

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Jul 05 2022

S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
In The Circuit Court

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2019-001061

James Stephen Nivens and
Carolyn Nivens,

Appellants,

v.

JB & E Heating & Cooling, Inc.,
a South Carolina corporation,

Respondent.

APPENDIX

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Order Denying Rehearing: June 2, 2022

Decision: May 11, 2022

Petition for Rehearing: May 26, 2022

Brief of Appellants: December 21, 2020

Brief of Respondent: October 23, 2020

Record on Appeal: September 30, 2020

The South Carolina Court of Appeals

James Stephen Nivens and Carolyn Nivens, Appellants,

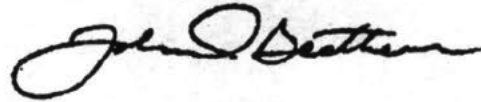
v.

JB & E Heating & Cooling, Inc., a South Carolina
corporation, Respondent.

Appellate Case No. 2019-001061

ORDER

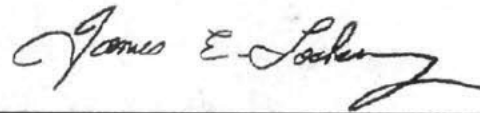
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



A.J.

Columbia, South Carolina

cc:

John Martin Foster, Esquire

James W. Boyd, Esquire

FILED
Jun 02 2022

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

James Stephen Nivens and Carolyn Nivens, Appellants,

v.

JB & E Heating & Cooling, Inc., a South Carolina
corporation, Respondent.

Appellate Case No. 2019-001061

Appeal From York County
William A. McKinnon, Circuit Court Judge

Unpublished Opinion No. 2022-UP-192
Submitted March 1, 2022 – Filed May 11, 2022

AFFIRMED

John Martin Foster, of Rock Hill, for Appellants.

James W. Boyd, of James W. Boyd Law Firm LLC, of
Rock Hill, for Respondent.

PER CURIAM: James and Carolyn Nivens appeal the circuit court's grant of summary judgment in favor of JB & E Heating & Cooling Inc. (JB & E). On appeal, they argue the circuit court erred in granting summary judgment because (1) it applied the incorrect statute of limitations and (2) res judicata and collateral estoppel did not apply. We affirm.

1. We hold the predominant purpose of the contract between the Nivenses and JB & E was for services with goods incidentally involved. Because the contract was predominantly for services, the Nivenses had three years after the breach of the contract was discoverable to file their action against JB & E. The Nivenses filed their complaint more than three years after the breach was discoverable. Therefore, the circuit court did not err in granting summary judgment. See *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002) ("An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRPC."); *Companion Prop. & Cas. Ins. Co. v. Airborne Express, Inc.*, 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006) ("Summary judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."); S.C. Code Ann. § 15-3-530(1) (2005) (stating an action for breach of contract outside the purview of the Uniform Commercial Code (UCC) must be brought within three years from the date it accrues); *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) ("A cause of action should have been discovered through exercise of reasonable diligence when the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist."); *Plantation Shutter Co. v. Ezell*, 328 S.C. 475, 478, 492 S.E.2d 404, 406 (Ct. App. 1997) ("In considering whether a transaction that provides for both goods and services is a contract for the sale of goods governed by the UCC, courts generally employ the predominant factor test."); *id.* ("Under this test, if the predominant factor of the transaction is the rendition of a service with goods incidentally involved, the UCC is not applicable."); *Fournier Furniture, Inc. v. Waltz-Holst Blow Pipe Co.*, 980 F. Supp. 187, 189 (W.D. Va. 1997) ("The court should consider such factors as the language of the contract, the structure of the compensation, and the ratio of material supplied to labor expended.").

2. We decline to address the Nivenses' argument that their claim is not barred by res judicata and collateral estoppel because the circuit court properly granted summary judgment based on the statute of limitations. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) ("In light of our disposition of the case, it is not necessary to address [the appellant's] remaining issues.").

AFFIRMED.¹

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

GEATHERS and HILL, JJ., and LOCKEMY, A.J., concur.

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May 26 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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APPEAL FROM YORK COUNTY
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William A. McKinnon, Circuit Court Judge

Appellate Case No. 2019-001061

James Stephen Nivens and
Carolyn Nivens,

Appellants,

v.

JB & E Heating & Cooling, Inc.,
a South Carolina corporation,

Respondent.

PETITION FOR REHEARING

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Attorneys for Appellants

STATEMENT OF THE CASE

In or about October, 2010, the Appellants NIVENS contracted with the Respondent JB & E HEATING & COOLING, INC. (hereafter also JB&E) for the installation of a geothermal system in their home at the price of \$15,280.00. The NIVENS allege that the system was never properly completed. JB&E's e-mail to NIVENS dated March 8, 2011 references the parties' continued dealings as to completion.

Appellant JAMES STEPHEN NIVENS alleges repeated promises of examination and repair, and the failure of those promises. In March, 2012, he initiated a complaint with the South Carolina Department of Labor and Licensing Regulation (hereafter also LLR) in March, 2012 alleging improper installation of the unit.

Appellants filed their civil action on August 10, 2017, alleging seven (7) causes of action:

- 1) Violation of the Magnuson-Moss Warranty Act;
- 2) Violation of the Unfair and Deceptive Trade Practices;
- 3) Breach of express warranties;
- 4) Breach of implied warranty of fitness;
- 5) Negligence;
- 6) Nuisance; and
- 7) Negligent misrepresentation.¹

Respondent JB&E filed for Summary Judgment on January 24, 2019, alleging an expired Statute of Limitations and that the claims were barred by *res judicata* and collateral estoppel due to the LLR ruling. The Appellants NIVENS alleged that their action falls under the U.C.C. Statute of Limitation, S.C. Code § 36-2-725, which allows a six-year period when dealing with a sale of goods.

By its Order filed March 18, 2019, the Circuit Court dismissed the action on the basis of an expiration of the applicable Statute of Limitations.

The NIVENS filed their Motion for Rehearing under Rule 59, S.C.R.C.P. on March 28, 2019. By its Order filed May 31, 2019, this Motion was denied. Appeal was filed herein on June 25, 2019.

By its Order of May 11, 2022, this Court dismissed the appeal, holding that "the predominant purpose of the contract between [the parties] was for services with goods incidentally involved." [ORDER OF MAY 11, 2022, Para. 1.] This Court based its decision upon such precedent as *Plantation*

¹ The cause of nuisance was dropped at the hearing on Summary Judgment.

Shutter Co. v. Ezell, 328 S.C. 475, 492 S.E.2d 404 (Ct.App. 1997), applying what it sees as the “predominant factor test.”

ARGUMENT

DOES THE SIX-YEAR STATUTE OF LIMITATIONS SET OUT IN S.C. CODE § 36-2-725 APPLY TO THIS ACTION?

The Appellants argue that the U.C.C. Statute of Limitations, S.C. Code § 36-2-725, titled “Statute of limitations in contracts for sale”, applies in this action. That Statute states, in relevant part:

- (1) An action for breach of any contract for sale must be commenced within six years after the cause of action has accrued.
- (2) A cause of action accrues for breach of warranty when the breach is or should have been discovered.
- ...
- (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this act becomes effective.

In determining whether a particular contract falls within the U.C.C. definition of a “sale of goods”, and thus whether § 36-2-725 would apply, the Courts have looked to the predominant purpose of the transaction. Most Courts have determined the predominant purpose by looking to the parties’ intent. In the leading case of *Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456, 460 (4th Cir. 1983), the Fourth Federal Circuit Court, applying Maryland law, looked to the language of the contract, the nature of the supplier’s business, and the intrinsic worth of the materials provided in determining that intent.

As stated above, in its Order of May 11, 2022, this Court dismissed this appeal, holding that “the predominant purpose of the contract between [the parties] was for services with goods incidentally involved.” [ORDER OF MAY 11, 2022, Para. 1.] The Court’s citation of *Plantation Shutter Co. supra*, omits that decision’s accurate summary of the rule on predominant purpose as recognized in this State:

In considering whether a transaction that provides for both goods and services is a contract for the sale of goods governed by the UCC, courts generally employ the predominant factor test. *Ranger Constr. Co. v. Dixie Floor Co.*, 433 F.Supp. 442 (D.S.C.1977). Under this test, if the

predominant factor of the transaction is the rendition of a service with goods incidentally involved, the UCC is not applicable. *Id.* at 445. If, however, the contract's predominant factor is the sale of goods with labor incidentally involved, the UCC applies. *Id.* at 444. In most cases in which the contract calls for a [328 S.C. 479] combination of services with the sale of goods, courts have applied the UCC. James J. White & Robert S. Summer, UNIFORM COMMERCIAL CODE § 1-1, at 4 (4th ed. 1995).

[*Plantation Shutter Co. v. Ezell*, 328 S.C. 475, 478, 492 S.E.2d 404, 406; emphasis added.]

In the case of *Fournier Furniture, Inc. v. Waltz-Blow Pipe Co.*, 980 F.Supp. 187 (W.D.Va. 1997), (cited by this Court's decision of May 11, 2022) the Federal District Court determined that a contract for design, fabrication and installation of a furnace and which provided for sales taxes, as here, was one for the sale of goods. The intent of the contract of the parties in this case was obviously to secure the Appellants new, properly working geothermal system of equipment in the Appellants' home. Thus, S.C. Code § 36-2-725 applies; since this action was brought within six years of the time to which the parties' actions extended their contract, the relevant Statute of Limitations is satisfied.

CONCLUSION

With respect to the Court, the Appellants can only cite, again, the fact which to their knowledge is undisputed in this action: the Appellants wanted and contracted for a working, adequate geothermal system to heat and cool their house. Installation of that system involved services and equipment. Under the existing and accepted precedent dealing with such a situation, they are entitled to invoke the U.C.C. statute of limitations. They have met that limitation and are entitled to move forward with their action.

May 26, 2022

Respectfully submitted,



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CERTIFICATE OF SERVICE

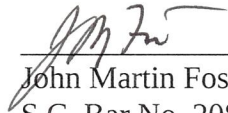
The undersigned, counsel for Appellants in the civil appeal above, hereby certifies that, on the date written below, he served copies of the following pleadings or documents in the above-captioned and numbered civil action:

Petition for Rehearing; and
this Certificate of Service,

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by service to the opposing lawyer's primary e-mail address listed in the Attorney Information System (AIS), as authorized by Section (b)(2) of the Order of the Supreme Court dealing with Electronic Filing and Service issued May 6, 2022.

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May 26, 2022

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Respondent.

BRIEF OF APPELLANTS

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SC Court of Appeals

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STATEMENT OF THE ISSUES ON APPEAL

- I. DOES THE SIX-YEAR STATUTE OF LIMITATIONS SET OUT IN S.C. CODE § 36-2-725 APPLY TO THIS ACTION?

- II. DOES THE PREVIOUS DECISION BY THE LLR BOARD PRECLUDE THIS ACTION?

STATEMENT OF THE CASE

In or about October, 2010, the Appellants NIVENS contracted with the Respondent JB & E HEATING & COOLING, INC. (hereafter also JB&E) for the installation of a geothermal system in their home at the price of \$15,280.00. The NIVENS allege that the system was never properly completed. JB&E's e-mail to NIVENS dated March 8, 2011 references the parties' continued dealings as to completion.

Appellant JAMES STEPHEN NIVENS alleges repeated promises of examination and repair, and the failure of those promises. In March, 2012, he initiated a complaint with the South Carolina Department of Labor and Licensing Regulation (hereafter also LLR) in March, 2012 alleging improper installation of the unit.

In the LLR Hearing Officer's Recommendation dated July 24, 2014, the evidence was found as follows:

9. Homeowner (NIVENS) testified that after several telephone calls from him Respondent (JB&E) quit answering the calls, did not communicate further and did not make any further modifications or adjustments to the system.

10. Respondent (JB&E) testified that he did stop responding to Homeowner's telephone calls, as the communication escalated.

[RECORD ON APPEAL, p. 43.]

By its final Order dated January 27, 2015, the Residential Building Commission of the LLR adopted the Hearing Officer's Recommendation, finding that JB&E did not obtain a building permit and imposing a fine for that inaction. [RECORD ON APPEAL, p. 50, 47-48.] Neither the Hearing Officer nor the Commission addressed the issue of JB&E's compliance with S.C. Code § 40-59-240(f), which

requires compliance with County licensing and Codes. [RECORD ON APPEAL, p. 50, 47-48.]

Finally, neither the LLR Hearing Officer nor the Commission determined that JB&E violated S.C. Code § 40-1-110(f), which prohibits any action of a licensed contractor that:

(f) has committed a dishonorable, unethical, or unprofessional act that is likely to deceive, defraud, or harm the public;

[RECORD ON APPEAL, p. 50, 47-48.]

Appellants filed their civil action on August 10, 2017, alleging seven (7) causes of action:

- 1) Violation of the Magnuson-Moss Warranty Act;
- 2) Violation of the Unfair and Deceptive Trade Practices;
- 3) Breach of express warranties;
- 4) Breach of implied warranty of fitness;
- 5) Negligence;
- 6) Nuisance; and
- 7) Negligent misrepresentation.¹

[RECORD ON APPEAL, p. 13-19.]

Respondent JB&E filed for Summary Judgment on January 24, 2019, alleging an expired Statute of Limitations and that the claims were barred by *res judicata* and collateral estoppel due to the LLR ruling. [RECORD ON APPEAL, p. 33-36.] The Appellants NIVENS alleged that their action falls under the U.C.C. Statute of Limitation, S.C. Code § 36-2-725, which allows a six-year period when dealing with a sale of goods. [RECORD ON APPEAL, p. 52-56.]

By its Order filed March 18, 2019, the Circuit Court dismissed the action on the basis of an expiration of the applicable Statute of Limitations. [RECORD ON APPEAL, p. 1-6.]

The NIVENS filed their Motion for Rehearing under Rule 59, S.C.R.C.P. on March 28, 2019. [RECORD ON APPEAL, p. 63-68.] By its Order filed May 31, 2019, this Motion was denied. [RECORD ON APPEAL, p. 7-9.] Appeal was filed herein on June 25, 2019.

¹ The cause of nuisance was dropped at the hearing on Summary Judgment.

STANDARD OF REVIEW

This Court has stated the standard in *Carolina Chloride Inc. v. South Carolina Dep't of Transp.*, 391 S.C. 429, 706 S.E.2d 501 (S.C. 2011) as follows:

When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRPC. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Fleming*, 350 S.C. at 493–94, 567 S.E.2d at 860. *Carolina Chloride Inc. v. South Carolina Dep't of Transp.*, 391 S.C. 429, 706 S.E.2d 501 (S.C. 2011). [*Id.*, 391 S.C. at 434, 706 S.E.2d at 504]

The Appellants maintain that there are open questions of fact that preclude Summary Judgment. The question here, however, is also whether the Circuit Court has applied the proper law. As the Supreme Court stated in *Gordon v. Lancaster*, 425 S.C. 386, 823 S.E.2d 173 (S.C. 2018):

The interpretation of a statute is a question of law, which an appellate court is free to decide without deference to the trial court. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). [*Id.*, 425 S.C. at 389, 823 S.E.2d at 174]

The question at hand is also one of statutory interpretation, which is for the Court.

ARGUMENT

I. DOES THE SIX-YEAR STATUTE OF LIMITATIONS SET OUT IN S.C. CODE § 36-2-725 APPLY TO THIS ACTION?

The Appellants argue that the U.C.C. Statute of Limitations, S.C. Code § 36-2-725, titled “Statute of limitations in contracts for sale”, applies in this action. That Statute states, in relevant part:

(1) An action for breach of any contract for sale must be commenced within six years after the cause of action has accrued.

(2) A cause of action accrues for breach of warranty when the breach is or should have been discovered.

...

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this act becomes effective.

In determining whether a particular contract falls within the U.C.C. definition of a “sale of goods”, and thus whether § 36-2-725 would apply, the Courts have looked to the predominant purpose of the transaction. Most Courts have determined the predominant purpose by looking to the parties’ intent. In the leading case of *Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456, 460 (4th Cir. 1983), the Fourth Federal Circuit Court, applying Maryland law, looked to the language of the contract, the nature of the supplier’s business, and the intrinsic worth of the materials provided in determining that intent.

In the case of *Fournier Furniture, Inc. v. Waltz-Blow Pipe Co.*, 980 F.Supp. 187 (W.D.Va. 1997), the Federal District Court determined that a contract for design, fabrication and installation of a furnace and which provided for sales taxes, as here, was one for the sale of goods. The intent of the contract of the parties in this case was obviously to secure the Appellants new, properly working geothermal equipment in the Appellants’ home. Thus, S.C. Code § 36-2-725 applies; since this action was brought within six years of the time to which the parties’ actions extended their contract, the relevant Statute of Limitations is satisfied.

The Circuit Court’s Order of May 19, 2019 discusses *Fournier* at length, concluding that since

“less than 40% of the total value” of the contract is attributable to the materials, the U.C.C. Statute does not apply. [RECORD ON APPEAL, p. 2-4.] The U.S. District Court in *Fournier*, addressing its facts, specifically held:

Accordingly, since the agreement is dominated by language designating a sale of goods, I find that the agreement at issue does contain the UCC implied sales warranties.

[*Id.*, 980 F.Supp. At 189].

The *Fournier* Court looked to the basic purpose of the contract in question, and applied its analysis to that end. Here, the Appellants’ purpose was the installation of a working geothermal unit: the services were subordinate to that end. The contract here was for a mixed purpose but, as in *Fournier*, the predominant purpose was for goods, and the U.C.C. Statute of Limitations must apply.

As matter of procedure, the Appellants argue that the question of predominant purpose is one for the finder of fact. As the Fourth Federal Circuit stated in *Coakley, supra*:

A distillation of the cases outlined in the [Court’s] foregoing [foot]notes 11-14 produces an inescapable conclusion that, on the facts in their present pro-Appellant posture, a reasonable viewing of them would permit a factfinder to conclude that the contract between Washington and Coakley predominantly concerned a sale of goods, and consequently was governed by the U.C.C. A Rule 12(b)(6) motion simply cannot serve to dispose of the case.²

[*Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d at 460; matter in brackets added for clarity; footnote omitted.]

The Appellants here were entitled to all presumptions accorded to a party defending against a 12(b)(6) or summary judgment motion. Even should their arguments on the parties’ primary purpose fail by themselves to preclude a refusal to apply the U.C.C. Statute, the Appellants raised sufficient factual points to require a submission of this issue to the jury. A grant of summary judgment to the Respondent was precluded.

2 A 12(b)(6) Motion would require of the moving party the same burden as one for Summary Judgment.

ARGUMENT

II. DOES THE PREVIOUS DECISION BY THE LLR BOARD PRECLUDE THIS ACTION?

The Orders of the Circuit Court do not address the Respondent's claim of preclusion by reason of the L.L.R. Decision included in its Summary Judgment Motion. That issue was argued below. The Appellants understand that under the doctrine allowing a decision on any grounds in the Record, they must address that issue.

It is unquestionably true that *res judicata* or collateral estoppel may apply as an effect of an administrative decision. *Stinney v. Sumter Sch. Dist. 17*, 391 S.C. 547, 707 S.E.2d 397, 266 Ed. Law Rep. 515 (2011). The question therefore is one of what was determined by the LLR Decision.

The Hearing Officer determined that the State had not proven a violation of the provisions of S.C. Code § 40-59-110(1)(f), which penalizes a licensed contractor who, in relevant part:

has engaged in misconduct in the practice of residential building or residential specialty contracting. For purposes of this section, misconduct includes a violation of Section 40-59-25.3, or a pattern of repeated failure by a residential builder or residential specialty contractor to pay labor or material bills. . . .

[RECORD ON APPEAL, p. 47-48.]

The Respondent did not obtain a building permit and was fined for that inaction.³ [RECORD ON APPEAL, p. 62.] The Hearing Officer did not try the issue of the Respondent's compliance with S.C. Code § 40-59-240(f), which requires compliance with County licensing and Codes. [RECORD ON APPEAL, p. 47-48.]

Finally, the Hearing Officer could not determine that the Respondent violated S.C. Code § 40-1-110(f), which prohibits any action of a licensed contractor that:

(f) has committed a dishonorable, unethical, or unprofessional act that is likely to deceive, defraud, or harm the public;

³ A copy of the assessed Penalty has been submitted.

[RECORD ON APPEAL, p. 47-48.]

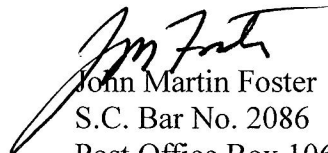
The L.L.R. Hearing Officer and that Agency's Order did not address the issues raised in this action. Neither *res judicata* nor collateral estoppel can attach where neither the Court nor the prosecuting agency possess the evidence to decide the case. *F.T.C. v. Markin*, 532 F.2d 541 (6th Cir. 1976). Even should these doctrines apply, their uttermost effect would be to strike the UFTPA Action alone.

CONCLUSION

Summary Judgment was improperly granted against the Appellants. The dealings of the parties were a sale of goods within the meaning of the U.C.C. Statute, and its Statute of Limitations applies in this action. There is no preclusion by reason of the LLR's decision. The ruling of the Circuit Court should be reversed and this matter should proceed to trial.

December 21, 2020


Respectfully submitted,


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CERTIFICATE OF COUNSEL

The undersigned certifies that the final Brief of Appellants complies with Rule 211(b), S.C.A.C.R.

December 21, 2020



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Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel for Appellants in the civil appeal above, hereby certifies that, on the date written below, he served copies of the following pleadings or documents in the above-captioned and numbered civil action:

final Brief of Appellants; and
this Certificate of Service,

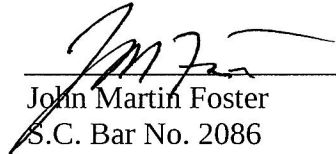
by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; or if the office was closed or the person to be served has no office, by

leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. all pursuant to Rule 262, S.C.A.C.R.

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December 21, 2020



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2019-001061

James Stephen Nivens and Carolyn Nivens. Appellant

v.

JB & E Heating & Cooling, Inc..... Respondent

RECEIVED

Oct 23 2020

SC Court of Appeals

FINAL BRIEF OF RESPONDENT

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October 23, 2020

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STATEMENT OF ISSUES

I. WAS THE PREDOMINANT PURPOSE OF THE CONTRACT A SALE OF GOODS AS CONTEMPLATED BY SOUTH CAROLINA CODE §36-2-725.

FACTS

On or about October 4, 2010, Appellant contracted with the Respondent for the installation of a geothermal HVAC unit at 105 Mountain View Street, Clover, SC. Pursuant to the contract the Respondent installed the unit. In March 2011 an email was sent by the Respondent that addressed the allegation by the Appellant that the unit was not working properly (R. p. 61). The last time that the unit was worked on by the Respondent was 2012 (R. p. 49). On or about March 28, 2012, a complaint was filed with the South Carolina Department of Labor and Licensing Regulation before the Residential Builders Commission alleging that the Respondent had improperly installed of the unit. On February 13, 2013, Panther Heating and Cooling, Inc. prepared an inspection report for Appellant, identifying alleged defects in the installation of the HVAC system (R. p. 40 on July 23, 2014). The Hearing Officer of the Commission issued a recommendation that the Complaint be dismissed (R. p. 41-48). The Hearing Officer's recommendation was adopted as a final Order, was issued January 27, 2015 (R. p. 50). The Appellant commenced this action on August 10, 2017 by the filing of a Summons and Complaint. The Respondent timely answered and thereafter filed a Motion for Summary Judgement. The Motion for Summary Judgement was heard by the Court on February 7, 2019. On March 18, 2019 the Court issued it Order granting the Respondent's Motion for Summary Judgement.

ARGUMENTS

I. THE PREDOMINANT PURPOSE OF THE CONTRACT WAS NOT A SALE OF GOODS AS CONTEMPLATED BY SOUTH CAROLINA CODE §36-2-725.

In order for a contract to fall under the six year statute of limitations of South Carolina Code §36-2-725 the contract must be for goods rather than services. If a contract provides for both good and services the Court use the “Predominant Purpose” test to determine if the UCC applies. *Ranger Construction Co. v. Dixie Floor Co.*, 433 F. Supp. 442 (D.S.C. 1977). If the predominant purpose of the contract is the rendition of services with goods incidentally involved the UCC is not applicable. In determining the predominant purpose of the contract, the Court should consider the language of the contract the structure of compensation and ratio of materials supplied to labor expended. *Fournier Furniture, Inc., v. Waltz-Holst Blow Pipe Co.*, 980 F. Supp. 187, 189 (W.D. Va. 1997). The Court found that the total value of the contract was \$15,280.00. The Court further found that only \$6,100.00, including sales tax, was for the material, which is less than 40% of the total value of the contract. The Appellant agreed with this calculation (R. p.113, lines 2-7). There were no allegations that the equipment was defective. The complaint was concerned the services provided by the Respondent including an allegation that the Respondent did not choose the correct equipment. The Respondent did not design, fabricate or manufacture the Climate Master Unit. The Respondent acquired the unit its necessary materials to the removal and installation service contract.

The Respondent cites the case *Coakley & Williams, Inc., v. Shatterproof Glass Corp.*, 706 F.2d 456, 460 (4th Cir. 1983). In *Coakley* the Court looked at the language of the contract, the nature of the supplier’s business and the intrinsic worth of the materials provided as the

factors in determining predominant nature of the contract. In the present case the contract itself is unclear as to whether it is predominantly for the sale of goods or for services. In looking at the second factor, the nature of the suppliers business, the Respondent is not a manufacturer or a store selling a product. It is a heating and cooling company that installs products. In looking at the intrinsic materials provided the undisputed fact is that over 60% of the contract was for installation. These factors clearly weigh in the Respondent's favor.

The statute of limitations runs from the date the injury is discoverable by the exercise of reasonable diligence. *Republic Contract Corporation v. SCDHPT*, 332 S.C. 197, 503 SE2d 761 (SC App. 1998). The appellant had the inspection report of Panther Heating and Cooling, Inc. on February 13, 2013. The report identified problems in the system, so Appellant had notice of the problems by that date. This action was not filed until August 10, 2017, and therefore was not filed within the three year statute of limitations.

CONCLUSION

For the reason stated, the Court should affirm the judgment of the Circuit Court.

Respectfully Submitted,

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October 23, 2020

...

(9) an action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

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Sep 30 2020
SC Court of Appeals

The Plaintiffs acknowledge that S.C. Code § 15-3-640 is a “statute of repose”, within which an applicable statute of limitation runs. They note, however, that the beginning date is stated to be after “substantial completion”. That term is defined by S.C. Code §§ 15-3-630, which states, in relevant part:

As used in Sections 15-3-630 to 15-3-670, the terms set out hereinbelow shall be defined as follows: . . . (b) "substantial completion" shall mean that degree of completion of a project, improvement, or a specified area or portion thereof (in accordance with the contract documents, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended; the date of substantial completion may be established by written agreement between the contractor and owner.

In light of the Plaintiff’s Affidavit, it is clear that “substantial completion” never occurred. It was promised, but such promise was not fulfilled. Given this fact, the Defendant is estopped by his promises from an attempt to invoke the statute of limitations. The Plaintiffs’ recognition of the worthlessness of those promises became clear to them only in 2012 and resulted in the LLR action.

In this regard, the Plaintiffs would note the language of S.C. Code § 15-3-120, which states:

No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter unless it be contained in some writing signed by the party to be charged thereby. But payment of any part of principal or interest is equivalent to a promise in writing.

The attached and incorporated e-mail of the Defendant's principal is sufficient in law to be held as "signed" and the promise contained therein is sufficient to extend the relevant limitation period.

The relevant statute of limitations herein is that of S.C. Code § 36-2-725, which states, in relevant part:

- (1) An action for breach of any contract for sale must be commenced within six years after the cause of action has accrued.
- (2) A cause of action accrues for breach of warranty when the breach is or should have been discovered.
- ...
- (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this act becomes effective.

In determining whether a particular contract falls within the UCC definition of a sale of goods, and thus whether § 36-2-725 would apply, the Courts have looked to the predominant purpose of the transaction. In this case, both goods and services were unquestionably involved.

In the case of *Fournier Furniture, Inc. v. Waltz-Blow Pipe Co.*, 980 F.Supp. 187 (W.D.Va. 1997), the Federal District Court for the Western District of Virginia determined that a contract, for design, fabrication and installation of a furnace, and which provided for sales taxes, as here, was one for the sale of goods.⁴ The intent of the contract here was obviously to secure new, properly working geothermal equipment in the Plaintiffs' home. S.C. Code § 36-2-725 applies and this action was brought within six years of the time to which the parties' actions extended their contract.

The Court discusses *Fournier* at length, concluding that since "less than 40% of the total value" of the contract is attributable to the materials, the U.C.C. shall not apply. The U.S. District Court in that case more specifically held:

Accordingly, since the agreement is dominated by language designating a sale of goods, I find that the agreement at issue does contain the UCC implied sales warranties. [*Id.*, 980 F.Supp. At 189].

4 Copies of the Defendant's Proposal and Invoice were attached to the Plaintiff's Memorandum in Opposition, and are adopted hereto by this reference.

The *Fournier* Court looked to the basic purpose of the Contract in question, and applied its analysis to that end. Here, the Plaintiffs contracted for the installation of a working geothermal unit: the services were subordinate to that end. The contract was for a mixed purpose, but as in *Fournier*, the predominant purpose was for goods, and the U.C.C. Statute of Limitations should apply.

The Plaintiffs note that they have abandoned their claim for nuisance.

Counsel for the Movants is not required to attempt in good faith to resolve the matter contained in this Motion by reason of the dispositive nature thereof.

The basis for this Motion is the applicable law and rules of procedure, the above-cited Rules and Statutes, the records of these civil actions, and any Supporting Memorandum which the Movants may submit herein.

Respectfully submitted,

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March 28, 2019

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA]
]
 COUNTY OF YORK]
]
 JAMES STEPHEN NIVENS and]
 CAROLYN NIVENS,]
 Plaintiffs,]
]
 v.]
]
 JB&E HEATING & COOLING, INC.,]
 a South Carolina corporation,]
]
 Defendant.]
]

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT
 MEMORANDUM
 ON RULE 59(e), S.C.R.C.P. MOTION
 C.A. No. 17-CP-46-02339

The Honorable Court has granted Defendant JB&E HEATING & COOLING, INC. summary judgment, finding expiration of the limitation period for the Plaintiff’s causes of action. The Plaintiff moves under Rule 59(e), S.C.R.C.P. to reopen and amend this Court’s Order.

GENERAL STATUTE OF LIMITATIONS

The date of the original contract on the Plaintiffs’ geothermal system and unit is cited as October, 2010. The Defendant has, to date, been unable to confirm the date of the Plaintiffs’ complaint to the LLR, but accepts the Defendant’s date of March 28, 2012.

The Defendant pleads the effect of S.C. Code § 15-3-530(1), which states the limitation to be:

- Within three years:
- (1) an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520;¹

With regard to the Plaintiffs’ Cause of Action for Unfair and Deceptive Trade Practices, the Defendant cites S.C. Code § 39-5-150, which states:

No action may be brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit.

The Plaintiff JAMES STEPHEN NIVENS has submitted his Affidavit herein, stating his repeated contacts with Hutchison Neely, the Defendant’s principal, and the promises of

1. S.C. Code § 15-3-520 deals with actions upon bonds and sealed instruments.

examination repair repeatedly given to him.² It was only after the failure of those promises that he initiated the procedure with the LLR in March, 2012.

S.C. Code §§ 15-3-630 to 15-3-670 deal with actions against contractors. S.C. Code § 15-3-640 provides, in relevant part:

No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

- (1) an action to recover damages for breach of a contract to construct or repair an improvement to real property;
- (2) an action to recover damages for the negligent construction or repair of an improvement to real property;
- ...
- (4) an action to recover damages for economic or monetary loss;
- (5) an action in contract or in tort or otherwise;
- (6) an action for contribution or indemnification for damages sustained on account of an action described in this section;
- ...
- (9) an action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

The Plaintiffs acknowledge that S.C. Code § 15-3-640 is a “statute of repose”, within which the applicable statute of limitation runs. They note, however, that the beginning date is stated to be after “substantial completion”. That term is defined by S.C. Code §§ 15-3-630, which states, in relevant part:

As used in Sections 15-3-630 to 15-3-670, the terms set out hereinbelow shall be defined as follows: . . . (b) "substantial completion" shall mean that degree of completion of a

2. The Defendant’s admission of discussions on further work on the geothermal unit is stated as Finding of Fact No.46., P.7, LLR Hearing Officer’s Recommendation, July 23, 2014 (included in the Defendant’s Motion). In addition, the Defendant’s e-mail to this effect was listed and entered into evidence at the LLR hearing as State’s Exhibit 7 and a copy has been submitted as an Exhibit.

project, improvement, or a specified area or portion thereof (in accordance with the contract documents, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended; the date of substantial completion may be established by written agreement between the contractor and owner.

In light of the Plaintiff's Affidavit, it is clear that "substantial completion never occurred. It was promised, but such promise was not fulfilled. Given this fact, the Defendant is estopped by his promises from an attempt to invoke the statute of limitations. The Plaintiffs' recognition of the worthlessness of those promises became clear to them only in 2012 and resulted in the LLR action.

In this regard, the Plaintiffs would note the language of S.C. Code § 15-3-120, which states:

No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter unless it be contained in some writing signed by the party to be charged thereby. But payment of any part of principal or interest is equivalent to a promise in writing.

The e-mail of the Defendant's principal is sufficient in law to be held as "signed" and the promise contained therein is sufficient to extend the relevant limitation period.

The facts as adduced by the Plaintiff are sufficient on the grounds argued above to preclude summary judgment.

U.C.C. STATUTE OF LIMITATION

The true statute of limitations herein is that of S.C. Code § 36-2-725, which states, in relevant part:

- (1) An action for breach of any contract for sale must be commenced within six years after the cause of action has accrued.
- (2) A cause of action accrues for breach of warranty when the breach is or should have been discovered.
- ...
- (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this act becomes effective.

In determining whether a particular contract falls within the U.C.C. definition of a sale of goods, and thus whether § 36-2-725 would apply, the Courts have looked to the predominant purpose of the transaction. Most Courts determine the predominant purpose by looking to the parties' intent. In the leading case of *Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456, 460 (4th Cir. 1983), the Federal District Court, applying Maryland law, looked to the language of the contract, the nature of the supplier's business, and the intrinsic worth of the materials provided in determining that intent.

In the case of *Fournier Furniture, Inc. v. Waltz-Blow Pipe Co.*, 980 F.Supp. 187 (W.D.Va. 1997), the Federal District Court determined that a contract for design, fabrication and installation of a furnace and which provided for sales taxes, as here, was one for the sale of goods.³ The intent of the contract here was obviously to secure new, properly working geothermal equipment in the Plaintiffs' home. S.C. Code § 36-2-725 applies and this action was brought within six years of the time to which the parties' actions extended their contract.

The Court's Order discusses *Fournier* at length, concluding that since "less than 40% of the total value" of the contract is attributable to the materials, the U.C.C. shall not apply. The U.S. District Court in that case, addressing its facts, more specifically held:

Accordingly, since the agreement is dominated by language designating a sale of goods, I find that the agreement at issue does contain the UCC implied sales warranties.

[*Id.*, 980 F.Supp. At 189].

The *Fournier* Court looked to the basic purpose of the Contract in question, and applied its analysis to that end. Here, the Plaintiffs contracted for the installation of a working geothermal unit: the services were subordinate to that end. The contract was for a mixed purpose but, as in *Fournier*, the predominant purpose was for goods, and the U.C.C. Statute of Limitations applies.

More basically, the question of predominant purpose is one for the finder of fact. As the Fourth Circuit stated in *Coakley, supra*:

A distillation of the cases outlined in the [Court's] foregoing [foot]notes 11-14 produces an inescapable conclusion that, on the facts in their present pro-plaintiff posture, a reasonable viewing of them would permit a factfinder to conclude that the contract between Washington and Coakley predominantly concerned a sale of goods, and consequently was governed by the U.C.C. A Rule 12(b)(6) motion simply cannot serve to dispose of the

3. Copies of the Defendant's Proposal and Invoice have been submitted.

case.

[*Coakley & Williams, Inc. v. Shatterproof Glass Corp.*, 706 F.2d at 460; matter in brackets added for clarity; footnote omitted.]

The Plaintiff here is also entitled to all presumptions accorded to a party defending against a 12(b)(6) or summary judgment motion. Even should its arguments on the parties' primary purpose fail to quash the Defendant's objection, the Plaintiff has raised sufficient factual points to require a submission of this issue to the jury. A grant of summary judgment to the Defendant is precluded.

MAGNUSON-MOSS ACT LIMITATION

The Magnuson-Moss Act contains no statute of limitations. In virtually all cases dealing with that Act, the Courts have looked to the State U.C.C. Statute of Limitations. *See, e.g., Lowe v. Volkswagen of Am., Inc.*, 879 F.Supp. 28 (E.D. Pa. 1995); *Tittle v. Steel City Oldsmobile GMC Truck, Inc.*, 544 So.2d 883, 8 U.C.C. Rep.2d 701 (Ala. 1989); *Price v. Freedom Ford, Inc.*, 46 Va.Cir. 129 (1998); *Waldron v. Subaru of Am., Inc.*, 20 Va. Cir. 355 (1990). In short, we are again referred to S.C. Code § 36-2-725, which has been complied with.

EFFECT OF LLR DECISION

The Order of this Court does not address the Defendant's claim of preclusion by reason of the L.L.R. Decision included in its Motion. The Plaintiff understands that under Rule 59, S.C.R.C.P., he is required to address that issue.

It is unquestionably true that *res judicata* or collateral estoppel may apply as an effect of an administrative decision. *Stinney v. Sumter Sch. Dist. 17*, 391 S.C. 547, 707 S.E.2d 397, 266 Ed. Law Rep. 515 (2011). The question therefore is one of what was determined by the LLR Decision.

The Hearing Officer determined that the State had not proven a violation of the provisions of S.C. Code § 40-59-110(1)(f), which penalizes a licensed contractor who, in relevant part:

has engaged in misconduct in the practice of residential building or residential specialty contracting. For purposes of this section, misconduct includes a violation of Section 40-59-25S.⁴, or a pattern of repeated failure by a residential builder or residential specialty

4. S.C. Code § 40-59-25 deals with roofing contracts and insurance coverage; it thus has no application here.

contractor to pay labor or material bills. . . .

The Defendant did not obtain a building permit and was fined for that inaction.⁵ The Hearing Officer did not try the issue of the Defendant's compliance with S.C. Code § 40-59-240(f), which requires compliance with County licensing and Codes.

Finally, the Hearing Officer could not determine that the Defendant violated S.C. Code § 40-1-110(f), which prohibits any action of a licensed contractor that:

(f) has committed a dishonorable, unethical, or unprofessional act that is likely to deceive, defraud, or harm the public;

The L.L.R. Hearing Officer and that Agency's Order did not address the issues raised in this action. Neither *res judicata* nor collateral estoppel can attach where neither the Court nor the prosecuting agency possess the evidence to decide the case. *F.T.C. v. Markin*, 532 F.2d 541 (6th Cir. 1976). Even should these doctrines apply, their uttermost effect would be to strike the UFTPA Action alone.

The Plaintiff is entitled to an order revoking the earlier decision of this Court, and to proceed to trial.

Respectfully submitted,

/s/ John Martin Foster
Attorney for Plaintiffs
S.C. Bar No. 2086

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April 23, 2019

Rock Hill, South Carolina

5. A copy of the assessed Penalty has been submitted.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 James Nivens and Carolyn Nivens,)
)
) **Plaintiffs,**)
))
) **v.**)
))
 JB&E Heating & Cooling, Inc., a)
 South Carolina Corporation,)
))
 _____) **Defendants.**)

**IN THE COURT OF COMMON PLEAS
 SIXTEENTH CIRCUIT COURT**

CASE NO.: 2017-CP-46-02339

**RESPONSE TO MOTION
 TO ALTER OR AMEND
 JUDGMENT**

The above named Defendant opposes the Motion to Alter or Amend the Judgment. The Defendant believes that the arguments and facts presented in the Notice or Motion to Alter or Amend Judgment are the same that were made when the Motion was heard by the Court and no new matters of law have been brought forth in the Motion to Alter or Amend Judgment. The Defendant stands on his Motion for Summary arguments and documents presented at the time the Motion was made.

Even if the Court should find that a six (6) year statute of limitation applies, pursuant to South Carolina Code §36-2-725, the Affidavit of the Plaintiff states that, “he noticed that the deficiency in the equipment and work provided by the Defendant, JB&E Heating and Cooling, Inc. after September 2010”. The Plaintiff submitted an dated March 2011, in which the Defendant discussed, “coming out this week to increase you”. Even if a six (6) year statute of limitation applies the Plaintiff did not bring the action during that timeframe.

FOR ALL THE ABOVE REASONS THE Defendant request that the Court deny the Plaintiff’s Motion to Alter or Amend Judgment..

Rock Hill, South Carolina
April 9, 2019

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P R O C E E D I N G S

* * *

THURSDAY, FEBRUARY 6, 2019

ROCK HILL, SOUTH CAROLINA

* * *

THE COURT: Good morning. It looks like first up today is James Nivens and Carolyn Nivens v. JB&E Heating and Cooling, Inc. The first motion is a Motion to Dismiss.

MR. BOYD: That is my motion. Your Honor, I think taking in order the Motion for Summary Judgment probably ought to be argued first, because that may be dispositive.

THE COURT: Okay.

MR. BOYD: Your Honor, just a brief overview of the facts of this case. I represent the defendant, JB&E Heating and Cooling. The Nivens, James and Carolyn Nivens, brought this lawsuit alleging several causes of action that arose out of a contract that was entered into on or about October 4, 2010. They entered into a contract with my client for installation of a heating and air unit at their home.

After that, the Nivens alleged certain problems with the unit's installation. On March 28, 2012, a complaint was filed with the South Carolina Department

1 of Labor and Licensing Regulation before the Residential
2 Builders Commission alleging improper installation of
3 the unit.

4 Then on February 13, 2013, Panther Cooling and
5 Heating, an expert on behalf of the plaintiff, filed a
6 report. The reason for the first ground for the Motion
7 for Summary Judgment is that these causes of actions are
8 barred by the Statute of Limitations.

9 The Statute of Limitations, Your Honor, is three
10 years when arising upon a contract under 15-3-530(1).
11 To the extent the causes of action do not arise out of a
12 contract, they are barred by 15-3-530(5). There is also
13 an Unlawful Trade Practices Act cause of action. There
14 is the three-year Statute of Limitations, 39-5-150.

15 This complaint was filed on August 10, 2017. The
16 Statute of Limitations, I think everyone will agree,
17 runs from the date -- the cause of action would be
18 discoverable by reasonable diligence on the part of the
19 plaintiff, certainly.

20 On March 28, 2012, the plaintiff filed a complaint
21 with the Residential Builders Commissions, so the
22 plaintiff certainly had notice at that time that there
23 was a problem. On February 13, 2013, the plaintiff had
24 an expert opinion from another heating and cooling
25 company, Panther. So they certainly had notice at that

1 time.

2 August 10, 2017, is well beyond the Statute of
3 Limitations of three years for that. The defense has
4 filed in their response to the Motion for Summary
5 Judgment that the Statute of Limitations, which is
6 covered by 36-2-725, which is a six-year Statute of
7 Limitations for breach of contract for sale of goods
8 under the UCC, which is six years.

9 The plaintiff has cited a case Fournier, which is
10 not a South Carolina case. It's a District Court
11 decision from Virginia. It's basically stating that a
12 contract such as this one that has both goods, meaning
13 the unit and the services, which would be the
14 installation, would be covered by the Six-Year Statute
15 of Limitations. However, that is not actually what
16 Fournier states.

17 Fournier says that the Court should examine any
18 contract that contemplates both services and goods and
19 determine whether goods or services is the predominant
20 factor. The Court lists several factors in determining
21 whether it's goods or services that predominate. One
22 is the language of the contract. One is the structure
23 of the compensation. One is the ratio of material
24 supplied to the labor extended.

25 The contract itself is set forth in the Defendant's

1 Response to the Motion for Summary Judgment. It really
2 doesn't explain a breakdown; however, if you look at the
3 invoices that are also attached to the Response for
4 Motion for Summary Judgment, it looks like the invoice
5 for the unit itself was \$5,000. Sales tax was paid in
6 the amount of 7 percent, \$350 on that.

7 The rest of the contract would be for installation.
8 No sales tax was paid on that. It looks like
9 predominantly, this contract is for services. So it's
10 basically, the installation of the unit and not the sale
11 of the unit.

12 I will also note -- if you look at the Panther
13 report that is also attached to the Motion for Summary
14 Judgment, it notes problems with the installation of the
15 unit, not the unit itself.

16 The main problem is not that the unit is defective,
17 but that the unit was not fit and not installed properly
18 at the home of the Nivens.

19 Even if the Court would rule that a six-year
20 Statute of Limitations applies -- then in the Response
21 to the Motion for Summary Judgment, you will notice that
22 apparently in 2010, the plaintiff started complaining to
23 the defendant concerning the issues with the unit. They
24 make reference to an email that is attached from March
25 8, 2011.

1 My client sends an email talking about lengthening,
2 doing some work and lengthening. That work never
3 occurred. Certainly, that shows that even as early as
4 2010 and certainly by March 8, 2011, the plaintiff was
5 aware of problems with the unit.

6 The complaint was filed again on August 10, 2017,
7 which is well after six years after the deficiencies
8 were noted in March 8, 2011. Even if the Court,
9 however, rules that the six-year Statute of Limitations
10 would apply, I would submit that the three-year Statute
11 of Limitations would still apply to the causes of
12 actions for unlawful trade practice, the actions for
13 negligence, the actions for nuisance, and the actions
14 for negligent misrepresentation.

15 Those are different causes of action that the
16 three-year Statute of Limitation would apply, even if
17 the others do not.

18 Your Honor, that is my argument on the Statute of
19 Limitations issue. I can go forward with the other
20 arguments at this time, if you want to just hear
21 everything at once.

22 THE COURT: Let's take them one at a time.

23 Mr. Foster, I will hear from you.

24 MR. FOSTER: Your Honor, Martin Foster with the
25 plaintiff. I will pass up my brief and the authority

1 relying on it.

2 THE COURT: Is this the same one you filed?

3 MR. FOSTER: Yes, sir.

4 THE COURT: The one that says, Memorandum in
5 Response to Motion for Summary Judgment?

6 MR. FOSTER: Yes, Your Honor. There is an
7 affidavit, and we also have authority.

8 THE COURT: Okay.

9 MR. FOSTER: Mr. Boyd has recited the dates. I
10 have been unable to confirm the date of the Complaint to
11 the LLR. South Carolina bureaucracy is a bit different
12 to me, but I will accept his date of March of 2012 as
13 the Complaint.

14 We have filed an affidavit in response addressing
15 statements in the complaint, basically agreeing with
16 those dates. Our contention is basically that my client
17 discovered the problem. He contacted the defendant. He
18 was continually promised that there would be repairs.

19 In that regard, Your Honor, I believe both parties
20 are, in essence, in agreement. If Your Honor has had
21 time to look at the hearing recommendations from the
22 LLR, the defendant agreed that there had been
23 discussions about repairs. His contention was that my
24 client would not agree. My client's contention, by
25 affidavit, was that you never followed through, which

1 is, of course, a factual issue.

2 Your Honor, we have cited on both acts the Code
3 Section 15-3-120, which holds that evidence of a new or
4 continuing contract can be put in to the total of the
5 Statute of Limitations if it is signed.

6 We would maintain -- and I believe they can agree
7 to it -- an email from the defendant is effectively
8 signed.

9 So here is what we have. We believe we have, first
10 of all, a mixed contract. We are going to install your
11 geothermal unit, and we are going to sell you the
12 equipment that actually makes up that unit.

13 Fournier also is cited, not because it's from the
14 Federal Western District of Virginia, but because it
15 involves the installation of a furnace. In that case,
16 the Federal Court essentially said, we are talking here
17 about the stuff, because that is the end product.

18 We are talking about the stuff because there are
19 taxes. That is also what is shown on the proposal and
20 invoices that we have attached as filed exhibits.

21 The purpose of a contract -- I believe known in UCC
22 law -- is a mixed purpose. It was to get a new,
23 functioning geothermal unit. As is often the case in
24 UCC litigation, the Courts look to, as counsel has
25 acknowledged, what the main purpose is.

1 We maintain the main purpose was the thing, the
2 working thing. As such, we have the right to invoke the
3 UCC Statute of Limitations. My client has indicated
4 that he tried continually to get with the defendant to
5 get this done.

6 THE COURT: Is there any case in South Carolina
7 where someone has installed a residential HVAC system in
8 as a residential improvement?

9 MR. FOSTER: Not that I am able to find, sir. Not
10 that I am aware of.

11 Shall I proceed, sir?

12 THE COURT: Absolutely.

13 MR. FOSTER: My point in citing Fournier was the
14 fact that it was the same analysis and the same type of
15 work. I don't believe the commercial status has
16 anything to do with it. It is, of course, up to the
17 Court. We continued to try to deal with the defendant
18 through the early part of -- to sue before the filing
19 with the LLR.

20 Time passed. The LLR -- I am not addressing the
21 LLR issues at this point, because that has been
22 deferred. We believe, based upon the statute, about the
23 continuing contract -- also, if I may say so, the
24 language in the Statute of Repose, 15-3-360, which says
25 basically that there is an eight-year final Statute of

1 Repose.

2 That statute firmly says, as I acknowledge -- that
3 is the Statute of Repose. Within that statute, you
4 still have to have some responsible deadline. The point
5 is, however, it goes on to define, when does this thing
6 start?

7 It talks about -- well, it starts when you have
8 substantial completion of contract. We maintain, quite
9 frankly, Your Honor, that it cannot be considered to be
10 substantially completed, when, in fact, the parties
11 continued to deal, we maintain, right up to the time of
12 the LLR claim with each other as to what was going to be
13 completed.

14 I agree the parties continued to deal, we maintain,
15 right up the time of the LLR thing, with each other as
16 to what was going to be completed. I agree it was a
17 contention of fact, that between the parties, on the one
18 hand, they claim they were not allowed to repair. We
19 claim they wouldn't repair. It's an issue of fact.

20 The point is, in the absence of substantial
21 completion under the South Carolina statute, they cannot
22 now say, "Well, time ended."

23 They dealt with this as evidenced by the email.
24 They dealt with this, according to my client's
25 affidavit, after that fact. Consequently, substantial

1 completion never occurred, unless we are going to use
2 the cut-off being the date of the LLR.

3 We are, in fact, still within the time up through
4 the LLR. Using the LLR or assuming that therefore as
5 the date when --

6 THE COURT: Mr. Foster, is the system working at
7 all?

8 MR. FOSTER: My understanding is that it is working
9 in some fashion. I admit to the Court that I think it
10 has been repaired by other parties.

11 THE COURT: The definition you provided me of
12 substantial completion says, "Substantial completion is
13 when the owner can use the same for the purpose for
14 which it was intended."

15 So if the system is partially working, that is
16 substantial completion, isn't it?

17 MR. FOSTER: Well, reading the statute, Your
18 Honor, which is, 15-3-640. It states "Substantial
19 completion means degree of completion in accordance with
20 the contract documents as modified by any change
21 orders."

22 Well, we have written information stating, "We are
23 still going forward. It's not working."

24 What my client bought --

25 THE COURT: At all?

1 MR. FOSTER: No, sir. We are not claiming it
2 didn't work at all. We are claiming it didn't work
3 properly. The point simply being that it was still
4 being modified or supposed to be modified through the
5 time that they continued dealing with each other, as
6 evidenced by the email. It's continuing, through my
7 client's affidavit, up until the time of the LLR
8 complaint.

9 THE COURT: Mr. Foster, isn't that the difference
10 between substantial completion and actual completion?
11 The fact that they are still working on it, it may not
12 not be completely done --

13 MR. FOSTER: Your Honor, obviously you are the
14 Judge.

15 THE COURT: I haven't made a decision yet. I am
16 just trying to talk to you.

17 MR. FOSTER: I understand, sir. All I can do at
18 this point is the read the statute. The statute says X.
19 It talks about completion through the time of the
20 agreement or the change orders.

21 I maintain, in all reality, when they are dealing
22 with each other -- as proven by the email and the
23 affidavit, they continued to deal with each other, and
24 it caused a contractual term. But the properly working
25 unit was not reached.

1 As such, we maintain substantial completion did not
2 occur; therefore, on that ground also, we maintain time
3 continued and that we were within the Statute of
4 Limitations.

5 THE COURT: Mr. Foster, it can't mean units
6 installed within the contract are perfectly working, can
7 it? There would have to be a new cause of action.

8 MR. FOSTER: I can only repeat -- I hope I don't
9 try the patience of the Court. The definition that I
10 read out states it has to be a contract or change order.
11 There is no question there was the equivalent of a
12 change order. There is no question there is a factual
13 issue as to whether the change order was ever followed
14 out.

15 Once again, claiming, on the defendant's part, "I
16 was not allowed." Claiming on our part, "You never
17 showed up." Therefore, there is a contract that was not
18 completed.

19 That is, I believe, all that is required under the
20 statute. So we maintain, Your Honor --

21 THE COURT: Show me where in the record the change
22 orders are.

23 MR. FOSTER: We maintain, sir -- we supplied to
24 the Court as an exhibit that has been filed with the
25 Court -- I believe it's Exhibit B. That is the email

1 from the defendant saying, I am going to come up there
2 and do something. Indicating, as said in there also, in
3 the hearing officer's recommendation --

4 THE COURT: I am not able to find it, Mr. Foster.

5 MR. FOSTER: It's a separate document, Your Honor.

6 THE COURT: The Gmail on March 8, 2011?

7 MR. FOSTER: Yes, sir.

8 Also, in the hearing officer's recommendation, the
9 last finding of fact is:

10 "The respondent," the defendant, "Testified that he
11 offered to return to Subject Property and install
12 auxiliary heating after Homeowner reported problems, but
13 Homeowner declined the offer."

14 Our affidavit indicates the opposite, that, in
15 fact, we found problems. We called the man and emailed
16 him. The result was, "I will be there" and he never
17 showed up.

18 Therefore, our view is that the contract, which
19 promised -- there is definition of a warranty, so they
20 had to be promised -- that there is going to be a
21 properly working unit. There was no properly working
22 unit. There was a continuation of the contract. As
23 such, there was a continuation of the time within which
24 the Statute of Limitations began to run under the
25 statutes we have cited.

1 THE COURT: All of that is based on the email from
2 March 8?

3 MR. FOSTER: On that section we cited, yes, sir.

4 THE COURT: I am looking at the email. Help me to
5 understand --

6 MR. FOSTER: My understanding is -- the complaint
7 was that the loop was insufficient for installation or
8 in the size to do the work that was supposed to be done.

9 THE COURT: What is a loop in this context?

10 MR. FOSTER: I am grasping, sir. This is the
11 geothermal unit. The loop is part of the equipment
12 buried in the ground that cycles certain air and/or
13 liquid and consequently heats and/or cools the house to
14 a certain degree.

15 THE COURT: At a minimum, your argument is that
16 there is a promise here in 2011 to fix something;
17 correct?

18 MR. FOSTER: Yes, sir.

19 THE COURT: Doesn't the clock start ticking on
20 that date at the latest?

21 MR. FOSTER: My understanding of the statute we
22 cited, sir, is, that there is a promise to continue the
23 contract and to do the work involved; that while that
24 promise is apparently good -- that is a factual
25 dispute -- the time has not yet begun to run.

1 THE COURT: When did the clock start?

2 MR. FOSTER: I would say, sir, at or shortly before
3 the LRR complaint was filed, which would be March of
4 2012, according to my client, which opposing counsel
5 tells me.

6 We would have filed in that time, according
7 to the UCC Statute. Therefore, we maintain that we are
8 within time.

9 THE COURT: What about the causes of action like
10 negligence and unfair trade practices for the three-year
11 statutes?

12 MR. FOSTER: I admit, sir, that I am not
13 concentrating on trying to answer those questions. It's
14 my understanding that if a UCC action is allowed, it
15 brings with it in its wake, those other statutes. The
16 same things applies. I do know that, specifically with
17 regard to Magnuson-Moss, which we claim -- as cited as
18 authority in our brief, which I have handed up, the
19 Courts have looked -- all those reported have looked to
20 the UCC limitations. In this case, we believe that
21 limitation has been met.

22 THE COURT: Yes, sir. I am referring to -- in the
23 State law causes of action, you clearly have a
24 three-year statute for a negligence claim.

25 MR. FOSTER: Again, I can only repeat what I have

1 said, Your Honor. I may be incorrect on this.

2 If we can sue him on one basis, we can sue him on
3 the other. I am not aware of anything where there is a
4 separate Statute of Limitations that does not follow in
5 the wake of the ones we are citing. I admit I have not
6 put in the proper time to answer that question for the
7 Court. I am happy to do so.

8 THE COURT: Mr. Foster, there are different causes
9 of action for the Statute of Limitations.

10 I understand your argument as to the UCC Statute
11 of Limitations. Are you saying that the facts that you
12 bring for the UCC cause of action, that that alters the
13 Statute of Limitations for the State Law Unfair Trade
14 Practices claim?

15 MR. FOSTER: I will answer that in length. It
16 certainly alters it with regard to Magnuson-Moss for the
17 reasons I have stated. Magnuson-Moss looks to the UCC.

18 As to the others, it is my understanding that if we
19 are in one cause of action, we are in the others. I am
20 unaware of the fact that there are different causes of
21 action for the same action, as long as we are in.

22 I have not researched that issue. I have not heard
23 opposing counsel cite anything on that issue.

24 THE COURT: Mr. Foster, as far as documents of
25 facts -- I have an email.

1 Is there anything else you want me to look at, as
2 far as a factual basis? A lot of this is a legal issue,
3 but is there anything else you wish for me to look at?

4 MR. FOSTER: We have that, sir, and we have our
5 verified complaint. That complaint has been modified
6 and corrected by our affidavit.

7 THE COURT: Thank you, Mr. Foster.

8 THE COURT: Mr. Boyd.

9 MR. BOYD: Your Honor, just a brief response.

10 As far as substantial completion goes, if the Court
11 looks at the hearing officer's recommendations from the
12 Residential Builders Commission, Paragraph 4 under
13 finding of facts states:

14 "Following installation of the System, Homeowner
15 noticed that the system did not adequately heat the
16 Subject Property in the winter or cool it in the
17 summer."

18 It was substantially completed when it was
19 installed. The complaint was that it was not adequately
20 cooling and not adequately heating.

21 It wasn't that it wasn't working, it just wasn't
22 working to the specifications.

23 This would be Page 3 under Findings of Fact. The
24 point being, the contractor was called. The
25 installation was done. It was substantially completed.

1 The only problem was, according to the plaintiff, that
2 it didn't adequately cool as much as he would like or
3 heat as well as he would like.

4 It was done. I think certainly from that point
5 on, the statutes would apply. Mr. Foster wants to -- as
6 far as the causes of action, clearly, the State causes
7 of action -- I don't know of any authority -- Mr. Foster
8 seems to think that if there is a statute of six years
9 on one cause of action, it would apply to all of them.
10 That is not an argument I have ever really heard before,
11 but I don't know of any law to support that theory.

12 THE COURT: Mr. Boyd, if you don't mind, take me
13 through the analysis of Fournier. You said that, you
14 believe, the contract predominantly was one of
15 services.

16 Do you mind going through that with me again?

17 MR. BOYD: Your Honor, Fournier basically -- the
18 Court should examine any contract that contemplates both
19 services and goods and determine whether the goods and
20 services predominate.

21 The Court lists factors, such as the language of
22 the contract, the structure of the compensation, the
23 ratio of material supplied to labor expended. In this
24 particular contract, all we really have is a proposal.
25 It doesn't really go into great detail into those

1 factors.

2 Looking at the invoices, however -- if you look at
3 the invoices that they are attached to the Response to
4 the Motion for Summary Judgment, the price of the unit
5 itself seems to be \$5,000. We know that for Fournier
6 mentions that sales tax was paid. That is one of the
7 factors that they looked at. The sales tax was paid of
8 \$350, which would be 7 percent of \$5,000.

9 Since there is no sales tax for anything else, the
10 rest of the contract would appear to be for the
11 installation and taking care of the installation of the
12 unit.

13 THE COURT: I am looking. It says "Unit and
14 piping, \$5,000 taxable." I see it.

15 MR. BOYD: I think in the contract overall, it's
16 concerning some weatherstrips or heating strips. I
17 don't think they were ever actually installed. There
18 may be a dispute over why they were not installed, but
19 that wasn't part of it.

20 That is basically the analysis under whether it
21 predominates or not. Again, I would submit even if you
22 take the six-year Statute of Limitations on that from
23 March of 2011 and still after six years --

24 THE COURT: The proposal of \$15,280. Is that the
25 grand total?

1 MR. BOYD: Yes, sir.

2 THE COURT: Of that \$15,280, \$5,000 was pipes and
3 the unit itself?

4 MR. BOYD: That's correct.

5 THE COURT: Mr. Foster, is that your understanding
6 of the facts?

7 MR. FOSTER: My understanding of the facts, yes,
8 sir. The document says what it says. I would point out
9 it includes the warranty language, and it includes the
10 sales tax. That is what I understand to be one of the
11 factors that Fournier looked at to find that the main
12 thing involved was the thing, the equivalent that is
13 being installed, which we maintain was the main deal.
14 The fellow wasn't called to say, "Will you redo
15 what we have?" He was called to say, "We want a new
16 system. Here is what it is. Here is the sales tax.
17 Here is the warranties."

18 Under Fournier, which is arguable, I believe this
19 is clearly a matter where the main purpose was the
20 goods. As such, the UCC statute would apply. I have
21 great regard for opposing counsel, but I believe he
22 meant to say when he said March of 2011, he meant March
23 of 2012, I believe. So 2012 is the date of the LLR and
24 what we maintain is the effective date near to which we
25 understand when the Statute of Limitations truly began.

1 THE COURT: Mr. Foster -- I don't know a lot about
2 geothermal systems. Was this a supplementary system, or
3 was this the system for the house?

4 MR. FOSTER: I will respond as far as I know, sir,
5 but I admit this is me grasping for knowledge.

6 My understanding of these systems are, they take
7 the ground heat, which I believe is 67 or 68 degrees,
8 run it through a loop, and basically gives that into the
9 house; therefore, it's raising the temperature in the
10 winter and lowering it in the summer.

11 Yes, I do understand there is auxiliary to that.
12 Most people don't want to live in 67, 68 degrees. My
13 statement is a layman's knowledge.

14 THE COURT: It was turned on and working, at least
15 as of the date your client said --

16 MR. FOSTER: It was working, sir. We maintain that
17 the parties were still under a contract as evidenced by
18 the affidavit and the email.

19 THE COURT: As to the amount of money, if I am
20 reading this correctly, \$5,000 of the \$15,000 contract
21 was for goods?

22 MR. FOSTER: Your Honor is reading the proposal?

23 THE COURT: Yes, sir. My question is, am I correct
24 that the proposal is for \$15,280 and \$5,000 was taxable
25 goods? Is that correct?

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1 MR. FOSTER: Yes, sir. We don't dispute there were
2 services involved. There is a separate invoice dated
3 10-11-2010, that says, "Unit piping."

4 There is also the invoice before that, which
5 includes plumbing for unit, and it recites warranty.
6 That is \$1,915.

7 THE COURT: That is zero taxable; correct?

8 MR. FOSTER: I presume a few things here, sir.
9 It's to be included within the proposal, the original
10 proposal, that we maintain included a new unit. We
11 don't dispute that there were services involved. We
12 don't dispute that this is what is called a mixed
13 contract.

14 The question before the Court is, if the Court
15 concludes UCC is applicable, what is the main purpose of
16 this contract? We maintain it's clearly a new, working
17 unit. I hope I have responded to the Court.

18 THE COURT: Yes, sir.

19 Counsel, I think I have heard enough. I will take
20 this matter under advisement before I make a ruling.

21 MR. BOYD: Your Honor, I have some other grounds.

22 THE COURT: Yes, sir.

23 MR. BOYD: Your Honor, my second ground on the
24 Motion for Summary Judgment is that this action is
25 barred by the Doctrines of Collateral Estoppel and Res

1 Judicata.

2 THE COURT: Based on the LLR?

3 MR. BOYD: That's correct, Your Honor.

4 Basically, the -- I am just going to quote from the
5 decision of the commission. Basically, the commission
6 found in favor of my client. It stated "The respondent
7 produced credible, reliable evidence that he properly
8 performed the necessary calculations to determine the
9 size of the system and loop. It properly installed the
10 equipment in accordance to the manufacturer's
11 specifications and advised him prior to the installation
12 of the system that auxiliary heating would be needed to
13 supplement the system."

14 The final recommendation was that the complaint be
15 dismissed. Then there was a final order that basically,
16 by the Chairman, adopted the findings of the
17 recommendation.

18 Basically, the Commission found that my client
19 performed the job he was required to do adequately. The
20 complaint basically alleges that he did not. Having had
21 an adverse finding by the Builder's Commission, we would
22 submit that Collateral Estoppel and Res Judicata applies
23 and that the case should be dismissed on those grounds.

24 THE COURT: Thank you, Mr. Boyd.

25 Mr. Foster.

1 MR. FOSTER: Your Honor, first of all, let me state
2 that I am not clear -- and counsel may be able to make
3 it clear to the Court -- that there was authority that
4 Res Judicata or Collateral Estoppel applied in the
5 instance of the LLR decision.

6 There have been decisions in the state, as I
7 understand it, where such Doctrines have been applied to
8 an administrative decision, and there have been
9 decisions where they have been refused.

10 I am unable to find any that deal with the LLR. In
11 terms of what he says, I would suggest the Court simply
12 look at what was done in that decision. What was
13 decided -- we have cited, in fact, one matter of
14 Estoppel under Stinney v. Sumter School District. In
15 that instance, they applied Res Judicata.

16 However, as I say, nothing with regard to the LLR.
17 What was found in that decision -- well, what was dealt
18 with. Let me put it that way. First of all, the
19 hearing officer determined that the State had not proven
20 a violation of 40-59-110(1)(f). That provision
21 penalizes a licensed contractor who has, quote, "Engaged
22 in misconduct in the practice of residential building or
23 residential specialty contracting."

24 Whether misconduct is intending for this matter to
25 be an all-inclusive description which would include all

1 other causes of action, is, in my opinion, far from
2 clear. They speak of examples.

3 "There is a pattern of repeated failure by the
4 residential builder for his failure to pay labor on
5 material bills." They also failed to find evidence of
6 violation of 40-1-110(f), which says that "The contract
7 cannot commit a dishonorable, unethical, or
8 unprofessional act that is likely to deceive, defraud,
9 or harm the public."

10 I freely concede if Collateral Estoppel and Res
11 Judicata apply, that section might well be seen by this
12 Court as precluding the UFTPA Statute, cause of action.
13 Pardon me. That seems to be directed specifically at
14 the UFTPA claim, because it talks about harming the
15 public -- which as the Court knows better than I do --
16 is the requirement of South Carolina to prove a UFTPA
17 violation. Beyond that, of course, he didn't get a
18 building permit, and he was fined for that purpose.

19 In terms of what was actually found in the matter,
20 I believe it is far too vague or far too general for
21 this Court to assume that we are precluded from all
22 causes of action.

23 At best, from the defendant's point of view, we
24 would be precluded from the UFTPA. That depends upon
25 whether a failure to find that they have proved a UFTPA

1 violation. Actually, it comes to the point of saying,
2 We have cleared you of UFTPA. We have cleared you of the
3 claim under that statute.

4 We have cited a Federal case in the brief in which
5 the Courts found that essentially when you don't have
6 the evidence to make a case, you can't go forward and
7 claim Res Judicata. We maintain that is the case here.

8 What the hearing officer effectively said is,
9 there is not enough here for me to make this finding. I
10 don't believe that, in essence, is enough to preclude us
11 from going forward. There is, no, to my knowledge,
12 precedent for holding that such a decision has that
13 effect.

14 THE COURT: Why did your client sue the LLR?

15 MR. FOSTER: I have no doubt, sir, that they did it
16 because they hoped for a quick resolution.

17 THE COURT: This is the same issue; right?

18 MR. FOSTER: It was the issue of whether he had
19 acted properly under LLR regulations, as I understand
20 it, sir.

21 The LLR does not, of course, act as an
22 Administrative Court to assess damages. It finds, as I
23 understand it, that had you followed the regulations
24 required of a licensed contractor -- I think that the
25 statute we cited in our brief goes to these points.

1 That is what the LLR is about.

2 If you had found evidence that he had been guilty
3 of those acts, that might well have resulted in a proper
4 action by him, but that is not actually the same thing
5 we are talking about here.

6 THE COURT: The standard is a preponderance of the
7 evidence of the LLR; correct?

8 MR. FOSTER: I am not capable to answer that, sir.

9 MR. BOYD: I believe that's correct.

10 THE COURT: Mr. Foster, if the LLR finds by a
11 preponderance of the evidence that the system was
12 installed properly, if that is how I view it, am I wrong
13 there that it was included?

14 MR. FOSTER: The LLR found as a finding of fact
15 what it says. In terms of what it imposed, it imposed a
16 finding that it could not find that the defendant was
17 guilty of the two statutes under which it had been
18 charged.

19 I do not understand that their inability to
20 conclude that he had violated the LLR regulations and
21 the statutes he was charged with, which we have cited,
22 amounts to a Res Judicata or a Collateral Estoppel that
23 holds that he cannot now sue for that cause of action.

24 THE COURT: The hearing officer says, the
25 respondent -- Mr. Boyd's client -- stated "The

1 respondent produced credible, reliable evidence that he
2 properly performed the necessary calculations to
3 determine the size of the system and loop. It properly
4 installed the equipment in accordance to the
5 manufacturer's specifications and advised him prior to
6 the installation of the system that auxiliary heating
7 would be needed."

8 If all of those things were true, isn't that issue
9 included?

10 MR. FOSTER: Assuming we have reached the question
11 and issue of conclusion -- which, again, I am not
12 convinced is the case with an LLR decision as to certain
13 statutes, that that is an arguable point.

14 We believe the only thing that, at most, can be
15 considered as being concluded would be the actual
16 conclusions of the hearing officer. Those conclusions
17 were that there was insufficient evidence to find that
18 the defendant was responsible under the two charged
19 statutes.

20 If we presume that an LLR decision also has the
21 effect of concluding by the finders of fact held that it
22 is Res Judicata or Collateral Estoppel, yes, then the
23 Court would be correct, or Mr. Boyd would be correct.
24 That is far from clear to me that the LLR decision has
25 that effect, because it is going toward a completely

1 different ending. It's going toward the question of
2 whether certain specific statutes have been violated?

3 THE COURT: Did your client appeal the decision of
4 the LLR?

5 MR. FOSTER: No, sir. If they had done so, we
6 would have stated so.

7 THE COURT: All right.

8 Mr. Boyd, any other basis for your motion?

9 MR. BOYD: That is all, as far as the motion for
10 summary judgment.

11 I do have 12(b)(6).

12 THE COURT: Yes, sir.

13 MR. BOYD: These would be noted if the Court rules
14 in my favor on the other two issues.

15 Concerning the cause of action for Unlawful Trade
16 Practices, we would move through a 12(b)(6) to dismiss.
17 There is no evidence that the action here affects the
18 public's interest. If we look at the Nowak case, 351 SE
19 2d 347, it's clear that unless a public interest is
20 affected or has the potential to be affected by this,
21 then there is no cause of action for just a basically
22 private action.

23 In this case, what we have is basically a contract
24 between two people for the installation of a heating and
25 air unit that was installed. Apparently, because of

1 different factors -- there is a claim that it doesn't
2 work properly for the particular house; that was it was
3 done -- that my client may have not installed adequate
4 loops.

5 None of that rises to the level of anything to do
6 with the public interest. This is purely a contract
7 between two people or two companies and another person
8 that has no bearing on the public interest.

9 I would submit that the case for Unlawful Trade
10 Practices should be dismissed for that reason.

11 THE COURT: Mr. Foster.

12 MR. FOSTER: Your Honor, once again, I assume this
13 depends on Your Honor's interpretation of the hearing
14 officer's finding. Obviously, if, in fact, the hearing
15 officer's finding is Res Judicata or Collateral
16 Estoppel, there is no question that the statutes deals
17 directly with UFTPA. Beyond that, I can only say this:
18 If it does not, if Collateral Estoppel and Res Judicata
19 do not apply, then I would simply say, yes, it does.

20 THE COURT: Yes, sir.

21 Mr. Boyd.

22 MR. BOYD: Your Honor, my last motion pursuant to
23 Rule 12(b)(6) is on the nuisance cause of action.
24 Frankly, I don't know see how this comes close to
25 alleging nuisance. Basically, nuisance involves wrongs

1 that arise from an unreasonable, unwarranted, unlawful
2 use by a person of his own property. There is no
3 allegation of that. I really don't know how to argue
4 this, because I don't see how it is present.

5 THE COURT: Mr. Boyd, I understand.

6 Mr. Foster, I agree that this is a pretty strange
7 nuisance allegation. What is the basis for your cause
8 of action for nuisance?

9 MR. FOSTER: Your Honor, I will simply abandon
10 that cause of action.

11 THE COURT: Counsel, I hate to go back and beat a
12 dead horse on the amount of money. Looking at the
13 hearing officer's report, the hearing officer refers to
14 the total amount of the contract as about \$7,200, which
15 would mean that most of the money was, in fact, for the
16 unit. Where does the \$15,000 come in?

17 MR. FOSTER: I have no idea how the hearing officer
18 got that figure.

19 THE COURT: Counsel, obviously, there are a lot of
20 issues in this case. There is no way I can make a
21 ruling from the bench on this.

22 Is there anything else that you gentlemen would
23 like to give me before we conclude?

24 MR. FOSTER: Just the obvious point of if the Court
25 would like us to further research any other points, we

1 would be happy to do so.

2 THE COURT: Thank you, Mr. Foster.

3 Anything else, Mr. Boyd?

4 MR. BOYD: No, sir.

5 THE COURT: Counsel, thank you for the excellent
6 oral argument. I will get an order to you as soon as I
7 can.

8 - - -END OF TRANSCRIPT- - -

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1 THE COURT: Mr. Foster and Mr. Boyd, whenever
2 you're ready.

3 MR. FOSTER: Thank you, sir. And if I could
4 approach and hand up the federal case we're citing.

5 THE COURT: Certainly.

6 MR. FOSTER: And I understand the court to say it
7 has my memorandum that was filed electronically?

8 THE COURT: Yes, this is -- if you want to double
9 check that's the right one.

10 LAW CLERK: That's right.

11 THE COURT: All right.

12 MR. FOSTER: Your Honor, I intend to just basically
13 follow my memorandum. If I go to slowly I trust the court
14 will follow me. We're here on a Rule 59 motion as to the
15 court's ruling. The court found that we had not managed to
16 meet the statute of limitations as advanced by counsel for
17 the defendant. We acknowledge that the general statute of
18 limitations, of course, is three years. In this case what
19 we have is, and I believe this is without argument, a
20 contract that was signed in 2010. Discussion between the
21 plaintiff and defendant continued through 2012. I note on
22 the second page of my memorandum that, that is acknowledged
23 in the LLR findings, as well as, I believe, in the
24 affidavit of the plaintiff which Your Honor has.

25 It is my understanding under the South Carolina

1 statutes that it is only at the time that negotiations or
2 attempts to repair breakdown the statute begins which we
3 believe is 2012. We also cite, though I don't think it has
4 any relevance here, the statute means repose, the statute
5 of repose, pardon me. So what I believe we're dealing with
6 as before with the court's desires, with the court's
7 finding is the UCC statute of limitations which is six
8 years, we, of course, filed in 2017.

9 Your Honor, beforehand, we cited the Fournier case
10 which was picked by me on the basis that it would also
11 involve the installation of what I'll generically referred
12 to as HVAC system. I've handed up to the court and cited
13 the case from the Fourth Circuit that's against the
14 Western, I believe the Maryland District which was
15 Fournier. I believe Coakley is the leading case in this
16 regard.

17 THE COURT: Mr. Foster, you handed up me two
18 copies. It is one of those your copy? One's got a ---

19 MR. FOSTER: No, sir, I have one. The same thing.

20 THE COURT: Okay. All right.

21 MR. FOSTER: And I've handed it to Mr. Boyd.

22 THE COURT: Okay. Oh, one for my law clerk. Thank
23 you. Continue.

24 MR. FOSTER: Yes, sir. We believe that the better
25 statement rule as to contracts which are joint which

1 involve some element of service and some element of the
2 supplying of materials. A mixed contract in short under
3 UCC jurisprudence is best stated here in Coakley. We cite
4 the language on Page 3 in our memorandum which I'll briefly
5 recite the Fourth Circuit there said, "they" being the
6 court that's dealing with this "emphasizing, in particular,
7 three aspects which may, or may not, constitute indicia of
8 the nature of the contract." "The language of the
9 contract, the nature of the business, the supplier, and the
10 intrinsic worth that of the matters, materials involved ---

11 THE COURT: Where in the case are you reading?

12 MR. FOSTER: I beg your pardon?

13 THE COURT: Where in the case are you reading from?

14 MR. FOSTER: Page 3, we've marked it.

15 THE COURT: Okay. All right.

16 MR. FOSTER: We've also marked their citation in
17 favor, Page 7, of an earlier case from the Eighth Circuit,
18 Bonebrake versus Cox where they state, "the appeal", I'm
19 skipping, "reached the conclusion that a contract to supply
20 and install bowling equipment dealt predominantly with
21 goods, even though the amount of service involved was
22 substantial". "The test for inclusion or exclusion in or
23 from the provisions of the U.C.C. is not whether they are
24 mixed, but, granting they are mixed with their predominant
25 factor, their thrust, their purpose, reasonably stated, is

1 the rendition of service, with goods incidentally involved.
2 For example, contracts with artist for painting or is a
3 transaction a sale, with labor incidentally involved, for
4 example, installation of a water heater in the bathroom.
5 We maintain that we are the latter.

6 Your Honor, I call the court's attention to what I
7 believe it has in the file, the invoice drawn by the
8 defendant JB&E Heat and Cooling, Inc, which is the
9 defendant, mark 10,11, and 20, pardon me, 10, 11, 2010.
10 That contract recites and what he is going to supply, it is
11 going to supply, a warranty. The warranty states as
12 follows: 10 years all major parts; 5 year small parts; 1
13 year labor; 50 years on closed loop piping underground.

14 Our maintaining, sir, our position, sir, is on its
15 face, this contract knew and intended that what it was
16 dealing with was the supplying of the equipment, working
17 equipment which is precisely what we're arguing about.
18 Fournier had used a test of saying, let's divide up and how
19 much money was being given to this or that. We maintain in
20 this case the language of the contract, the invoice in
21 question drawn up by the defendant, is dispositive this
22 question. To go through the factors that we've cited in
23 Coakley ---

24 THE COURT: Mr. Foster, can I stop you for second?
25 In my order, is my math right?

1 MR. FOSTER: I beg your pardon, sir?

2 THE COURT: Is the math right in my order? Because
3 what I computed was the total value of the contract was
4 \$15,280 and of that only about \$6,000 were for goods, is
5 that -- is my math correct?

6 MR. FOSTER: Sir, I am not disputing the court's
7 conclusion about the math.

8 THE COURT: Okay.

9 MR. FOSTER: We're disputing, I believe with
10 respect, the question whether that analysis is dispositive.
11 It is the analysis used in Fournier. What we're citing by
12 way of Coakley, which is of course the larger federal court
13 and, I believe the control link matter, is whether that in
14 fact is the only thing we looked at to go back Coakley,
15 elements. They cite the language of contract which we're
16 citing, the nature of the business. Well, the nature of
17 the business was the supplying of a working system which we
18 maintain to be mainly that of giving us a working, again I
19 don't know how to say it, underground system for cooling
20 and heating and the intrinsic worth of value elements which
21 I will grant, using that, you would go to Fournier and you
22 would look at what the court look at in this order. We
23 maintain overall that the elements as set out in Coakley
24 are in our favor. I would point out one other thing, Your
25 Honor, if I could, I'm dealing mainly with what the court

1 dealt with and what the court found and what the court
2 ordered. There's a long discussion in Coakley with various
3 cases and various situations and how they were viewed by
4 various courts. The court did not deal with, and I feel I
5 at least have the duty to bring up the question, of the
6 defendant interpretation of the LLR decision. The LLR
7 decision as we cited in our memorandum, basically, says,
8 what they were trying was, my terms, whether he's engaged
9 in misconduct, whether he lied in so many words, has
10 committed dishonorable unethical or professional act.
11 Okay, they found he didn't. That has nothing to do with
12 our causes of action. To go over this thing again as I'm
13 sure Your Honor remembers, we did throw out the cause for,
14 I won't say invasion of privacy, nuisance, I beg your
15 pardon. We do believe the other matters are viable. We do
16 believe they are within the statute of limitations. I'm
17 not discussing Magnuson-Moss because again as the court
18 recited in its order, Magnuson-Moss looks to U.C.C. or the
19 state law to determine when the statute of limitations is.
20 Again, so that is where we're at. If I can answer any
21 questions for the court, I'm happy to do so.

22 THE COURT: This is the first time I've read the
23 Coakley case so I can't, I can't say I've given it careful
24 study. But it appears to me that Coakley is a 12(b)(6)
25 motion and it looks to me like Coakley is, basically,

1 saying this is a motion to dismiss and we don't have enough
2 facts at this point on the record on the amount, you know,
3 what everything cost to make a determination. It doesn't
4 seem that they're saying those are not the appropriate
5 factors to look at. It seems that they're just saying we
6 don't have that information right now. Am I misreading
7 that?

8 MR. FOSTER: That it certainly the procedural basis
9 but we're citing Coakley for the question of how would we
10 determine whether there was a mix contract or not. I don't
11 think there's much dispute that they go into that and
12 making finding about that. The elements it cites are the
13 ones that I recited to the court. And the commentary on
14 that from Bonebrake versus Cox, basically, says, the same
15 thing. What is going on here? We maintain, in light of
16 the invoice and the language in the contract as well as a
17 general nature of the defendant business, that this was a
18 contract for the sale of goods in a predominant sense and,
19 as such, we have the right to claim mixed, a mixed contract
20 within the U.C.C. statute of limitations.

21 THE COURT: Okay. Thank you, Mr. Foster. Mr.
22 Boyd?

23 MR. BOYD: Yes, sir. Your Honor, I think the
24 point is that in Coakley it is a question that the court
25 did make the determination because there was insufficient

1 facts. In this case, I think it's, both sides agreed on
2 the facts. I mean, as Mr. Foster said the math put in the
3 order, correct, that it was less than 40% of this contract
4 provided for the unit itself. And I would point out Your
5 Honor, my reading and understanding of the complaint and
6 everything else, the plaintiff does not complain that the
7 unit itself was defective. As in Coakley, involve some
8 windows that apparently were defective and the goods itself
9 were defective. There's not allegation in this case of the
10 goods, itself, that the unit was defective. The allegation
11 is that my client installed it improperly. It was a good
12 unit that my client installed it improperly. So we're
13 dealing with, basically, the service of installation and
14 the ---

15 THE COURT: Mr. Boyd, let me stop you. Let me ask
16 Mr. Foster -- Mr. Foster, is that the allegation just in
17 the complaint, I mean, either it's ---

18 MR. FOSTER: It's part -- I don't mean to interrupt
19 the court. It is part of the allegation but, no sir, it is
20 my recollection, I'm not able to cite the language from the
21 complaint. In fact, the equipment was improper. It was
22 incapable of providing what the service that we wanted.

23 THE COURT: But it was defective or it was the
24 wrong equipment that was selected by the company, because I
25 think -- isn't that ---

1 MR. FOSTER: Used the wrong equipment among other
2 things.

3 THE COURT: Isn't that a complaint about the
4 knowledge or the service provided because the defendant
5 didn't choose the right piece of equipment, not that the
6 equipment was defective?

7 MR. FOSTER: I understand the court's point but I
8 really think that splitting the hairs. The fact of the
9 matter is we're talking about the equipment. The equipment
10 wasn't what it was supposed to be. We're looking to the
11 defendant to pick the equipment. The equipment is what
12 we're paying for and once again the risk of being
13 inseparable, the equipment is what he spent most of his
14 time saying this is what I'm guaranteeing.

15 THE COURT: Okay. I'm sorry I apologize for
16 interrupting you, Mr. Boyd.

17 MR. BOYD: I think I made that point. But Your
18 Honor even if Mr. Foster is correct and the three year
19 statute of limitation apply, I think there's an additional
20 sustaining ground ---

21 THE COURT: You mean the six year?

22 MR. BOYD: Yes. Even if it is six years that
23 based on the email that Mr. Foster brought before for the
24 motion for summary judgment I think it's in March of 2011,
25 the plaintiff had noticed that something was wrong, they

1 were talking about something was wrong even before then.
2 The action wasn't filed until August 10, 2017. So it's
3 filed outside the six, outside the six year statute of
4 limitations.

5 THE COURT: But if your clients in negotiations to
6 repair it, doesn't that delay the start of the statute of
7 limitations, the total statute?

8 MR. BOYD: If he was actually doing something at
9 that time, yes.

10 THE COURT: Okay. My recollection there was an
11 email between the parties that suggested that your client
12 was trying to remediate it or fix it in some way, am I
13 remembering that wrong?

14 MR. BOYD: That was correct. I think that email
15 was March of 2011 when he ---

16 THE COURT: The final -- was that the final contact
17 from your client?

18 MR. BOYD: I don't know if that was final. He may
19 have done something after that. I'm not sure.

20 THE COURT: Well, let's -- Mr. Boyd, in your
21 contention, when does the clock start running? You said,
22 2011?

23 MR. BOYD: That's correct.

24 THE COURT: With the email you're discussing ---

25 MR. BOYD: That would be contention.

1 THE COURT: Where -- okay. You're contention.
2 What's the date of that email?

3 MR. BOYD: It's in March of 2011.

4 THE COURT: Mr. Foster, when do you contend the
5 clock started running?

6 MR. FOSTER: I do not have the email in front of me,
7 but we did say on the bottom of Page 2 of our memo, it's in
8 the LLR findings that the owner of JB&E simply stopped
9 corresponding to my client's emails.

10 Now, that strikes me as a fairly general idea of when
11 things stopped. But our contention and our statement in
12 the affidavit and where we're at is, is to say, we had to
13 have a reasonable grounds to believe that the defendant
14 simply stopped doing any remediation or attempting to do
15 any remediation. Which we understand to be roughly at the
16 time that they filed the 2012 complaint with the LLR. We
17 are within that time.

18 THE COURT: Okay. Now, I'm reading from your memo
19 and you refer the same email Mr. Boyd does, that I remember
20 reading, that's March 8, 2011. So at that point, at least,
21 your client knows there's something wrong with the system,
22 right?

23 MR. FOSTER: Yes, sir. And if I'm not interrupting
24 the court?

25 THE COURT: No! No! Go ahead.

1 MR. FOSTER: But my understanding of that statute,
 2 the South Carolina statute, about remediation continuing
 3 things is, it's not the fact that we "know something is
 4 wrong" it's the fact that remediation has shut down. And
 5 remediation, as we understand, shut down only in 2012 which
 6 is what we contend by affidavit and what was effectively
 7 admitted in the LLR findings. The owner of JB&E had said
 8 that he had just stopped responding at some point. That
 9 would be the magical date.

10 THE COURT: Well, when is that?

11 MR. FOSTER: All we're able to say at this point is
 12 within the time or approximate time that we filed the LLR
 13 complaint which would be March of 2012.

14 THE COURT: Anything else, Mr. Foster?

15 MR. FOSTER: I beg your pardon, sir?

16 THE COURT: Anything else before we ---

17 MR. FOSTER: Not unless the court wishes.

18 THE COURT: Mr. Boyd?

19 MR. BOYD: Nothing further, Your Honor.

20 THE COURT: Mr. Foster I'm going to deny the
 21 motion. I've looked at Coakley and, again, in my opinion,
 22 two of the three factors in Coakley weigh in Mr. Boyd's
 23 clients favored given the math in this situation. I
 24 understand the first half of the language of the contract,
 25 you make a good point on that regard. But the second

1 factor, the nature of the business, the defendant here is
2 not a manufacturer or a store selling these products,
3 they're a heating and cooling company. And on that factor,
4 the Coakley court says, "the question comes down to whether
5 essentially the materials or the service predominated
6 without full consideration of the appertained facts it's
7 not a right resolution". But in this case, we have the
8 numbers and it's, the majority of the contract was for the
9 installation and then, of course -- and then the value
10 being the third factor. So I think the second and third
11 factor weigh in, in favor Mr. Boyd's client. I'm going to
12 deny the motion.

13 MR. FOSTER: I understand and I thank, Your Honor,
14 for your patience.

15 THE COURT: Yes, sir. Thank you both.

16 (CONCLUSION OF THE HEARING ON MAY 31, 2019)

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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Sep 30 2020



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SC Court of Appeals

September 30, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2019-001061

James Stephen Nivens and
Carolyn Nivens,

Appellants,

RECEIVED

Sep 30 2020

SC Court of Appeals

v.

JB & E Heating & Cooling, Inc.,

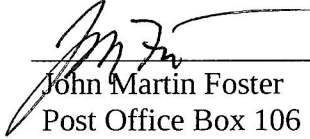
Respondent.

CERTIFICATE OF SERVICE

I certify that I have served one (1) copy of the Record on Appeal, on the following party of record:

James W. Boyd
1544 Ebenezer Road
Rock Hill, S.C. 29732
Attorney for Respondent

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below, pursuant to Rule 233(b), S.C.A.C.R.



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September 30, 2020