

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM YORK COUNTY  
In The Circuit Court

William A. McKinnon, Circuit Court Judge

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Appellate Case No. 2019-001061

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James Stephen Nivens and  
Carolyn Nivens,

Appellants,

v.

JB & E Heating & Cooling, Inc.,

Respondent.

**RECEIVED**

**MAR 09 2020**

**SC Court of Appeals**

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INITIAL BRIEF OF APPELLANTS

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*Fournier Furniture, Inc. v. Waltz-Blow Pipe Co.*, 980 F.Supp. 187 (W.D.Va. 1997)

## 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.

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. 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.

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;

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.<sup>1</sup>

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.

#### 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

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<sup>1</sup> The cause of nuisance was dropped at the hearing on Summary Judgment.

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 (4<sup>th</sup> 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. 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 herewas 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.<sup>2</sup>

[*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.

## 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.

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

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. . . .

The Respondent did not obtain a building permit and was fined for that inaction.<sup>3</sup> 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.

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;

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 (6<sup>th</sup> Cir. 1976). Even should these doctrines apply, their uttermost effect would be to strike the UFTPA Action alone.

## CONCLUSION

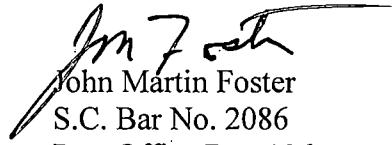
Summary Judgment was improperly granted against the Appellants. The dealings of the parties were a sale of goods within the meaning of the U.C.C. Statute, and its Statute of Limitations applies in this action. There is no preclusion by reason of the LLR's decision. The ruling of the Circuit Court should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

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<sup>3</sup> A copy of the assessed Penalty has been submitted.

March 6, 2020

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Martin Foster". The signature is written in a cursive style with a long horizontal stroke extending to the right.

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CERTIFICATE OF COUNSEL

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

March 6, 2020

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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:

Initial Brief of Appellants;  
Designation of Matter to Be Included in the Record on Appeal; and  
this Certificate of Service,

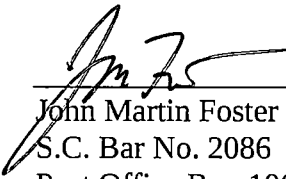
by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

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; of 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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March 6, 2020



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March 6, 2020

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

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MAR 09 2020

Re: James Stephen Nivens and Carolyn Nivens, Appellants  
v. JB & E Heating & Cooling, Inc., Respondent  
Case No.: 2017-CP-46-02339  
Appellate Case 2019-001061

SC Court of Appeals

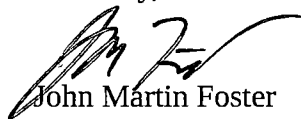
Dear Ms. Kitchings:

Pursuant to our recent Motion, enclosed herewith please find the original and one (1) copy of the Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal, together with Certificate of Service for the same in the above referenced case.

By copy of this letter, I am serving the attorney for the Respondent with copies of the said documents as evidenced by the Certificate of Service.

Please return the extra conformed copy to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

Sincerely,

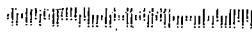


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jmf/  
enclosures

cc: Clients

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MAR 09 2020

SC Court of Appeals

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**TO:**

THE HONORABLE JENNY ABBOTT KITCHINGS

CLERK OF THE COURT OF APPEALS

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