner has paid a general contractor a substantial amount of the contract price, we find the mechanic's lien statute, and their limitations, are a proper measure of the subcontractor's damages against the property owner in a quantum meruit action."

Rose Electric, Inc. v. Cooler Erectors of Atlanta, Inc., 418 S.C. 424, 433, 794 S.E.2d 382, 387 (Ct.App.2016).

Again, if the property owner has paid on its contract with the general contractor, then the subcontractor's damages against a property owner are zero. *Supra* Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 326, 734 S.E.2d 177, 180 (Ct.App.2012) ("Courts addressing a

claim of unjust enrichment [or quantum meruit] by a subcontractor against a property owner have typically denied recovery where the owner in fact paid on its contract with the general contractor") (quoting Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 262-63, 440 S.E.2d 129, 131 (1994)).

In this case, Meritage did not pursue a mechanic's lien. More importantly, the Department paid the general contractor, Freeland, in full for the construction of the Saluda Armory. Thus, the Department is not unjustly enriched; it paid for the construction of the Saluda Armory. Because Meritage cannot prove circumstances establishing unjust enrichment, its failure to pursue a mechanic's lien is fatal to its quantum meruit claim.

If Meritage's quantum meruit claim did not fail as a matter of law (which it does), Meritage would still receive nothing from the Department. A subcontractor's recovery in a quantum meruit action is limited to the amount of the property owner's contract with the general contractor. Recovery, however, is typically denied when the property owner has paid the general contractor in full. Because the general contractor has been paid in full for the construction of the Saluda Armory, the Department does not owe Meritage anything. There is no genuine issue of material fact in this case, and the Department is entitled to judgment as a matter of law.

SOVEREIGN IMMUNITY

Meritage has two claims against the Department in this case. One of those claims is a third party beneficiary breach of contract claim. That claim stems from a contract between the Department and Freeland. The SPPA's bonding requirements are incorporated into all public works construction contracts. Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 574-5, 743 S.E.2d 778, 785 (2013) (citing Sloan Const. Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 120, 659 S.E.2d 158, 165 (2008)). Thus, the SPPA's bonding requirements are incorporated

into the contract between the Department and Freeland.

The Supreme Court has held that the exclusive procedures for resolving suits on contracts with the State or State entities are contained within the South Carolina Consolidated Procurement Code. Unisys Corp. v. South Carolina Budget and Control Bd. Div. of General Services Information Technology Management Office, 346 S.C. 158, 170, 551 S.E.2d 263, 270 (2001) (citing S.C. Code Ann. §11-35-4230 "Authority to resolve contract and breach of contract controversies"). Those procedures do not involve the circuit court, unless a party appeals the decision of the procurement panel. S.C. Code Ann. §11-35-4410(6).

Meritage's third party beneficiary breach of contract claim is a contractual dispute with a State entity. Because the procurement code provides the exclusive procedures for resolving contract disputes with State entities—procedures removed from circuit court until an appeal of the procurement panel—Meritage should be barred from bringing its third party beneficiary breach of contract claim in circuit court. Nevertheless, the Supreme Court has allowed subcontractors to sue on a contract with a State entity in circuit court, when the suit is based on the failure to comply with the requirements of the SPPA. Sloan Const. Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 121, 659 S.E.2d 158, 166 (2008) (remanding subcontractor's third party beneficiary breach of contract claim to circuit court for a determination of SCDOT's liability to the subcontractor); and Sloan Const. Co., Inc. v. Southco Grassing, Inc., 395 S.C. 164, 173, 717 S.E.2d 603, 608 (2011) (affirming circuit court's ruling that SCDOT was liable to subcontractor for its failure to maintain a valid bond under SPPA). Therefore, Meritage's third party beneficiary breach of contract claim in circuit court is not barred by the doctrine of sovereign immunity, though it still fails as a matter of law for other reasons outlined earlier. (Nevertheless, the Department would like to preserve any right that it may have to argue against

the precedent of the Sloan line of cases, in the event of an appeal).

Meritage's quantum meruit claim, however, is barred by sovereign immunity. "[B]ecause a statute waiving the State's immunity must be strictly construed, the State can be sued only in the manner and upon the terms and conditions prescribed by the statute." Unisys Corp. v. South Carolina Budget and Control Bd. Div. of General Services Information Technology Management Office, 346 S.C. 158, 170, 551 S.E.2d 263, 270 (2001) (citing Jeff Hunt Mach. Co. v. South Carolina State Highway Dep't, 217 S.C. 423, 60 S.E.2d 859 (1950)). In Unisys, the Supreme Court made clear that the State, because of the passage of §11-35-4230, consented to be sued based upon contract; the State, however, did not and has not consented to suits in equity.

Meritage's quantum meruit claim is obviously not based upon contract; quantum meruit is an equitable remedy. Because the State has never consented to suits in equity, Meritage's quantum meruit claim is barred by State sovereign immunity, whether the claim is brought under the procurement code or in circuit court. Consequently, that claim fails as a matter of law.

CONCLUSION

Based on the above, the Department moves for summary judgment. "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." State Farm Fire & Casualty Co. v. Breazell, 324 S.C. 228, 230, 478 S.E.2d 831, 832 (1996) (citing Café Associates, Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991)). Under Rule 56(b), a defending party can move for summary judgment at any time.

Although the Department is sympathetic to the plight of Meritage, the only legal recourse is against Freeland. Meritage cannot obtain any money from the Department. Because there is no genuine issue of material fact, the Department is entitled to judgment as a matter of law.

Respectfully submitted,

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Attorney General

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BY: Kevin Desmond Maroney

May 26, 2017

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND) THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

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

Defendant.

Civil Action No.: 2016-CP-40-7647

CROSS MOTION FOR SUMMARY JUDGMENT

RICHLAND CO. FILED
2017 JUL 14 PM 12:42
JEANETTE W. MCBRIDE
CLERK C.P. & G.S.

TO: THOMAS PARKIN C. HUNTER, ESQUIRE AND KEVIN DESMOND MARONEY, ESQUIRE, ATTORNEYS FOR SOUTH CARLINA MILITARY DEPARTMENT:

PLEASE TAKE NOTICE THAT, the undersigned attorneys for the Plaintiff, will move before a presiding judge for the Richland Court of Common Pleas on the tenth (10th) day after service thereof, or as soon thereafter as may be heard, for an Order granting Defendants summary judgment in accordance with Rule 56 of the South Carolina Rules of Civil Procedure.

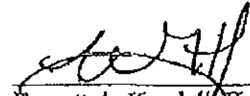
The grounds for this Motion are that the Defendant South Carolina Military Department has filed a Motion for Summary Judgment. Plaintiff stipulates to the facts asserted by the Defendant and, as a result, no genuine dispute as to any material fact exists.

This motion will be supported by a memorandum of law that may include deposition transcripts, affidavits, and other evidentiary material which discovery has revealed in this matter.

Signature Page to Follow

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.



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ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina

July 13, 2017

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND) THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

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

Defendants.

Civil Action No.: 2016-CP-40-7647

RICHLAND COUNTY FILED 2017 NOV 29 JEANETTE W. McBRIDE C.C.P. & G.S.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiff Meritage Asset Management, Inc., d/b/a Century Glass Company's ("Meritage") Cross Motion for Summary Judgment. Meritage respectfully requests that this Court grant it's Motion for Summary Judgment and deny Defendant South Carolina Military Department's (the "Department") Motion for the reasons set forth below.

FACTS

The facts relating to this Motion are not in dispute. The legal issue is whether the Department is obligated to pay a sub-contractor for work performed on the Saluda Armory where the department has failed to comply with the requirements of the Little Miller Act and the Subcontractors' and Suppliers' Payment Protection Act ("SPPA"). The Department failed to require Defendant Freeland Construction to obtain a payment bond for work performed. See Defendant's Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment at p. 1. Furthermore, neither the Department nor Freeland informed Meritage of the failure to obtain a payment bond. Id. Freeland was paid in full but failed to pay

Meritage. Id. Freeland is in default. To date, Meritage has still not been paid for the satisfactory work it performed on the Saluda Armory. Id.

LEGAL STANDARD

A motion for summary judgment shall be granted "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." Rule 56(c), SCRCP. "When a motion for summary judgment is made and supported by such facts as would be admissible in evidence at trial, the adverse party may not rest upon the mere allegations of his pleadings. Instead his response to the motion must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him." Moody v. McLellan, 295 S.C. 157, 163, 367 S.E.2d 449, 452-53 (Ct. App. 1988) (citing Rule 56(e), SCRCP).

ARGUMENT

Prior to the enactment of South Carolina's "Little Miller Act", S.C. Code Ann. § 11-30-3030, South Carolina "law afforded limited protection to subcontractors and suppliers providing labor and materials on public projects." Sloan Const. Co. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008). "[T]hese provisions are . . . enacted to address the problem of subcontractors who may not use liens on public property to secure payment for work performed on public projects . . . ." Id. The Subcontractors' and Suppliers' Payment Protection Act ("SPPA") was designed to "expand[] the protections afforded these parties under the Little Miller Acts." Id. at 144. 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 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 Ann. § 29-6-250 (emphasis added). Further, the South Carolina Supreme Court has held that the "government's failure to comply with the SPPA's bond requirements [] gives rise to a third-party beneficiary breach of contract claim by the subcontractor against the government entity. Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013) (citing Sloan at 118, 659 S.E.2d at 164).

"[A] governmental entity may be liable to a subcontractor only for breach of contract for failing to comply with the SPPA bonding requirements." Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 572, 743 S.E.2d 778, 784 (2013). Under the SPPA, the Department was required to ensure that Freeland obtained a payment bond. It is not disputed that the Department failed to do so - in its own Motion for Summary Judgment, the Department boldly proclaims that it did not secure a payment bond.

The holding in Sloan, however, grants the Department a pass: "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." Sloan, 377 S.C. at 121, 659 S.E.2d at 165-66. With Sloan as a shield, the Department argues that its failure to follow the law as prescribed is of no consequence. Because the Department paid the full balance to Freeland, they are not liable.

The Court's holding in Sloan should be overturned because it corrupts the very purpose for which the SPPA was created: to protect subcontractors that choose to provide labor and/or materials on government projects. In a private construction setting in which a subcontractor has not been paid for work completed, the subcontractor may take out a lien on a property it provided

labor and materials. See S.C. Code Ann. § 29-5-10. Because no lien may be had against the government, small businesses were at risk for financial ruin prior to the enactment of the SPPA. Consider, without the SPPA, a subcontractor provides labor and/or materials but is not paid. When the sub appeals to the prime and is told the prime is insolvent, he has no option but to take a loss. The SPPA was specifically enacted to protect small businesses from this scenario.

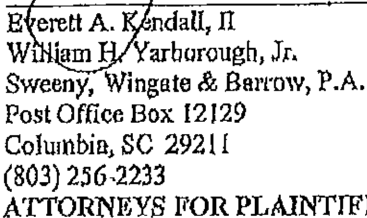
The holding in Sloan castrates each of the protections afforded to small businesses by the legislature in enacting the Little Miller Act and the SPPA. Take this case: Meritage provided labor and materials and was not paid. Meritage appealed to Freeland only to find Freeland is insolvent and no payment bond existed. Because the Department failed to follow the prescribed and codified process, Meritage has no option but to take the loss. Despite the enactment of the South Carolina Little Miller Act and the SPPA, the Sloan Court has ensured that the outcome is the same.

CONCLUSION

Meritage respectfully requests that the Court grant Summary Judgment in its favor as a third-party beneficiary to the contract between the Department and Defendant Freeland for the Department's admitted failure to comply with the SPPA's bonding requirements

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.



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Columbia, South Carolina
November 29, 2017

State of South Carolina)
) In the Circuit Court
County of Richland)

Meritage Asset Management Inc., et al.,

Plaintiffs,) 2016-CP-40-07647

versus) December 8, 2017

Freeland Construction Company Inc., et al.) Columbia, South Carolina

Defendants.)

TRANSCRIPT OF RECORD

B E F O R E:

The Honorable Thomas G. Cooper, Jr.

A P P E A R A N C E S:

William Harley Yarborough, Jr., Esq.
Attorney for the Plaintiff

Kevin Desmond Maroney, Esq.
Attorney for the Defendant

PROVIDED FOR: Will Yarborough, Jr., Esq.

FOR COPIES CONTACT: DeeAnne Varnadoe
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THIS TRANSCRIPT WAS PREPARED FOR WILL YARBOROUGH, ESQ.

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Hearing 4

Certificate 23

THIS TRANSCRIPT WAS PREPARED FOR WILL YARBOROUGH, ESQ.

E X H I B I T S

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FOR THE DEFENDANT:

(WHEREUPON, no exhibits were introduced during this proceeding.)

THIS TRANSCRIPT WAS PREPARED FOR WILL YARBOROUGH, ESQ.

1 PROCEEDINGS

2 THE COURT: Meritage Asset versus Freeland

3 Construction.

4 Please identify yourself for the record.

5 MR. YARBOROUGH: William Yarborough for Meritage

6 Asset.

7 MR. MARONEY: Kevin Maroney for the South Carolina

8 Department of the Military.

9 MR. SMITH: I'm Edward Smith, Your Honor. I'm not

10 hear to argue. I'm just here to merely observe and be of

11 assistance.

12 THE COURT: You're what they call eye candy.

13 I'm sorry, and you are?

14 MR. YARBOROUGH: William Yarborough for Meritage

15 Asset, Your Honor.

16 THE COURT: All right. It's your motion, Mr. Maroney.

17 MR. MARONEY: Thank you, Your Honor. We also have a

18 motion to amend on the docket. I don't know if you want to

19 address that or just go straight to the motion for summary

20 judgement.

21 MR. YARBOROUGH: Your Honor, if I may? I think it

22 might be easiest if he does his motion and we kind of put

23 the motions for summary judgement together with the cross

24 motions. We don't really have a disagreement on the facts.

25 It might make the later argument moot.

1 THE COURT: Well, somebody tell me something about it.
2 MR. MARONEY: Yes, Your Honor.
3 Just for the motion to amend, we move to add the
4 defense of a mechanics failure to pursue a mechanics' lien.
5 THE COURT: Well, tell me what happened.
6 MR. MARONEY: I'm sorry, Your Honor.
7 The Department of the Military contracted with
8 Freeland Construction in this -- to perform certain work on
9 various -- in this case, an armory. Freeland then
10 contracted with the subcontractor Meritage.
11 The work was completed on June 1st on the Saluda
12 Armory.
13 THE COURT: Was that 2017?
14 MR. MARONEY: 2016, Your Honor. Excuse me.
15 The Department paid Freeland, the general contractor,
16 in full on June 7, 2016. The first time that the
17 Department learned of the lack of payment between Freeland
18 and Meritage was August 8, 2016. That fact is important
19 because the Plaintiff Meritage brings a third party
20 beneficiary breach of contract claim based on the
21 Subcontractors' and Suppliers' Payment Protection Act.
22 The South Carolina Supreme Court has stated that the
23 only -- that the liability is limited to the amount
24 outstanding on the contract between the agency and the
25 general contractor at the time of notice. In this case,

1 notice was given after payment had been given in full, so
2 there is no recovery possible.
3 THE COURT: What -- when was the certificate of
4 occupancy, if there was one, issued?
5 MR. MARONEY: I don't -- I don't think there was one,
6 Your Honor, but I wouldn't be able to say for certain.
7 THE COURT: Well ---
8 MR. MARONEY: It was -- the work was completed on June
9 1st and the payment was given in full on June 7, 2016 and
10 then it ---
11 THE COURT: So work was completed on June 1st.
12 MR. MARONEY: Yes, Your Honor.
13 THE COURT: And payment was made on June 7, 2016; is
14 that correct?
15 MR. MARONEY: That's correct, Your Honor.
16 THE COURT: And that's -- and that was the remaining
17 balance on the contract.
18 MR. MARONEY: Yes, Your Honor.
19 THE COURT: And the notice wasn't given until August
20 8th?
21 MR. MARONEY: That's correct, Your Honor.
22 THE COURT: And that was not in the form of a lien.
23 MR. MARONEY: It was not in the form of a lien. It's
24 an e-mail. It's listed in the affidavit in support,
25 paragraph eight. It's an e-mail to one of the individuals

1 at the South Carolina Department of the Military. And Mr.
2 -- and Meritage agrees with the facts and the issue of
3 notice.
4 THE COURT: What is your motion to amend?
5 MR. MARONEY: We can actually drop it, Your Honor,
6 unless you'd like me to -- we had moved, but we can drop
7 that motion.
8 THE COURT: Well, it's up to you.
9 MR. MARONEY: We'll go ahead and drop it.
10 THE COURT: All right. It's withdrawn. That one's
11 signed.
12 And it looks like, Mr. Yarborough, you have a motion
13 for default?
14 MR. YARBOROUGH: Yes, Your Honor, against co-defendant
15 Freeland Construction.
16 THE COURT: Against who?
17 MR. YARBOROUGH: Freeland Construction, Your Honor.
18 THE COURT: Okay.
19 MR. YARBOROUGH: Would you like to hear that now, Your
20 Honor?
21 THE COURT: Yes. Either that or -- Yes, I think we
22 get to -- that will take us to the two motions for summary
23 judgement.
24 MR. YARBOROUGH: Sure.
25 THE COURT: All right. Go ahead.

1 MR. YARBOROUGH: Your Honor, Meritage Asset signed --
2 enacted a contract with Freeland Construction for this
3 project on the Saluda Armory. It was for a total amount of
4 Fifty Thousand Six Hundred Dollars ($50,600) and that
5 contract was actually appended to the complaint in this
6 matter.
7 I have a copy of it if you'd like to see it, Your
8 Honor.
9 THE COURT: Well, do you want me to see it?
10 MR. YARBOROUGH: I would, Your Honor.
11 (WHEREUPON, a document is presented to the Court.)
12 THE COURT: All right. Hold on a minute. Ma'am, are
13 you involved in this case?
14 UNIDENTIFIED SPEAKER: I'm just watching from the
15 Attorney General's office.
16 THE COURT: Okay. I didn't want to hold you here
17 because this make take some time, if you had another case.
18 All right. Tell me about this, Mr. Yarborough.
19 MR. YARBOROUGH: Your Honor, we completed work and
20 submitted our final invoice on May 20, 2016 which made
21 payment due 30 days following that application for payment.
22 I have the application for payment here too, Your
23 Honor, and I will pass it up.
24 We were never paid. To date we have not been paid
25 anything on this contract, so that's a total of ---

1 THE COURT: Nothing?
2 MR. YARBOROUGH: Nothing.
3 THE COURT: No periodic pay?
4 MR. YARBOROUGH: Nothing, Your Honor.
5 THE COURT: Okay.
6 MR. YARBOROUGH: So the total of Fifty Thousand Six
7 Hundred Dollars ($50,600) total, plus interest which is
8 computed -- which is accounted for in the contract at a
9 rate of 8.75 -- well, it's the South Carolina rate per
10 statute, but it's 8.75 percent per annum.
11 THE COURT: Tell me why they should -- you should find
12 them in default.
13 MR. YARBOROUGH: Well, Your Honor, we served them with
14 the complaint on February 9, 2017. Default was actually
15 entered on March 20, 2017. To date we've heard nothing
16 from Freeland Construction in regards to this lawsuit.
17 We sent them a letter. We had a -- we had another
18 hearing on this that was ultimately continued because we
19 had a trial that week, Your Honor, and then we sent a
20 letter giving them notice of that default hearing. And we
21 gave them -- we sent them a letter for this one as well,
22 Your Honor, and we have ---
23 THE COURT: Where's your notice letter?
24 MR. YARBOROUGH: Your Honor, I actually don't have it
25 with me. I can submit it to the Court. We do have a

1 letter and it was sent, I believe, on November 6th by
2 certified and regular mail.
3 THE COURT: Well, it should -- let's put it in the
4 file.
5 MR. YARBOROUGH: All right.
6 THE COURT: For your protection.
7 MR. YARBOROUGH: Yes, Your Honor.
8 Your Honor, I also have ---
9 THE COURT: Now, do we have -- is there any doubt
10 about the amount of damages you're seeking?
11 MR. YARBOROUGH: No, Your Honor. I actually have an
12 affidavit ---
13 THE COURT: Was that provided to them?
14 MR. YARBOROUGH: Yes, sir. I have an affidavit from
15 Randy Wright who is the owner of Meritage Asset Century
16 Glass and it states that's it's Fifty Seven Thousand Two
17 Hundred and Ninety-Six Dollars and Eighteen Cents
18 ($57,296.18).
19 THE COURT: Make it part of the record.
20 MR. YARBOROUGH: Yes, Your Honor, I will.
21 And I also have a computation of that interest if
22 you'd like it.
23 THE COURT: Make it part of the record.
24 MR. YARBOROUGH: Will do.
25 Your Honor, I would like to introduce Subcontractors'

1 Application for Payment as Plaintiff's Exhibit Number Two.
2 (WHEREUPON, Subcontractors' Application for
3 Payment was introduced and received into
4 evidence as Plaintiff's Exhibit Number Two.)
5 THE COURT: Without objection.
6 MR. YARBOROUGH: And Your Honor, I'd like to make the
7 contract between Meritage Asset and Freeland Construction
8 Plaintiff's Exhibit Number One.
9 (WHEREUPON, the Contract between Meritage
10 Asset and Freeland Construction was
11 introduced and received into evidence as
12 Plaintiff's Exhibit Number One.)
13 THE COURT: Without objection.
14 MR. YARBOROUGH: The Affidavit of Randy Wright as
15 Plaintiff's Exhibit Number Three.
16 (WHEREUPON, the Affidavit of Randy Wright
17 was introduced and received into evidence as
18 Plaintiff's Exhibit Number Three.)
19 THE COURT: Without objection.
20 MR. YARBOROUGH: The computation of interest as
21 Plaintiff's Exhibit Number Four.
22 (WHEREUPON, the Computation of Interest was
23 introduced and received into evidence as
24 Plaintiff's Exhibit Number Four.)
25 THE COURT: Without objection.

1 Anything further on this issue?
2 MR. YARBOROUGH: No, Your Honor. And I have a
3 prepared order if you'd like it.
4 THE COURT: You do?
5 MR. YARBOROUGH: Yes, sir.
6 THE COURT: Hand it up, please.
7 (WHEREUPON, a document is presented to the Court.)
8 THE COURT: I've signed your order and I'm going to
9 file it.
10 MR. YARBOROUGH: Thank you, Your Honor.
11 THE COURT: Who filed first?
12 MR. MARONEY: I did, Your Honor.
13 THE COURT: All right. You may proceed.
14 MR. MARONEY: Thank you, Your Honor.
15 As I noted in the earlier recitation, the general
16 contractor in this case, Freeland, was paid in full by the
17 Department on June 7, 2016. The Department was not given
18 notice by Meritage of the nonpayment between Freeland and
19 Meritage until August 8, 2016 after full payment had been
20 given.
21 The Supreme Court in *Sloan* and then reaffirmed in
22 *Shirley's Iron Works* said that the third-party beneficiary
23 breach of contract claim based on the SPPA, the
24 Subcontractors' and Suppliers' Payment Protection Act, is
25 limited to the amount outstanding on the contract between

1 the agency and the general contractor at the time notice is
2 given of nonpayment between the general and the sub. That
3 precludes any recovery for Meritage under the SPPA in this
4 case. That's the argument pertaining to the third-party
5 beneficiary breach of contract claim, Your Honor.
6 Meritage has also asserted a *quantum meruit* claim.
7 For that we have two principle arguments, Your Honor.
8 First, in *Shirley's Iron Works*, the Court made clear
9 that the existence of an outstanding -- the existence of a
10 valid contract enforced precludes *quantum meruit* because
11 it's fundamentally at odds with an equitable -- with that
12 equitable claim which is supposed to occur when there is no
13 governing contract. In this case, as just occurred, the --
14 Meritage has brought Freeland into default for the contract
15 between them. They've also asserted a breach of contract
16 claim against -- they don't dispute that there's an existed
17 -- an existing governing contract for both Meritage and
18 Freeland as well as between the Department and Freeland.
19 That precludes a *quantum meruit* claim, Your Honor.
20 In addition, even if there is some -- perhaps some
21 case law that might indicate a *quantum meruit* claim can be
22 made, the limitation is the same as for the SPPA, which is
23 when a general contractor has been paid in full the agency
24 or property owner does not owe anything or recovery is not
25 possible under a *quantum meruit* claim.

1 THE COURT: Is there evidence in the file that you
2 paid the general contractor in full?
3 MR. MARONEY: Yes, Your Honor. It's attachment --
4 it's in our motion for summary judgement. The final
5 payment was deposited -- it's affidavit in support,
6 paragraph six. The affidavit in support is attached to the
7 motion for summary judgement.
8 THE COURT: As what? Exhibit what?
9 MR. MARONEY: It's ---
10 THE COURT: It's not an exhibit. I found it.
11 MR. MARONEY: Yes, Your Honor. It's the -- That's
12 correct. It's the affidavit that's referencing various --
13 the screenshot was Exhibit E -- pardon me -- which shows
14 the direct deposit clearing date was June 17, 2016; that's
15 Exhibit E of the motion for summary judgement. But the
16 payment is explained in the affidavit in support which is
17 at the back of the motion for summary judgement or attached
18 to the motion for summary judgement.
19 THE COURT: All right. Anything further?
20 MR. MARONEY: No, Your Honor.
21 THE COURT: All right. Mr. Yarborough.
22 MR. YARBOROUGH: Your Honor, we do not dispute the
23 facts in this case and we understand that we have a hill to
24 climb and some hurdles to jump.
25 The South Carolina Supreme Court found in *Sloan* and

1 did later affirm in *Shirley's Iron Works* that the
2 government's failure to secure a payment bond under the
3 SPPA does give rise to a third-party breach of contract
4 action against the government by an injured subcontractor.
5 And to reach this conclusion, Your Honor, the Supreme Court
6 looked at the legislature's intent in enacting SPPA. And
7 in *Sloan* the Court stated that as a remedial statute, the
8 SPPA should be liberally construed to effectuate its
9 purpose. And it further went on to quote that the very
10 title of the SPPA clearly indicates the General Assembly
11 intended to provide stronger payment protection
12 specifically for subcontractors and suppliers on government
13 projects.
14 THE COURT: Let me ask you, what should they have
15 done?
16 MR. YARBOROUGH: Your Honor, they should have complied
17 with their duty in ensuring that Freeland had the payment
18 bond in place prior to granting Freeland Construction the
19 contract.
20 THE COURT: Okay.
21 MR. YARBOROUGH: Going forward, Your Honor, the Court
22 also found that the SPPA does create an affirmative duty on
23 behalf of the government and that the legislators intended
24 for subcontractors to be able to vindicate their rights as
25 against the government when they're injured.

1 The Court further looked at the public policy behind
2 SPPA and they said that protecting the subcontractor's
3 payment rights on government projects encourages
4 competitive bidding on projects which leads to a more
5 efficient use of our tax dollars.
6 Your Honor, with one hand the Court giveth and then
7 with the other it taketh away, because in *Sloan* and in
8 *Shirley's Iron Works*, as we stated correctly, it did limit
9 the recovery to the amount that was -- that is due -- that
10 is still remaining due at the time the government receives
11 the notice by the subcontractor that they have not been
12 paid by the general contractor.
13 But Your Honor, we would draw a distinction between
14 *Sloan* and *Shirley* because in both *Shirley* and *Sloan* the
15 Court had the background of knowing that the subcontractors
16 knew and notified the Court or notified the government
17 prior to the government issuing final payment that they had
18 not been paid in full.
19 Your Honor, we don't have that today. This is a novel
20 set of facts because in our case we didn't submit a final
21 invoice until May 20, 2016, so payment on that was due on
22 the 30th of June -- or about 30 days later which would be
23 June 20, 2016. And as we stated earlier, the final payment
24 was posted on, I think it was -- he said June 7th but I
25 believe that was June 17th, but I could be wrong. But

1 either way, Your Honor, that is before the payment was due
2 to Meritage Asset under contract, so it was simply
3 impossible for us to know in the situation that we were not
4 going to be paid until -- according -- if the *Sloan* and the
5 *Shirley* courts previous case law is utilized in this
6 situation, there is no possibility for us to ever recover
7 in this case because our remedy was cut off before our
8 payment was even due.
9 And, you know, we believe that if the Supreme Court
10 was faced with the facts of this case, their conclusion
11 might be different, you know, especially considering the
12 strong stance they took on the legislative intent and the
13 public policy behind the SPPA. You know, and if they had
14 not, the ruling would really have been at odds with itself.
15 They would grant the protections that the legislators
16 intended under the SPPA, but then say never mind and you
17 actually don't get this in this situation. And that's just
18 -- we believe that doesn't go together.
19 So the situation that existed prior to the enactment
20 of the SPPA was if a subcontractor performed work on a
21 government project and the -- and, you know, submitted
22 their bid for payment and it came back that the prime
23 contractor was insolvent, there likely would be no remedy
24 and they would essentially just take a loss, and that's
25 what the SPPA was enacted to protect against. But then

1 after *Shirley* in -- or after *Sloan* and *Shirley*, if that
2 holds, essentially the teeth of the SPPA would have been
3 completely nullified because now we have a subcontractor
4 who applies for payment with the prime contractor only to
5 find that the prime contractor is insolvent and they're
6 left with nothing again. So the entire purpose of the SPPA
7 is overridden if *Sloan* and *Shirley* applied in this specific
8 fact pattern.
9 THE COURT: All right.
10 MR. YARBOROUGH: Your Honor, we would submit that
11 instead of *Sloan* and *Shirley* applying and there's no
12 potential for recovery, like in this case, that the Court
13 modify how it would see it and take the stance that the
14 Florida and Texas courts have taken. They have similar
15 statutory structure, Your Honor, where there's an
16 affirmative duty on behalf of the government. And
17 essentially -- and I have copies of both of those cases for
18 your guys and for the Court if you'd like it. But
19 essentially, what those cases do is they -- if the
20 government does not comply with its duty, then they become
21 insured themselves so they step into the shoes of the
22 bonding agency. And so if they don't comply with their
23 duty, they then have to pay what would amount to probably
24 double in that contract.
25 Your Honor, so that's what we submit should happen in

1 this situation.

2 As far as my motion for summary judgement, my motion
3 for summary judgement is extremely simple. It's just that
4 the SPPA creates a duty to the government, the government
5 didn't comply with that duty, and the Supreme Court
6 provides a remedy for third-party breach of contract when
7 the government fails to uphold that duty.

8 And since the government did fail to uphold that duty
9 and we are left with an injury, Your Honor, we would
10 respectfully request that -- we ask for recovery due from
11 the contractor -- from the government who did not ensure
12 that they complied with their duty.

13 THE COURT: All right.

14 MR. MARONEY: If I may, Your Honor? I would note that
15 this particular distinction was not made in the memorandum
16 of law, so I haven't -- obviously, I haven't reviewed these
17 cases that Mr. Yarborough presented to the Court.

18 Nonetheless, I would direct the Court to *Sloan*
19 *Construction Company* where in the section that starts on
20 page 121, the Extent of Government Liability section, it
21 draws a parallel between the SPPA and the mechanics' lien
22 statute. The Court said that they were taking cues from
23 the mechanics' lien statute and that is why they decided to
24 limit the extent of the government liability to the amount
25 outstanding on the contract between the property owner --

1 in this case the government agency and the general
2 contractor because that's how it would work under the
3 mechanics' lien statute. A property owner is not entitled
4 to pay both the general contractor in full and a
5 subcontractor in full. That was the reasoning.
6 So these other statutes that were mentioned in these
7 case laws might be -- they might be doing exactly what Mr.
8 Yarborough says, but I haven't been able to review them.
9 But in our governing case, *Sloan*, the Court didn't look at
10 other bonding statutes; it looked at the mechanics' lien
11 statute and the -- and the way the mechanics' lien statute
12 was the rationale -- was adopted as the rationale for
13 limiting government liability under the SPPA.
14 THE COURT: Are you saying that the subcontractor sits
15 on his rights?
16 MR. MARONEY: Essentially, Your Honor.
17 THE COURT: All right.
18 MR. MARONEY: If there's no -- if the subcontractor --
19 these are sophisticated parties and if the subcontractor
20 was concerned about payment, I believe -- I'd have to
21 double check but I don't believe that they reached out
22 prior to check about the bond when they entered the
23 contract with Freeland. I don't believe they checked until
24 that. It's not disputed they did not give notice of
25 nonpayment until August 8th.

1 THE COURT: Okay.
2 MR. MARONEY: And again, the -- I'm not disputing what
3 Mr. Yarborough said about these cases, but our court was
4 not drawing any comparison between the SPPA and other
5 bonding statues. It was discussing and drawing comparison
6 between the SPPA and the mechanics' lien statute. And the
7 mechanics' lien statute is very clear that liability is
8 limited to -- for a property owner to the extent that's
9 outstanding on the contract between the property owner and
10 the general contractor.
11 THE COURT: Okay. Anything further?
12 MR. YARBOROUGH: Your Honor, I would just quickly note
13 that historically there are actually two types of
14 mechanics' liens and that's what you see in the statute. I
15 believe it's codified in two different sections -- and I
16 can't remember the first two, but the last is 20 and the
17 second one is 40, Your Honor. And what that is, is in 20
18 there is no mention of the remaining balance due by the
19 owner under a mechanics' lien. And I think that's a
20 codification of the historic principle that there are two
21 types of mechanics' liens, Your Honor, whereas that one
22 section of the statute does not state anything about what
23 the owner -- what the owner has left due on the contract
24 with the general contractor, the second part of that
25 statute does, Your Honor.

1 So I believe there are two different types of
2 mechanics' liens. One precludes recovery against the owner
3 beyond what's owed on the general contract, and the other
4 one does not.
5 MR. MARONEY: There are two -- there are two
6 mechanics' liens statues. One applies to the general
7 contractor and the other is specifically for
8 subcontractors, Your Honor. But there is no -- the
9 distinction -- the case law governing the liability between
10 a property owner and a subcontractor is as I just stated
11 and is as the Court stated it in *Sloan*, that a property
12 owner never needs to pay a subcontractor beyond the amount
13 outstanding on a contract between a property owner and the
14 general contractor at the time of notice of nonpayment.
15 THE COURT: Okay. Proposed orders in ten days.
16 MR. YARBOROUGH: Thank you, Your Honor.
17 MR. MARONEY: Thank you, Your Honor.
18 (WHEREUPON, the hearing in the above-entitled
19 matter was concluded.)
20
21
22
23
24
25

STATE OF SOUTH CAROLINA)
)   CERTIFICATE
COUNTY OF RICHLAND)

Be it known that I, the undersigned DeeAnne Varnadoe, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing transcript represents a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, before the Circuit Court for Richland County, South Carolina, so given on December 8, 2017, to the best of my skill and ability;

That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

IN WITNESS WHEREOF I have here unto set my hand this 19th day of February, 2018.

S/DeeAnne Varnadoe
DeeAnne Varnadoe
Official Court Reporter
Notary Public for South Carolina
My commission expires 3/14/2026.

THIS TRANSCRIPT WAS PREPARED FOR WILL YARBOROUGH, ESQ.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-40-7647 - Appellate No.: 2018-000162

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

v.

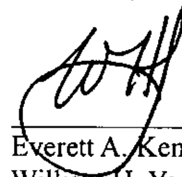
Freeland Construction Company, Inc. and South Carolina Military Department..........Defendants,

Of which South Carolina Military Department is the Respondent.

CERTIFICATE OF COUNSEL

Pursuant to Rule 210(c) of the South Carolina Rules of Appellate Procedure, I certify that the Record on Appeal only contains mater that was presented at the lower court or tribunal. Additionally, pursuant to Rule 209(c), I certify that the Record does not contain matter which is irrelevant to the appeal. Furthermore, and with the exception of certain documents designated by Appellant which was not considered by the lower court or the tribunal, I also certify that the Record contains all material proposed to be included by any of the other parties and not any other material.

August 1, 2018



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Of which South Carolina Military Department is the Respondent.

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE GOVERNMENT ON A SUB-CONTRACTORS' CLAIMS FOR PAYMENT AGAINST A GOVERNMENTAL AGENCY WHERE THE AGENCY FAILED TO FULFILL ITS STATUTORY DUTY TO ENSURE THAT A GENERAL CONTRACTOR OBTAINED A PAYMENT BOND?

2. DID THE TRIAL COURT ERR IN DENYING SUMMARY JUDGMENT IN FAVOR OF A SUBCONTRACTOR ON ITS CLAIMS AGAINST THE GOVERNMENT WHERE THE GOVERNMENT FAILED TO FULFILL ITS STATUTORY DUTY TO ENSURE THAT A GENERAL CONTRACTOR OBTAINED A PAYMENT BOND?

STATEMENT OF THE CASE

This appeal arises from a breach of contract action initiated by Meritage Asset Management, Inc., d/b/a Century Glass Company ("Appellant") against Freeland Construction Company, Inc. ("Freeland") and South Carolina Military Department ("Respondent") as a result of nonpayment for work Appellant performed on the South Carolina National Guard Armory ("Saluda Armory") in Saluda, South Carolina. Petitioner filed the Summons and Complaint on December 29, 2016 in the Richland County Court of Common Pleas alleging, in part, Respondent's breach of contract. Respondent answered and subsequently filed its Motion for Summary Judgment on May 26, 2017. Petitioner filed a cross Motion for Summary Judgment on July 14, 2017. The competing Motions for Summary Judgment were heard on December 8, 2017. The Honorable G. Thomas Cooper, Jr. entered an Order denying Petitioner's Motion for Summary Judgment and granting Respondent's Motion on January 8, 2018. Petitioner served its Notice of Appeal of the trial court's order on February 5, 2018.

The undisputed facts underlying the case are as follows: On September 19, 2014, Respondent awarded Freeland the general contract for the Saluda Armory Project. It is undisputed that Respondent did not ensure that Freeland had a payment bond in place prior to awarding the contract or at any phase of the Saluda Armory Project. See e.g. Respondent's Motion for Summary Judgment at p. 1; R. p. 26. Appellant submitted a subcontract proposal to Freeland for the Saluda Armory on January 21, 2016. Freeland accepted the proposal on January 27, 2016 and Appellant subsequently successfully completed all work due under the subcontract. See e.g. Court's Order, January 2, 2018 at p. 2; R. p. 3. Appellant submitted a final invoice to Freeland on May 20, 2016 for $50,600.00, the total amount of the contract, with payment due on June 20, 2016. Transcript of Record 8:1–6; 16:19–23; R. p. 51, lines 1-6; R. p. 59, lines 19-23.

With Appellant's payment pending, Freeland finalized work on the Saluda Armory on June 1, 2016 and submitted its final invoice to Respondent on June 3, 2016. Respondent promptly paid the final invoice due to Freeland on June 7, 2016. On August 8, 2016, after Respondent had made final payment, Appellant notified Respondent that it had not been paid for its work. To date, Appellant has received no compensation its work completed on the Saluda Armory.

ARGUMENTS

I. BECAUSE NO FACTUAL ISSUES WERE PRESENTED TO THE TRIAL COURT, RULINGS ON CROSS-MOTIONS FOR SUMMARY JUDGMENT SHOULD BE REVIEWED *DE NOVO.*

In the parties' cross motions for summary judgment, "[b]oth parties agree[d] that the facts in this case are not in dispute. . . ." Court's Order at p. 1. As a result, the Court was asked to rule strictly on the legal issues presented. Id. As the only questions before the trial court were questions of law, the trial court's ruling should be reviewed *de novo*. See e.g. Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009) ("[The Court of Appeals] reviews all questions of law de novo."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718–19 (2000) (citing S.C. Const. art. V, §§ 5 and 9; S.C. Code Ann. §§ 14–3–320 and –330 (1976 & Supp. 1998); S.C. Code Ann. § 14–8–200 (Supp.1998) (granting Supreme Court and Court of Appeals the jurisdiction to correct errors of law in both law and equity actions)); see also S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008) ("Questions of law may be decided with no particular deference to the trial court.").

II. THE SOUTH CAROLINA SUBCONTRACTOR AND SUPPLIER PAYMENT PROTECTION ACT GIVES RISE TO A PRIVATE RIGHT OF ACTION AGAINST A GOVERNMENT ENTITY FOR FAILURE TO ENSURE THAT A CONTRACTOR IS PROPERLY BONDED.

A. South Carolina's Little Miller Act and Subcontractor and Suppliers Payment Protection Act ("SPPA") are intended to provide protection and recourse to subcontractors on government projects where traditional Mechanic's Liens are not available.

Prior to the enactment of South Carolina's "Little Miller Act", S.C. Code Ann. § 11-30-3030, South Carolina "law afforded limited protection to subcontractors and suppliers providing labor and materials on public projects." Sloan Const. Co. v. Southco Grassing, Inc. 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008). In a private construction setting, a subcontractor that has not

been paid for work completed may take out a lien on a property for which it provided labor and materials. See S.C. Code Ann. § 29-5-10. However, because no lien may be had against the government, unpaid subcontractors on government projects were left with little or no remedies available. In response to the discrepancy in remedy, the legislature stepped in. "[T]hese provisions are . . . enacted to address the problem of subcontractors who may not use liens on public property to secure payment for work performed on public projects . . . ." Sloan, 377 S.C. at 113, 69 S.E.2d at 161. South Carolina's Littler Miller Act is modeled after the Federal Miller Act legislation, which was enacted to address the problem of subcontractors who may not take out mechanic's liens on public property to secure payment for work performed on public projects and must otherwise rely on the financial solvency of prime contractors. 40 U.S.C. §§ 3131, et seq.

The Subcontractors' and Suppliers' Payment Protection Act ("SPPA") was designed to "expand[] the protections afforded these parties under the Little Miller Acts." Sloan, 377 S.C. at 114, 69 S.E.2d at 161. 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 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 Ann. § 29-6-250 (emphasis added).

The South Carolina Supreme Court examined the statutory framework behind the SPPA in Sloan, first noting "that the very title of the SPPA clearly indicates the General Assembly intended to provide stronger payment protection specifically for subcontractors and suppliers on government projects." Sloan, 377 S.C. at 115, 69 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)). Further, the Court noted that it "has long held that such remedial statutes should be liberally construed in order to effectuate their purpose." Id. (citing S.C. Dept. of Mental Health v. Hanna, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978).

The Supreme Court recognized that the General Assembly, in enacting the SPPA, went one step further than the Little Miller Act's bond requirement 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. Id. In other words, the General Assembly provided subcontractors greater protections and remedies by placing an affirmative duty on the governmental entity to assure the appropriate payment bond is issued. See id. "In placing an affirmative duty on the government that is absent from the Little Miller Acts, [the Supreme Court found] 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 116, 659 S.E.2d at 162–3 (citing State ex. rel. McLeod. v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) (finding that a court must presume that the legislature "intended by its action to accomplish something and not to do a futile thing")). Thus, the Court in Sloan 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." Id. at 118. Specifically, "government may be liable to a subcontractor for breach of contract for failing to comply with SPPA bonding requirements." Id. at 120; see Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013) (clarifying that "a governmental entity may be liable to a subcontractor *only* for breach of contract for failing to comply with SPPA bonding requirements." (emphasis added)).

B. Appellant is entitled to Summary Judgment against the Appellant for Breach of Contract due to the Appellant's failure to ensure that the Contractor had obtained a payment bond.

Respondent awarded Freeland the general contract for the Saluda Armory Project on September 19, 2014. Court's Order at p. 2; R. p. 3. It is undisputed that Respondent did not ensure that Freeland had a payment bond in place prior to awarding the contract or at any phase of the Saluda Armory Project. See e.g. Respondent's Motion for Summary Judgment at p. 1; R. p. 26. Based on Respondent's failure to comply with its statutorily prescribed duty, Appellant remains unpaid for its work on the Saluda Armory to this day. Because Respondent failed to comply with the SPPA bonding requirements, Appellant was, and is, entitled to summary judgment in its favor for Respondent's breach of contract.

III. THE TRIAL COURT ERRED IN HOLDING THAT THE SUBCONTRACTOR WAS NOT ENTITLED TO RELIEF WHERE IT WAS NOT AFFORDED ANY OPPORTUNITY TO GIVE NOTICE OF NON-PAYMENT.

A. The holding in Sloan that purports to limit government liability should not by applied to the facts at hand.

Although the issue of limits on governmental liability under the SPPA was not directly before the Court in Sloan, the Court took the opportunity to "clarify" its holding. Sloan, 377 S.C. at 121, 69 S.E.2d at 165. 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.

Sloan at 121, 166-67.

In Sloan, the subcontractor gave notice to the Department of Transportation 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 were paid in full. Sloan 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 non-payment was given to the Respondent prior to its payment to the general contractor because no payment was 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 Century Glass 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 Century Glass and granted judgment. But, Century Glass could not have given notice of non-payment prior to the Department's payment because the non-payment had not yet occurred. Non-payment didn't occur until after liability was extinguished by payment.

This can't be the intended result of Sloan. The Trial Court should have relied on the fact that no payment was due, thus no "liability" had yet attached to the Department at the time payment was made to Freeland. Thus, because no liability had attached, no liability could be "limited" or, in this case, extinguished. In other words, Century Glass 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. The holding in Sloan that purports to limit governmental liability should be clarified in light of prevailing rules of statutory construction.

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, Century Glass has a right without a remedy.

This 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 Legislature intended to provide a similar protection to subcontractors on public projects to that afforded to those on private, 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 are 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]

---

[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).

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

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 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.

Unlike the mechanics' 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 contractor. Also, the SPPA gives no instruction to assist the subcontractor in protecting these rights. The

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

Sloan holding creates these limitations by analogy to the detriment of the statutory rights of recovery specifically granted by the SPPA.

C. Other states with statutory schemes similar to South Carolina 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 establishes a governmental duty only to limit the recovery such that no remedy exists. The facts of this case are analogous to

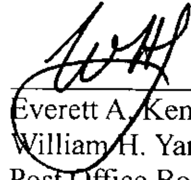
those in the Texas and Florida cases above and are squarely in the center of the public policy the Legislature sought to promote. With Sloan as a shield, the government's failure to follow the law is of no consequence because the holding in Sloan subverts each of the protections afforded to small businesses by the legislature in enacting the Little Miller Act and the SPPA. The limitation on recovery by 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.

CONCLUSION

Under the Trial Court's interpretation of Sloan, a sub-contractor 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 sub-contractor to sue the government for this breach of duty, the Trial Court's application of this doctrine has deprived the sub-contractor of any effective remedy. This thwarts the clear legislative purpose of the SPPA and should be clarified by this Court. For these reasons, the Court should overturn 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 remand the case for consideration of the amount due to the Appellant.

Respectfully submitted,

August 1, 2018



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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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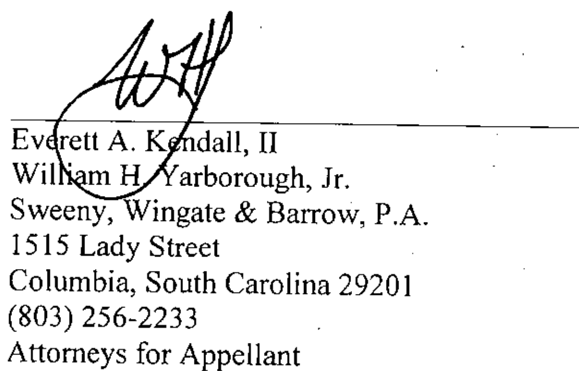

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STATEMENT OF ISSUE ON APPEAL

I. In granting summary judgment for the Respondent, the circuit court correctly followed Supreme Court precedent and limited Respondent's liability to Appellant.

STATEMENT OF THE CASE

The Appellant (Meritage) filed an action against Freeland Construction Company, Inc. (Freeland) and the South Carolina Military Department (Respondent/Department) on December 29, 2016. As to the Department, the complaint alleged a third-party beneficiary breach of contract claim (based on the SPPA[1]) and an equitable claim for quantum meruit. The amount of the contract was $50,600. (R., p. 14, §16). (Meritage alleged damages of $55,027.50, however. (R., p. 16, §§27-28)). Meritage asked for actual damages, prejudgment interest, attorney's fees and costs, and further relief that the court deemed appropriate. (R., p. 16). The Department answered the complaint, and eventually filed a motion for summary judgment on May 26, 2017. Meritage filed its own motion for summary judgment on June 14, 2017.The Honorable Thomas G. Cooper, Jr. heard the competing motions on December 8, 2017. At the hearing, the quantum meruit claim was discarded; the only issue was the third-party beneficiary breach of contract claim. (R., pp. 3-4). On January 8, 2018, Judge Cooper entered an order denying Meritage's motion while simultaneously granting the Department's motion for summary judgment. Meritage served its Notice of Appeal on February 5, 2018.

The case below was about the extent of government entity liability to a subcontractor. The issue on appeal is, whether, in granting the Department's motion for summary judgment, the circuit court correctly followed Supreme Court precedent and limited the Department's liability to Meritage. It did, so the court of appeals should affirm the lower court's ruling.

The following facts are undisputed. (R., p. 3). In September of 2014, the Department and Freeland agreed on a contract that required Freeland to perform work on one of the Department's

[1] S.C. Code Ann. §§29-6-210 through 29-6-290 (the Subcontractors' and Suppliers' Payment Protection Act).

properties, the Saluda Armory. In January of 2016, Meritage submitted a subcontractor proposal to Freeland. Freeland accepted. On June 3, 2016, Freeland submitted a final invoice to the Department. The Department posted the amount due, on June 7, 2016; the final amount was deposited ten days later. Unbeknownst to the Department, Freeland had not paid Meritage. And Meritage did not inform the Department of Freeland's nonpayment until August 8, 2016—almost two months after the Department paid Freeland in full. Because of binding Supreme Court precedent, this last, undisputed fact determines the outcome of this case.

STANDARD OF REVIEW

"In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial judge under Rule 56(c), SCRCP." *Shirley's Iron works, Inc. v. City of Union*, 403 S.C. 560, 567, 743 S.E.2d 778, 782 (2013) (citation omitted). If there is no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, then summary judgment is proper. *Id.* In this case, the facts are undisputed and, after applying binding Supreme Court precedent, the Department must prevail as a matter of law.

ARGUMENT

In the first part of its brief, Meritage argues that, because the Department did not secure a bond, it is entitled to judgement as a matter of law. (Brief of the Appellant, p. 7). In the next part of its brief, Meritage argues that the Supreme Court did not actually limit the extent of Government entity liability to a subcontractor, at least not in a factual situation that is similar to that of the parties in this case. (Brief of Appellant, pp. 7-9). In the final part, Meritage admits the Supreme Court did erect an applicable limit on liability, but argues this court should nevertheless overturn the higher court. (Brief of Appellant, pp.9-12). For example, Meritage disagrees with "[t]he limitation on recovery by the Sloan Court," and contends the "Court's holding in Sloan should be clarified because it undermines the very purpose for which the SPPA was created." (Brief of Appellant, p. 12). After stating the Court erected a limit on liability, the word "clarified" can only mean, "overturned." The circuit court heard these exact same arguments, and did not consider them persuasive. Neither should this court.

I. Meritage was not entitled to summary judgment in this case, because the Department is not liable to Meritage for any amount of money.

Meritage first argues that, because the Department did not secure a payment bond, it is entitled to summary judgment on its third-party breach of contract claim. (Brief of Appellant, p. 7). (Although it may be a pedantic point, Meritage did not sign the contract between the Department and Freeland. (R., p. 3). So, Meritage does not have a breach of contract claim; Meritage has a third-party beneficiary breach of contract claim, as the Supreme Court made clear in both *Sloan* and *Shirley's Iron Works*.). As will be shown below, Meritage's argument ignores the fact that, because Meritage did not give notice of Freeland's nonpayment before the Department paid Freeland in full, the Department is not liable to Meritage for any amount of money. Thus, Meritage's third-party beneficiary breach of contract claim fails. Consequently, the Department,

not Meritage, was entitled to judgment as a matter of law.

"[A] governmental entity may be liable to a subcontractor only for breach of contract for failing to comply with the SPPA bonding requirements." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 564, 743 S.E.2d 778, 780 (2013). Although Meritage may pursue a third-party beneficiary breach of contract claim against the Department, the law is clear: "[T]he 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." *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 121, 659 S.E.2d 158, 165–66 (2008); *see also Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 575, 743 S.E.2d 778, 786 ("*Sloan I* limits the [government entity's] liability to the remaining unpaid balance on the contract with the [general contractor] at the time the [government entity] received notice of [the general contractor's] nonpayment.") (citing *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 120, 659 S.E.2d 158, 165-66).

Meritage informed the Department of Freeland's failure to pay on August 8, 2016. At that time, the Department did not owe any money to Freeland; it had paid Freeland in full on June 17, 2016. Because no outstanding balance existed between the Department and Freeland at the time of notice, the Department does not owe Meritage anything. Meritage's third party beneficiary breach of contract claim fails, consequently, as a matter of law. The circuit court properly granted the Department's motion for summary judgment.

II. Despite the clarity of the Supreme Court, Meritage unpersuasively argues that the Court did not actually limit the extent of government liability to a subcontractor, at least not in a factual situation that is similar to that of the parties in this case.

Freeland did not have to pay Meritage prior to June 19, 2016. The Department paid Freeland in full prior to that date. (R., p. 3). Thus Meritage had no chance to notify the Department of Freeland's nonpayment. Meritage argues that the lack of an opportunity to provide notice of nonpayment distinguishes the facts of this case from those in *Sloan*, making the rule limiting a government entity's liability inapplicable. The argument is nothing more than wishful thinking.

In *Shirley's Iron Works*, subcontractors notified the government entity of the general contractor's nonpayment. *Shirley's Iron Works v. City of Union*, 403 S.C. 560, 564-65, 743 S.E.2d 778, 780. The government entity tried to settle with the subs, offering to distribute to each of them an equal portion of the unpaid balance owed to the general contractor, in exchange for a release of the government entity's liability. *Id.*, 403 S.C. 560, 565, 743 S.E.2d 778, 780. Some of the subs accepted the offer, while a few others refused and proceeded to litigation. Eventually, the case arrived at the Supreme Court, and one of the issues was, whether the Court of Appeals should have affirmed the government entity's motion for summary judgment, given that the remaining unpaid balance on the contract with the general contractor had been paid to several of the subs. *Id.*, 403 S.C. 560, 575, 743 S.E.2d 778, 786. The government entity argued that, because the remaining unpaid balance had been paid, no remand was necessary. *Id.* The Supreme Court disagreed. Although the Court agreed, "*Sloan I* limits the [government entity's] liability to the remaining unpaid balance on the contract with [the general contractor] at the time the [government entity] received notice of [the government entity's] nonpayment," *Id.* (citing *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 120, 659 S.E.2d 158, 165-66, the record was not clear enough to determine that the limit had been reached.

> The record is unclear as to the [government entity's] methodology of payment disbursement, and there are genuine issues of material fact regarding the date upon which the [government entity] learned of [the general contractor's] nonpayment, as well as the amount remaining unpaid at that time.

Id.

If the record had been clear enough to determine that the limit on liability had been reached, the Court would have affirmed the grant of summary judgment: "Because factual questions are in dispute, summary resolution would be premature." *Shirley's Iron Works v. City of Union*, 403 S.C. 560, 575, 743 S.E.2d 778, 786. *Shirley's Iron Works* is very clear: subcontractors who give notice of nonpayment before the government entity pays the general contractor in full—*i.e.*, before the limit of liability has been reached—can still be denied recovery if the limit of liability is subsequently reached through the payment of other subcontractors. The limit of government entity liability is never more than the remaining unpaid balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's nonpayment.

There are no factual disputes in this case. Meritage gave notice of nonpayment, after the Department paid Freeland in full. If subcontractors who give notice of nonpayment, before the general contractor is paid in full, can be denied recovery because the limit of liability is subsequently reached through the payment of other subcontractors, then surely subcontractors who give notice of nonpayment—after the limit of government entity liability has been reached—are denied recovery. Meritage's contrary argument is untenable.

What is more, Meritage could have structured the contract with Freeland to reflect the concern about notice. After all, Meritage knew or should have known about the Supreme Court's holding in *Sloan*, as the Court issued the *Sloan* opinion in 2008. The Court issued the *Shirley's*

Iron Works opinion in 2013. Both opinions came out prior to the contract between Meritage and Freeland. Meritage could have taken steps to mitigate if not remove the possibility of having no recourse against any entity other than Freeland; it just didn't take any.

III. Meritage is asking this court to overturn the decision of the Supreme Court, which of course this court cannot and will not do.

Despite initially arguing that the limit on government entity liability does not apply here, Meritage proceeds to argue that, though the limitation does apply, this court should overturn the limitation. (Brief of Appellant, pp.9-12). Of course the court cannot do this, however, as the circuit court pointed out. (R., p. 5 (citing *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) ("[I]t is incumbent upon the court of appeals to apply this Court's precedent.") (citing S.C. Const. art V., §9).

Nevertheless, the Department will give a few points in reply to Meritage's contentions. First, Meritage criticizes the Supreme Court for "an over extension of the analogy of [the] SPPA and the traditional mechanic's lien statutes." (Brief of Appellant, p. 9). The problem with this argument is that the Supreme Court did not think it over extended the analogy. And this court cannot effectively overrule the Supreme Court by analyzing the issue of government entity liability differently than the higher court did. Second, Meritage argues that the General Assembly was aware of the limitation on recovery within the mechanic's lien statute when it passed the SPPA, and "intentionally left out any such limitation in the SPPA." (Brief of Appellant, p. 10). If that were true, one would think the General Assembly would have altered the statute to reflect this intention, especially after the Supreme Court ruled otherwise. Changing a statute, after all, is completely within the authority of the General Assembly. Bryan A. Garner, et al., *The Law of Judicial Precedent*, p. 410 ("[I]f the precedent or precedents have misinterpreted the legislative intention, the Legislature's competency to correct the misinterpretation is readily at hand.")

(internal citation omitted). Despite its authority to do so, the statute remains unchanged, even a decade after *Sloan*. Regardless, the Supreme Court's interpretation of the statute is binding precedent; this court cannot ignore it, even if the court thinks the General Assembly meant the words of the statute to indicate something other than what the Supreme Court says they mean. Third, Meritage argues the Supreme Court should be overruled, because the SPPA does not warn a subcontractor that the ability to recover from a government entity will be limited if it does not give notice of nonpayment before the general contractor is paid in full. The text of the SPPA may not warn subcontractors—but case law does. *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 121, 659 S.E.2d 158, 165–66; *see also Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 575, 743 S.E.2d 778, 786. Sophisticated parties (among whom Meritage is counted) should know that it is the role of the Supreme Court to say what the law is,[2] and that consulting the judicial interpretation of a statute is therefore a necessity. Finally, Meritage claims an appellate court in Florida and an appellate court in Texas have ruled that their respective State statutes do not limit government entity liability to subcontractors, so the South Carolina Court of Appeals should rule similarly. Besides asking the court to ignore the fact that these Courts were not construing the South Carolina statute at issue, Meritage is arguing that this court should follow the appellate courts of Texas and Florida rather than the Supreme Court of South Carolina. Meritage does not provide any support for this novel legal theory.

The Texas statute, furthermore, expressly provides that, "if the governmental entity fails to obtain from a prime contractor a payment bond as required by Section 2253.021 [,] the entity is subject to the *same liability that a surety would have if the surety had issued a payment bond* and if the entity had obtained the bond." *Texas Dept. of Mental Health and Mental Retardation v.*

[2] Meritage is aware of judicial review, as it quotes from "the landmark Supreme Court decision," *Marbury v. Madison*. (Brief of Appellant, p. 9).

Newbasis Central, L.P., 58 S.W.3d 278, 281 (2001) (citing Tex. Gov't Code Ann. §2253.027) (emphasis in original). No similar provision, which makes the government entity the surety, exists in the SPPA. *See* S.C. Code Ann. §§29-6-210 through 29-6-290.

At bottom, Meritage is really arguing that the Supreme Court's limitation on government entity liability works a hardship in its case. That may be correct. It is nevertheless irrelevant.

> Considering the effect of the law in a particular case is tantamount to disregarding the law: In determining a case [,] the court is not concerned with what the law ought to be, but its sole function is to declare what the law, applicable to the facts of the case, is.

Bryan A. Garner, et al., *The Law of Judicial Precedent*, pp. 412-13 (internal citations and quotations omitted).

So even if this court had the authority to overrule the Supreme Court (which it does not), no court should overrule, based on hardship in a particular case, *Sloan* or *Shirley's Iron Works*. Meritage incorrectly argues otherwise.

CONCLUSION

The governing law is clear: 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 nonpayment. When Meritage notified the Department of Freeland's nonpayment, the Department had already paid Freeland in full. Consequently, the Department has no outstanding liability to Meritage.

This court should affirm the ruling of the circuit court.

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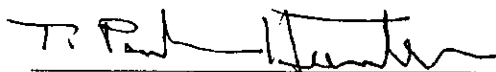

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August 2, 2018.

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CERTIFICATE OF COUNSEL

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ARGUMENT

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

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

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

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

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

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

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

[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.

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. Id.

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

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

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

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

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

[4] S.C. Code § 29-6-230.

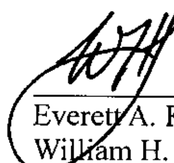
This suggestion is completely devoid of understanding of how subcontracts are entered and materials acquired on a construction project. Moreover, the SPPA does not require a written contract with any specific terms. In this case, the contract between Freeland and Century was in the form of an accepted proposal.[5] Oftentimes, contracts terms are stated in the small print of a purchase order, or they are entirely oral. Following Respondent's suggestion would bring the wheels of construction commerce to a grinding stop.

CONCLUSION

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

Respectfully submitted,

August 1, 2018



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[5] See eg., Respondent South Carolina Military Department's Memorandum in Support of Summary Judgment at p. 2, R. p. 27; Appellant's Complaint at ¶¶ 13–14, R. p. 14, lines 13-14.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

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SC Court of Appeals

Case No. 2016-CP-40-7647 - Appellate No.: 2018-000162

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

v.

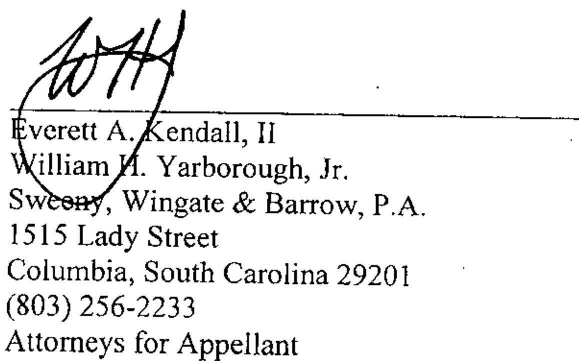
Freeland Construction Company, Inc. and South Carolina Military Department...Defendants,

Of which South Carolina Military Department is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

August 1, 2018



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Of which South Carolina Military Department is the Respondent.

Appellate Case No. 2018-000162

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5802
Heard September 14, 2020 – Filed February 10, 2021

AFFIRMED

Everett Augustus Kendall, II, of Murphy & Grantland, P.A., and William Harley Yarborough, Jr., of Cavanaugh & Thickens, LLC, both of Columbia, for Appellant.

Chief Deputy Attorney General W. Jeffrey Young, Deputy Assistant Attorney General Harley Littleton Kirkland, and Assistant Attorney General Leon David Leggett, III, all of Columbia, for Respondent.

WILLIAMS, J.: Meritage Asset Management, Inc., d/b/a Century Glass Company (Meritage), appeals the trial court's order granting South Carolina Military Department (the Department) summary judgment. On appeal, Meritage argues it was entitled to summary judgment because it was undisputed the Department failed to comply with the Subcontractors' and Suppliers' Payment Protection Act (the SPPA).[1] We affirm.

FACTS/PROCEDURAL HISTORY

The facts of this case are not in dispute. In September 2014, the Department executed a contract with Freeland Construction Company, Inc. (Freeland) to perform construction work on the Saluda Armory. Freeland failed to secure a payment bond for the project or submit any proof of adequate bonding in its bid submission to the Department. The Department admitted it failed to require Freeland to obtain a payment bond as required under the SPPA.[2] In January 2016, Freeland subcontracted with Meritage to perform work on the project. Meritage completed the work and submitted a final invoice to Freeland on May 20, 2016. Freeland submitted its final invoice to the Department on June 3, 2016, and was paid in full on June 17, 2016. Freeland never paid Meritage for its work on the project. Meritage notified the Department of Freeland's failure to pay on August 8, 2016.

Meritage brought a breach of contract claim alleging (1) the Department was obligated to compensate Meritage as a third-party beneficiary to the contract between the Department and Freeland and (2) the Department failed to ensure that Freeland was properly bonded pursuant to the SPPA.[3] The Department admitted it failed to comply with the SPPA's payment bond requirement, but it nevertheless moved for summary judgment. The Department argued that under *Sloan Construction Company, Inc. v. Southco Grassing, Inc.*, Meritage was not entitled to any recovery from the Department because there was no outstanding balance owed to Freeland when the Department received notice of Freeland's nonpayment.[4] Meritage filed a cross motion for summary judgment.

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[1] S.C. Code Ann. §§ 29-6-210 to -290 (2007 & Supp. 2019).
[2] *See* § 29-6-250.
[3] Meritage also brought a breach of contract claim against Freeland and obtained a default judgment.
[4] 377 S.C. 108, 121, 659 S.E.2d 158, 165–66 (2008) ("[T]he government entity's liability [under the SPPA] is *limited to the remaining unpaid balance* on the contract with the general contractor when the subcontractor notifies the

Finding *Sloan* applied, the trial court granted the Department's motion for summary judgment. The court held that under *Sloan*, the Department did not owe Meritage damages because no outstanding balance existed between the Department and Freeland at the time Meritage notified the Department of Freeland's failure to compensate. This appeal followed.

ISSUE ON APPEAL

Did the trial court err in granting summary judgment to the Department?

STANDARD OF REVIEW

"In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial judge under Rule 56(c), SCRCP." *Shirley's Iron Works*, 403 S.C. at 567, 743 S.E.2d at 782. "Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Id.*

LAW/ANALYSIS

Meritage argues the trial court erred in denying its motion for summary judgment and in granting summary judgment to the Department. Meritage asserts the trial court erred in holding *Sloan* applied, arguing this case is distinguishable from *Sloan* because the Department paid Freeland in full before Meritage notified the Department of Freeland's nonpayment. Meritage contends the application of *Sloan*'s limitation is inconsistent with the SPPA's goal of protecting subcontractors and suppliers. We disagree.

Prior to 2000, subcontractors and suppliers providing labor or materials for public projects had limited payment protection in the event the general contractor became insolvent because mechanics' liens cannot be enforced on public property. *Sloan*, 377 S.C. at 113, 659 S.E.2d at 161; *see also Atl. Coast Lumber Corp. v. Morrison*, 152 S.C. 305, 309, 149 S.E. 243, 245 (1929) (stating a mechanics' lien is not enforceable against public property). The South Carolina General Assembly

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government of the general contractor's nonpayment." (emphasis added)), *holding modified by Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013).

enacted the SPPA in 2000 to institute a bonding scheme to ensure such entities are compensated for their work on public projects. *Sloan*, 377 S.C. at 114, 659 S.E.2d at 161. Section 29-6-250 provides 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.

In *Sloan*, the government hired a general contractor for a maintenance project on state highways, and the general contractor provided proof of a payment bond. 377 S.C. at 111, 659 S.E.2d at 160. The general contractor hired a subcontractor, but before the subcontractor completed its work, the payment bond was canceled due to the bond issuer's insolvency. *Id.* The government requested proof of a replacement bond, but the general contractor never responded. *Id.* The subcontractor completed its work but did not receive payment from the general contractor, and it notified the government (1) it had not been paid and (2) the general contractor did not obtain a replacement payment bond. *Id.* The general contractor, without paying the subcontractor, subsequently informed the government it made all payments due to subcontractors and requested its final payment, which the government disbursed. *Id.* The subcontractor sued the government, ultimately raising to our supreme court the issue of whether a subcontractor could recover from the government under the SPPA. *Id.* at 111–12, 659 S.E.2d at 160–61.

The court, noting the SPPA was a remedial statute subject to liberal construction, held section 29-6-250 created a private right of action against the government for failure to ensure the general contractor obtained a payment bond. *Id.* at 117–18, 659 S.E.2d at 163–64. The SPPA does not provide a remedy for the government's failure to comply with section 29-6-250, but the supreme court held its failure to do

so does not subject it to open-ended liability. *Id.* at 121, 659 S.E.2d at 165. In determining the government's limits on liability, the court considered the limits set forth in the mechanics' lien statutes. *Id.* Specifically, the court noted "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." *Id.*; *see* S.C. Code Ann. § 29-5-40 (2007) ("But in no event shall the aggregate amount of liens set up hereby exceed the amount due by the owner on the contract price of the improvement made."). Noting the similar purposes between the SPPA and the mechanics' lien statutes, the court held "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.

The supreme court subsequently modified the holding in *Sloan* in *Shirley's Iron Works*. In that case, a city contracted with a general contractor to improve real property but failed to require the general contractor to obtain a payment bond. 403 S.C. at 564, 743 S.E.2d at 780. The general contractor failed to compensate its subcontractors, who contacted the city to receive payment. *Id.* at 564–65, 743 S.E.2d at 780. The city offered to split the amount remaining on the general contractor's contract, but some subcontractors refused to accept less than they were due, and the city distributed the offered amount to other subcontractors. *Id.* at 565, 743 S.E.2d at 780. While holding the city could be liable to the appellant for failing to comply with section 29-6-250, our supreme court modified *Sloan*'s holding to clarify the government can only be liable under a third-party beneficiary breach of contract action, not tort, for failing to comply with the SPPA. *Id.* at 567, 571–73, 743 S.E.2d at 781–84. However, the court did not modify *Sloan*'s holding that the government's liability is limited to the remaining unpaid balance on its contract with the general contractor, and it remanded the matter to the trial court for a determination of the government's liability pursuant to *Sloan*'s limitation.[5] *See id.* at 575, 743 S.E.2d at 786.

We find the trial court correctly applied *Sloan* to the facts of this case. Because Meritage alleges the Department violated section 29-6-250 and *Sloan* established

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[5] Meritage argues the supreme court was not asked to review the limits of liability in *Sloan*, but whether a subcontractor had a private right of action against the government for noncompliance with section 29-6-250. Any argument that *Sloan*'s limitation is dicta is without merit due to the supreme court's application of the limitation in *Shirley's Iron Works*.

the remedy for violations of section 29-6-250, *Sloan*'s limitation on liability applies to this case. *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 of the South Carolina Supreme Court."). Accordingly, the Department's liability to Meritage is limited to the amount remaining on its contract with Freeland when Meritage notified it of Freeland's nonpayment.[6] Because it is undisputed that the Department did not learn of Freeland's nonpayment until after it had paid Freeland the remaining amount on the contract, its liability to Meritage is zero as a matter of law. *See Sloan*, 377 S.C. at 121, 659 S.E.2d at 165–66 ("[T]he government entity's liability [under the SPPA] 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."); *see also Shirley's Iron Works*, 403 S.C. at 567, 743 S.E.2d at 782 ("Summary judgment is proper if, viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law."). Thus, the trial court did not err in granting summary judgment to the Department and in denying summary judgment to Meritage.

Accordingly, the decision of the trial court is

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

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[6] 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.

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SC Court of Appeals

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.

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[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

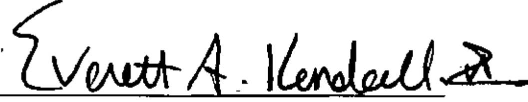
protections to subcontractors working with the government comparable to those working in the private sector. It defeats the purpose of the statute. *Sloan*, at 114, 659 S.E.2d at 162. Additionally, this Court's Opinion encourages a relationship between subcontractors and already over-burdened government 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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Columbia, South Carolina
February 25, 2021

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SC Court of Appeals

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.

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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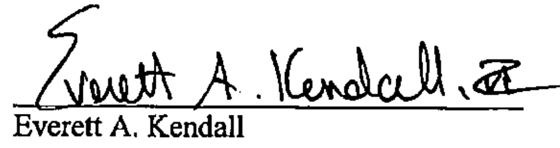

Everett A. Kendall

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February 25, 2021

HAND DELIVERED
Jenny Abbot Kitchings
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RECEIVED
FEB 25 2021
SC Court of Appeals

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
Harley Kirkland
Alan Wilson
W. Jeffrey Young

SC Court of Appeals
Clerk's Office

RECEIVED
FEB 25 2021
SC Court of Appeals

The South Carolina Court of Appeals

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

v.

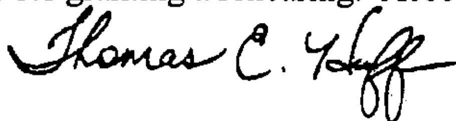
Freeland Construction Company, Inc and South Carolina Military Department, Defendants,

Of which South Carolina Military Department is the Respondent.

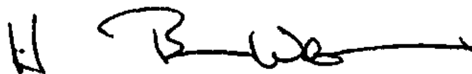
Appellate Case No. 2018-000162

ORDER

After 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. Accordingly, the petition for rehearing is denied.



_______________________________ J.



_______________________________ J.

_______________________________ J.

Columbia, South Carolina

cc:

FILED
May 25 2021

Everett Augustus Kendall, II, Esquire
William Harley Yarborough, Jr., Esquire
Harley Littleton Kirkland, Esquire
W. Jeffrey Young, Esquire
Leon David Leggett, III, Esquire
The Honorable G. Thomas Cooper, Jr.