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**SC Court of Appeals**

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.

---

RECORD ON APPEAL

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John Martin Foster  
Post Office Box 106  
Rock Hill, South Carolina 29731  
(803) 324-8100  
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
	)	CASE NO.: 2017-CP-46-02339
James Nivens and Carolyn Nivens,	)	
	)	ORDER GRANTING DEFENDANT'S
Plaintiffs,	)	MOTION FOR SUMMARY JUDGEMENT
	)	
v.	)	
	)	
JB&E Heating & Cooling, Inc., a	)	
South Carolina Corporation,	)	
	)	
<u>Defendants.</u>	)	

This matter came before the court on February 7, 2019, by way of Defendant's Motion for Summary Judgement. Defendant was represented by James W. Boyd, Esquire, and Plaintiffs were represented by John Martin Foster, Esquire. Having considered exhibits submitted by both parties, written motions and oral argument; the Court enters this Order.

PROCEDURAL HISTORY

On or about October 4, 2010, Plaintiff contracted with the Defendant for the purchase and installation of a geothermal HVAC unit. On or about March 28, 2012, Plaintiff filed a complaint with the South Carolina Department of Labor and Licensing Regulation before the Residential Builders Commission alleging improper installation of the unit. On February 13, 2013, Panther Heating and Cooling, Inc. prepared an inspection report for Plaintiff, identifying alleged defects in the installation of the HVAC system. (Defendant's Exhibit B). On July 23, 2014, the Hearing Officer of the Commission issued a recommendation that the Complaint be dismissed. (Defendant's Exhibit C). The Hearing Officer's recommendation was adopted as a final Order, dated January 27, 2015. (Defendant's Exhibit D). The Plaintiff filed his civil complaint on August 10, 2017, alleging the following 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.

Defendant filed a Motion to Dismiss within their answer on April 4, 2018. Defendant then filed their Motion for Summary Judgement on January 24, 2019.

#### STANDARD OF REVIEW

Rule 56 of the SCRCP provides that a trial judge may grant summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Charleston Lumber Co. v. Miller Hous. Corp., 318 S.C. 471, 478, 458 S.E.2d 431, 436 (Ct. App. 1995). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the non-moving party. Cafe Assoc., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991).

#### ANALYSIS

Defendant argues it is entitled to summary judgement based on two separate grounds: (1) the action is barred by the South Carolina Statute of Limitations; and (2) the action is barred by the doctrines of res judicata and collateral estoppel.

##### 1. The Statute of Limitations is Three Years on All of Plaintiffs' Claims

South Carolina Code § 15-3-530 provides for a three (3) year statute of limitations, “on an action upon a contract, obligation, liability, expressed or implied,” “an action for assault, battery, or any injury to the person or rights of another,” and “an action for trespass upon or damage to real property.” All of Plaintiffs’ state law claims are therefore subject to a three years statute of limitations. See e.g., Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 371, 725 S.E.2d 112, 125 (Ct. App. 2012) (state law breach of warranty and

negligence); Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 355, 559 S.E.2d 327, 336 (Ct. App. 2001) (nuisance); Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 392, 503 S.E.2d 184, 188 (Ct. App. 1998) (SCUFTPA).

Plaintiffs argue that their contract falls within the Uniform Commercial Code (“UCC”) definition of a sale of goods, entitling them to a six (6) year statute of limitation as provided by S.C. Code § 36-2-725, which states:

- (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 order for this contract to fall under the South Carolina UCC, the contract must be for goods rather than services. When a contract provides for both goods and services, courts have used the “predominant purpose test” to determine if the UCC applies. Ranger Constr. Co. v. Dixie Floor Co., 433 F.Supp. 442 (D.S.C. 1977). Under this test, if the predominant purpose of the transaction is the rendition of a service with goods incidentally involved, the UCC is not applicable. Id. at 445. In determining the predominant purpose of the contract, the court should consider factors such as the language of the contract, the structure of the compensation, and the ratio of material supplied to labor expended. Fournier Furniture, Inc. v. Waltz-Holst Blow Pipe Co., 980 F. Supp. 187, 189 (W.D. Va. 1997).

According to the exhibits submitted by the Plaintiff, this contract consists of a proposal and three invoices detailing the labor to be performed, the materials supplied, and their respective costs. The proposal provides that the total value of the contract is \$15,280; \$750 of which is for “15 KW heat strips”. The remaining \$14,530 was for the removal of an old oil furnace and ductwork; installation of a new duct system, Climate master unit and plumbing; installation of “closed loop[s]”; and “start-up and check out of the system”. While the proposal itself is vague as to the cost of the actual Climate Master unit, the accompanying invoices provide clarification. Invoice #80206 states the cost of the parts, “the unit and piping”, is \$5,000. The total contract value also includes \$350 in sales tax. The court finds the costs associated with the materials, including sales tax, is only \$6,100; which is less than 40% of the total value of the \$15,280 contract. Additionally, Defendants did not design, fabricate, or manufacture the Climate Master unit; they merely acquired it as a necessary material to this removal/installation service contract. Accordingly, the court finds that this contract is predominately for the delivery of services with goods only incidentally involved. Therefore, the UCC does not apply.

The Magnuson-Moss warranty act borrows the appropriate state law statute of limitations, here three years because the UCC is not implicated. See, e.g., Dilly v. Corp., No. 2:14-CV-03307-DCN, 2016 WL 53828, at \*11 (D.S.C. Jan. 4, 2016).

## 2. This Action is Untimely

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 SE2nd 761 (SC App. 1998). An injured party must act promptly when the facts and circumstances of the injury place a reasonable person on notice that a claim against another party might exist. *Id.* Here, Panther Heating and Cooling (a competitor company hired to inspect the system) issued its

inspection report on February 13, 2013 and identified problems in the system. This, therefore, is the very latest date the statute of limitations clock began running. Any action filed after February 13, 2016 is therefore untimely, and this action was not filed until August 10, 2017.

3. Remaining Arguments

Since all causes of action are barred by the South Carolina Statute of Limitations, the court declines to address the remaining grounds for dismissal.

CONCLUSION

Accordingly, the court grants the Defendant's motion for summary judgement because even viewing the evidence in the light most favorable to the Plaintiff, this action was commenced more than three years after a written report identifying problems with the system. It is therefore untimely. For the forgoing reasons, Defendant's motion for summary judgement is GRANTED. IT IS SO ORDERED.

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WILLIAM A. MCKINNON  
Presiding Judge  
Sixteenth Judicial Circuit

\_\_\_\_\_, South Carolina



York Common Pleas

**Case Caption:** James Stephen Nivens , plaintiff, et al VS JB&E Heating & Cooling Inc  
**Case Number:** 2017CP4602339  
**Type:** Order/Summary Judgment

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

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**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCF.

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York Common Pleas

**Case Caption:** James Stephen Nivens , plaintiff, et al VS JB&E Heating & Cooling Inc  
**Case Number:** 2017CP4602339  
**Type:** Order/Electronic Form 4

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

Electronically signed on 2019-05-31 13:38:55 page 3 of 3

ELECTRONICALLY FILED - 2019 May 31 1:43 PM - YORK - COMMON PLEAS - CASE#2017CP4602339

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

FILED-RECEIVED

SIXTEENTH JUDICIAL CIRCUIT

JAMES STEPHEN NIVENS and  
CAROLYN NIVENS,

2017 AUG 10 PM 4:26

DAVID HAMILTON  
C.P. & G.S.  
YORK COUNTY (S)  
Plaintiffs,

SUMMONS

vs.

JB&E HEATING & COOLING, INC.,  
a South Carolina corporation,

C.A. No: 2017-CP-46-

2339

Defendant.

TO THE DEFENDANTS ABOVE-NAMED:

IF UPON AN INDIVIDUAL, OTHER THAN A MINOR, OR AN INCOMPETENT PERSON, CORPORATION, PARTNERSHIP, OR OTHER UNINCORPORATED ASSOCIATION WHICH IS SUBJECT TO SUIT UNDER A COMMON NAME:

YOU ARE REQUIRED to answer the Complaint in this action and to serve a copy of your Answer on the subscriber of this Summons at 223 East Main Street, Suite 520, Post Office Box 106, Rock Hill, South Carolina 29731, within thirty (30) days after service of this Summons, exclusive of the day of service.

YOU ARE NOTIFIED that in case of your failure to appear and defend within thirty (30) days after service of this Summons, judgment by default will be rendered against you for the relief demanded in the Complaint.

IF UPON A MINOR, A PERSON JUDICIALLY DECLARED INCAPABLE OF CONDUCTING HIS OWN AFFAIRS, OR AN INCOMPETENT PERSON:

YOU ARE NOTIFIED if you have a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may defend on your behalf.

If you are not otherwise represented in this civil action or the Court shall deem it proper, the Court shall appoint a Guardian *ad litem* for you.

If you are a minor party of the age of 14 years or over, you may apply for the appointment of a Guardian *ad Litem* to represent your interests in the above-entitled matter.

If you are a minor party under the age of 14 years, your parent, general or testamentary guardian, relative or friend may apply for the appointment of a Guardian *ad Litem* to represent your interests in the above-entitled matter.

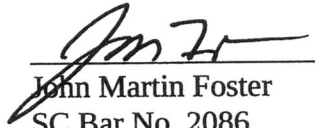
If you are an imprisoned person, you, your relative or friend may apply for the appointment of a Guardian *ad Litem* to represent your interests in the above-entitled matter.

If no application for the appointment of a Guardian *ad litem* is made by or in your behalf within Thirty (30) days after service of this Summons upon you, then the undersigned as attorney for the Plaintiff will make application for the appointment of such Guardian *ad Litem*, after first giving notice of such application to the person or persons to whom such notice must be given under Rule 17(d)(3), (4), or (5), S.C.R.C.P.

IF UPON THE UNITED STATES OF AMERICA:

YOU ARE REQUIRED to answer the Complaint in this action and to serve a copy of your Answer on the subscriber of this Summons at 223 East Main Street, Suite 520, Post Office Box 106, Rock Hill, South Carolina 29731, within Sixty (60) days after service of this Summons, exclusive of the day of service.

YOU ARE NOTIFIED that in case of your failure to appear and defend within Sixty (60) days after service of this Summons, judgment by default will be rendered against you for the relief demanded in the Complaint.

  
\_\_\_\_\_  
John Martin Foster  
SC Bar No. 2086  
Attorney for Plaintiffs

The Guardian Building  
223 East Main Street, Suite 520  
Rock Hill, S. C. 29730

Post Office Box 106  
Rock Hill, S. C. 29731-6106

803 324-8100  
803 324-8109: Fax  
[jmfoster@comporium.net](mailto:jmfoster@comporium.net)

August 10, 2017

Rock Hill, South Carolina

attached hereto and incorporated herein as "Exhibit A".

4. On knowledge and information, the said contract between the parties, as drawn by the Defendant, its agents, servants or employees, included the following warranties:

"10 years all major parts"

"5 years on small parts"

"1 year labor"

"50 years on closed loop piping under ground"

5. On knowledge and information, the said work performed by the Defendant, and the materials supplied by the Defendant, was deficient in the following areas, among others:

the loop system for the geothermal unit was inadequate for the system;

the hose kit from the flow center for the geothermal unit was too long;

the loop piping from the foundation wall of the Plaintiffs' house to and from the flow center was inadequately insulated; and

a water flow control device was not installed on the water-leaving side of the flow center unit.

6. On knowledge and information, the materials used in the work performed by the Defendant were defective and failed to meet the standard required for materials intended for the uses to which the same were put in the work performed by the Defendant for the Plaintiffs.

7. As a proximate result of the failure of the Defendant to perform the agreed work for the Plaintiffs, and/or of the defective nature of the materials used by the Defendant in its work for the Plaintiffs, the Plaintiffs have suffered damage in that their geothermal system failed to operate properly and failed in or about December, 2014.

8. On knowledge and information, the Defendant JB&E HEATING & COOLING, INC. was, as of the time of the installation of the Plaintiff's geothermal system or unit, or has since that time become, aware of the proper methods of installation of such units and of the proper

materials used therein.

9. Despite such knowledge of geothermal units and the methods and requirements for installation and repair thereof, the Defendant failed to advise the Plaintiffs of the defects in the geothermal system or unit and its installation after those defects became known to the Defendant.

10. As a result of the defects in the geothermal system set out and referenced above, the said system failed and left the Plaintiffs without adequate heat in their home.

11. After the failure of their geothermal unit in or about December, 2014, the Plaintiff contacted the Defendant upon several occasions and made demand for a repair or replacement of their geothermal system or unit.

12. Despite such demands, the Defendant failed to repair or replace the said geothermal system or unit in order to provide their home with heat.

13. In the absence of action by the Defendant to repair or replace the said geothermal system or unit to working order, the Plaintiffs were forced to have such work performed by third-party contractors, to their damage.

14. As a direct result of the actions and conditions referred to in the paragraphs above, the owners occupiers of such units have suffered and/or will suffer:

deterioration of quality of life;

annoyance and inconvenience;

property damage; and

loss of value of their property.

**FIRST CAUSE OF ACTION: MAGNUSON-MOSS**

15. The First Cause of Action is brought against the Defendant JB&E HEATING & COOLING, INC. pursuant to Section 2310(d) of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (hereafter "Magnuson-Moss") for actual damages, and for Defendants' breach of implied warranties.

16. All matters set out herein and consistent herewith, are realleged hereby as fully as if

set out herein.

17. On knowledge and information, the said geothermal unit or system is a "consumer product", as that term is defined in Section 2301(1) of Magnuson-Moss, and was manufactured after July 4, 1975.

18. On knowledge and information, the Defendant is a warrantor, as that term is defined in Section 2301(5) of Magnuson-Moss.

19. On knowledge and information, the Plaintiffs JAMES STEPHEN NIVENS and CAROLYN NIVENS are "consumers", as that term is defined in Section 2301(3) of Magnuson-Moss.

20. On knowledge and information, the Defendant has no dispute resolution mechanism which meets the requirements of 16 C.F.R. Part 703, promulgated by the Federal Trade Commission (FTC) pursuant to Section 2310(2) of Magnuson-Moss.

21. In the alternative to the allegations of the paragraph above, the Defendant has not utilized any dispute resolution mechanism meeting the requirements of 16 C.F.R. Part 703, promulgated pursuant to Section 2310(2) of Magnuson-Moss, to the extent the same are applicable.

22. The Plaintiffs gave the Defendant a reasonable opportunity, on several occasions, as described above, to cure their failure to comply with the warranties and the Defendant did not so cure.

23. The Plaintiffs gave the Defendant a reasonable opportunity to utilize any dispute resolution mechanism meeting the requirements of 16 C.F.R. Part 703, promulgated pursuant to Section 2310(2) of Magnuson-Moss, to the extent applicable.

#### **SECOND CAUSE OF ACTION: UNFAIR AND DECEPTIVE TRADE PRACTICES**

24. All matters set out and referenced herein, and consistent herewith, are realleged hereby as fully as if set out herein.

25. This Second Cause of Action is brought against the Defendant B&E HEATING & COOLING, INC for actual and statutory treble damages based on the Defendant's violation of Title 39, Chapter 5 of the South Carolina Code of Laws (hereafter the Unfair Trade

Practices Act or "UTPA"), in the negligent installation and non-repair of the Plaintiffs' geothermal system or unit which is the subject of this action.

26. On knowledge and information, the actions of the Defendant, by and through its agents, servants, and employees, have an impact, either direct or indirect, upon the public interest as defined by S.C. Code § 39-5-10(b) and by the holding of the South Carolina Court of Appeals in *Noack Enterprises, Inc. v. Country Corner Interiors*, 290 S.C. 475, 351 S.E.2d 347 (Ct.App. 1986).

27. On knowledge and information, the actions and omissions of the Defendant and its agents, servants and employees show a pattern of behavior by the Defendant consistent with a deliberate pattern of such actions both in the past and planned in the future.

28. On knowledge and information, the actions and omissions of the Defendant have the potential for repetition within the meaning of *Noack, supra*, and of the holding of the Supreme Court of the State of Washington cited in that case, *Anhold v. Daniels*, 94 Wash.2d 40, 614 P.2d 184 (1980).

29. On knowledge and information, the actions and omissions of the Defendant as set out and referenced herein constitute an unfair or deceptive method, act or practice in the conduct of a trade or commerce as defined by S.C. Code § 39-5-20.

30. On knowledge and information, the possession of a South Carolina license for the installation and maintenance of heating and air equipment, held through and recognized by, the SC Labor, Licensing and Regulation Department and the Residential Builders Board imposes on the person or party so licensed a duty of reasonable care to the Plaintiffs as contractees with the Defendant for its licensed services that it use the knowledge, skill and care that is generally used in similar geothermal heating and cooling equipment installation and repair by similar licensees in South Carolina and in states having similar licensing standards, which duty the said Defendant breached in one or more of the ways set out or referenced herein, any one of which was a departure from the accepted standard of care and behavior for heating and cooling licensees.

31. On knowledge and information, the actions and omissions of the Defendant entitle the Plaintiffs to damages in the amount of three times the actual damages sustained by reason of the Defendant's unfair or deceptive methods, acts or practices, as defined by S. C. Code § 39-

5-140(a).

32. On knowledge and information, the actions of the Defendant entitle the Plaintiffs to an award of reasonable attorney's fees and costs under the provisions of S. C. Code 39-5-140(a).

### **THIRD CAUSE OF ACTION: BREACH OF EXPRESS WARRANTIES**

33. All matters set out and referenced herein, and consistent herewith, are realleged hereby as fully as if set out herein.

34. In the said contract of the parties, the Defendant JB&E HEATING & COOLING, INC. made express warranties to the Plaintiffs JAMES STEPHEN NIVENS and CAROLYN NIVENS.

35. The mechanical problems and defects referenced above are not among those excluded under the warranties as set out in the Contract, and the same are covered by the warranties contained within the Contract.

36. By its actions and omissions referenced above, the Defendant JB&E HEATING & COOLING, INC. breached the express warranties referenced above.

37. For all the reasons set out above, the breach of the express warranties by the Defendant JB&E HEATING & COOLING, INC. caused damage to the Plaintiffs.

### **THIRD CAUSE OF ACTION: BREACH OF IMPLIED WARRANTY OF FITNESS**

38. All matters set out and referenced herein, and consistent herewith, are realleged hereby as fully as if set out herein.

39. The Defendant JB&E HEATING & COOLING, INC. was, at all relevant times, a "merchant" with respect to geothermal systems or units, as that term is defined in S.C. Code § 36-2-104(1).

40. A warranty that the said geothermal system or unit was in merchantable condition was implied by law in the instant transaction, pursuant to S.C. Code § 36-2-314.

41. The said geothermal system or unit was not in merchantable condition when installed

and sold to the Plaintiffs or at any time thereafter until a repair by third parties, and was not fit for the ordinary purpose for which a geothermal system or unit is used.

42. On knowledge and information, the Defendant JB&E HEATING & COOLING, INC. breached the warranty of merchantability implied by law in the instant transaction.

43. For all the reasons set out above, the breach of the warranty of merchantability of the Defendant JB&E HEATING & COOLING, INC. caused damage to the Plaintiffs.

### **THIRD CAUSE OF ACTION: BREACH OF IMPLIED WARRANTY OF FITNESS**

44. All matters set out and referenced herein, and consistent herewith, are realleged hereby as fully as if set out herein.

45. The Defendant JB&E HEATING & COOLING, INC. was, at all relevant times, a "merchant" with respect to geothermal systems or units, as that term is defined in S.C. Code § 36-2-104(1).

46. A warranty that the said geothermal system or unit was in merchantable condition was implied by law in the instant transaction, pursuant to S.C. Code § 36-2-314.

47. The said geothermal system or unit was not in merchantable condition when installed and sold to the Plaintiffs or at any time thereafter until a repair by third parties, and was not fit for the ordinary purpose for which a geothermal system or unit is used.

48. On knowledge and information, the Defendant B&E HEATING & COOLING, INC. breached the warranty of merchantability implied by law in the instant transaction.

49. For all the reasons set out above, the breach of the warranty of merchantability of the Defendant JB&E HEATING & COOLING, INC. caused damage to the Plaintiffs.

### **FOURTH CAUSE OF ACTION: NEGLIGENCE**

50. All matters set out and referenced herein, and consistent herewith, are realleged hereby as fully as if set out herein.

51. At all times material hereto JB&E HEATING & COOLING, INC. was negligent in that it failed to use reasonable care:

In allowing the geothermal system or unit to be installed in the defective manner in which it was;

In the design, manufacture, testing and selection of materials and in the installation of the geothermal system or unit for the Plaintiffs; and

In failing to advise the Plaintiffs of the defects in the geothermal system or unit after those defects became known to, or were chargeable to, the Defendant

In its failure to perform its contractual obligations in a reasonable manner; and,

In its failure to conform to generally accepted construction practices of the industry as to geothermal systems or units.

52. For all the reasons set out above, JB&E HEATING & COOLING, INC. knew or should have known that its negligence would subject the Plaintiffs to harm.

53. For all the reasons set out above, the negligence of the Defendant JB&E HEATING & COOLING, INC. caused damage to the Plaintiffs.

#### **FIFTH CAUSE OF ACTION: NUISANCE**

54. All matters set out and referenced herein, and consistent herewith, are realleged hereby as fully as if set out herein.

55. The actions and inaction of the Defendant JB&E HEATING & COOLING, INC., amount to a nuisance that has damaged the Plaintiffs in that its acts and omissions have unreasonably interfered with the Plaintiffs' use and enjoyment of their residential property.

#### **SIXTH CAUSE OF ACTION: NEGLIGENT MISREPRESENTATION**

56. All matters set out and referenced herein, and consistent herewith, are realleged hereby as fully as if set out herein.

57. At all times material hereto, the Defendant JB&E HEATING & COOLING, INC. knew or should have known of the defective nature of the geothermal components, and of the

inappropriate materials and procedures used in the installation of the geothermal system or unit for the Plaintiffs..

58. At all times material hereto, the Defendant JB&E HEATING & COOLING, INC. knew or should have known that the defective conditions of the geothermal components or units were latent and not readily observable by the Plaintiff.

59. At all times material hereto, the Defendant JB&E HEATING & COOLING, INC. failed to exercise reasonable care in that it did not advise or warn the Plaintiffs of the defective nature of the geothermal components, or of the inappropriate materials and procedures used in the installation of the geothermal system or unit for the Plaintiffs.

60. The said omissions of the Defendant were of material facts to the transaction upon which the Plaintiffs reasonably relied.

61. The Defendant knew or should have known that their negligence would subject the the Plaintiffs to an unreasonable risk of harm.

62. For the reasons set out and referenced above, the negligence of the Defendant JB&E HEATING & COOLING, INC. caused damage to the Plaintiffs.

**AS TO ALL RELEVANT CAUSES OF ACTION:**

63. The actions and omissions of the Defendant JB&E HEATING & COOLING, INC. were undertaken or omitted in reckless disregard of or indifference to the rights and interests of the Plaintiffs.

WHEREFORE, the Plaintiffs JAMES STEPHEN NIVENS and CAROLYN NIVENS demand judgment against the Defendant JB&E HEATING & COOLING, INC. as follows:

A) Assume jurisdiction of this case;

**As to the First Cause of Action (Magnuson-Moss)**

B) Enter Judgment for Plaintiffs and against the Defendant in the amount of the actual

damages referenced above;

- C) Award the Plaintiff their costs and reasonable attorney's fees to be paid by the Defendant;

As to the Second Cause of Action (SCUTPA)

- D) Award the Plaintiffs three times the actual damages sustained by them pursuant to S. C. Code § 39-5-140(a) against the Defendant;

- E) Award the Plaintiffs their reasonable attorney's fees and costs pursuant to S. C. Code § 39-5-140(a), to be paid by the Defendant;

As to the Third Cause of Action (Breach of Warranty)

- F) Enter Judgment for the Plaintiffs and against the Defendant, in the amount of actual damages referenced above;

As to the Fourth Cause of Action (Negligence)

- G) Enter Judgment for the Plaintiffs and against the Defendant, in the amount of actual damages referenced above;

As to the Fifth Cause of Action (Nuisance)

- H) Enter Judgment for the Plaintiffs and against the Defendant, in the amount of actual damages referenced above;

As to the Sixth Cause of Action (Negligent Misrepresentation)

- I) Enter Judgment for the Plaintiffs and against the Defendant, in the amount of actual damages referenced above;

As to all relevant Causes of Action

- J) Award the Plaintiffs exemplary and punitive damages, by reason of the Defendant's willful, wanton and malicious actions as set out above, against the Defendant.

As to the all Causes of Action

- K) Award the Plaintiffs their costs herein, against the Defendant;
- L) Include a prayer for any other relief which may be authorized under other causes of action; and
- M) Award or allow Plaintiff such other and further relief as this Court may deem just and proper.



---

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Attorney for Plaintiffs

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August 10, 2017

Rock Hill, South Carolina

**J B & E Heating and Cooling, Inc.**

P O Box 968  
 Rock Hill, SC 29731  
 803-325-1058

**Proposal**

Date	Proposal #
8/21/2010	10976p

<b>Customer</b>
Steve Nivens 105 Mountain View Clover, SC 29710

P.O. No.	Terms	Job Location
closed loop	Due on Completion	

Item	Description	Total
Proposal	Remove old oil furnace and ductwork Install new duct system Install Climate master Unit, TSH048AGCO1ALSS under house Plumbing for unit—closed loop and wiring for unit Install closed loop in yard 4 loops at 250' each or 5 loops at 200' Start up and check out system Warranty 10 years all major parts 5 years on small parts 1 year labor	14,530.00
Additions	50 years on closed loop piping under ground Add 15 KW heat strips for back up heat and the power for back up heat 7% State/Local	750.00 0.00

Payment Terms: 1/3 to Begin, 1/3 when half units set and 1/3 upon completion	<b>Total</b>	<b>\$15,280.00</b>
--	--------------	--------------------

Acceptance of Proposal-The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Signature Steve Nivens

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration, deviation or unforeseen- necessary changes from above specifications involving extra cost will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delay beyond our control. Owner to carry fire, tornado and other necessary insurance. To keep warranties valid, units have to be serviced seasonally. Proposal active for 30 days.

Phone #	Fax #	E-mail
803-325-1058	866-775-5763	JBEH@comporium.net





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

IN THE COURT OF COMMON PLEAS  
SIXTEENTH CIRCUIT COURT

CASE NO.: 2017-CP-46-02339

**ANSWER**

The Defendant, above named, answering the Complaint of the Plaintiffs would respectfully show:

1. The Defendant admits the allegations contained in Paragraphs One (1) and Two (2) of the Complaint.
2. The Defendant admits the allegations of Paragraphs Three (3) and Four (4) of the Complaint.
3. The Defendant denies the allegations of Paragraph Five (5), Six (6) and Seven (7) of the Complaint.
4. The Defendant admits the allegations of Paragraph Eight (8) of the Complaint.
5. The Defendant denies the allegations of Paragraph Nine (9) of the Complaint. The Defendant denies that there were defects in the geothermal system or unit and its installation.
6. The Defendant denies the allegations of Paragraph Ten (10) of the Complaint.
7. Answering for Paragraph Eleven (11) of the Complaint, the Defendant would show that the Plaintiffs contacted the Defendant several times concerning problems that the Plaintiff alleged to have with the unit. The contacts were made before December 24, 2014. The Defendant made attempts to satisfy the Plaintiffs but was unable to satisfy the Plaintiffs due to

the Plaintiffs refusing to allow the Defendant to make changes to the system. The Defendant advised the Plaintiffs prior the installation of the system that auxiliary heating would be need to supplement the system. The auxiliary heating would consist of adding 15 KW heat strips for back up heat and for the power in the back up heat. This was specified in the contract but the Plaintiffs refused to allow the Defendant to install the heat strips.

8. Answering Paragraph Twelve (12) of the Complaint the Plaintiff would not allow the Defendant to perform the services needed as specified in the preceding paragraphs.

9. The Defendant denies the allegations of Paragraph Thirteen (13) and Fourteen (14) of the Complaint.

**AS TO THE FIRST CAUSE OF ACTION**  
Magnuson-Moss

**FOR A FIRST DEFENSE**

10. The First Cause of Action is barred by the South Carolina Statute of Limitations South Carolina Code Annotated §15-3-530.

**FOR A SECOND DEFENSE**

11. The Defendant reaffirms and reiterates all the allegations contained in the First Defense as fully as if set forth herein.

12. The Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et seq. does not apply to the facts of the case. The contract in this case was primarily a contract for the installation of a heating system and not for the sale of a consumer product.

**FOR A THIRD DEFENSE**

13. The Defendant reaffirms and reiterates all the allegations contained in the First and Second Defenses as fully as repeated herein.

14. The Defendant denies the allegations of Paragraph Twenty (22) of the Complaint. The Defendant would further show that there was no failure to comply with the warranty. The Defendant would further show that any failure of the heating system to operate properly was the fault of the Plaintiffs in failing to allow the Defendant to fully comply with the contract.

**AS FOR THE SECOND CAUSE OF ACTION**  
**Unfair and Deceptive Trade Practices**

**FOR A FIRST DEFENSE**

15. The Second Cause of Action is barred by the Statute of Limitations South Carolina Code Annotated §39-5-150.

**SECOND DEFENSE**

16. The Defendant reaffirms and reiterates all the allegations contained in the First Defense as set forth and repeated herein.

17. The Plaintiff's Second Cause of Action fails to state a cause of action and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

**FOR A THIRD DEFENSE**

18. The Defendant reaffirms and reiterates all the allegations contained in the First and Second Defense as set forth and repeated herein.

19. The Defendant denies that there were actions and admissions on his part and that the Defendant installed the heating system using the accepted standard care and behavior for heating and cooling licensees.

20. The Defendant denies that the Plaintiffs are entitled or incurred any damage from any actions of the Defendant.

**AS TO THE THIRD CAUSE OF ACTION**

Breach of Expressed Warranties

**FOR A FIRST DEFENSE**

21. The Third Cause of Action is barred by the Statute of Limitations of the South Carolina Code Annotated §15-3-530 and any applicable statutes.

**FOR A SECOND DEFENSE**

22. The Defendant reaffirms and reiterates all the allegations contained in the First Defense as set forth and repeated herein.

23. The Defendant denies that there mechanical problems and defects in the geothermal system or that the Defendant's actions or alleged omissions breach any expressed warranties given to the Plaintiffs.

**AS TO THE THIRD CAUSE OF ACTION**

Breach of Implied Warranty of Fitness

**FOR A FIRST DEFENSE**

24. The allegations of the Third Cause of Action Breach of Implied Warrant of Fitness is barred by the Statute of Limitations of the South Carolina Code Annotated §15-3-530 and any applicable statutes.

**FOR A SECOND DEFENSE**

25. The Defendant reaffirms and reiterates all the allegations contained in the First Defense as set forth and repeated herein.

26. The Defendant would show that the geothermal system or unit was in a marketable condition and was fit for ordinary purpose for which a geothermal system or unit is used. The Defendant further denies any breach of the warranty of merchantability applied by law.

**AS TO THE THIRD CAUSE OF ACTION**

Breach of Implied Warranty of Fitness

**FOR A FIRST DEFENSE**

27. The allegations of the Third Cause of Action Breach of Implied Warrant of Fitness is barred by the Statute of Limitations of the South Carolina Code Annotated §15-3-530 and any other statutes.

**FOR A SECOND DEFENSE**

28. The Defendant reaffirms and reiterates all the allegations contained in the First Defense as set forth and repeated herein.

29. The Defendant would show that the geothermal system or unit was in a marketable condition and was fit for ordinary purpose for which a geothermal system or unit is used. The Defendant further denies any breach of the warranty of merchantability applied by law.

**AS TO THE FOURTH CAUSE OF ACTION**

Negligence

**FOR A FIRST DEFENSE**

30. The Fourth Cause of Action is barred by the Statute of Limitations of the South Carolina Code Annotated §15-3-530 and South Carolina Code Annotated §15-3-535 and other statutes.

**FOR A SECOND DEFENSE**

31. The Defendant reaffirms and reiterates all the allegations contained in the First Defense as fully as if set forth herein.

32. The Defendant denies the alleged as set forth in Paragraphs Fifty-One (51) through Fifty-Three (53) of the Complaint.

**AS FOR THE FIFTH CAUSE OF ACTION**

Nuisance

**FOR A FIRST DEFENSE**

33. The Fifth Cause of Action is barred by the Statute of Limitations.

**FOR A SECOND DEFENSE**

34. The Defendant reaffirms and reiterates all the allegations contained in the First Defense as fully as if set forth herein.

35. The Plaintiffs has failed to set forth a cause of action and the Fifth Cause of Action should be dismissed pursuant to Rule(12)(b)(6) of the South Carolina Rules of Civil Procedure.

36. The Plaintiff has failed to set forth elements of a cause of action for Nuisance. Nuisance involves wrongs that arise from unreasonable, unwarranted or unlawful use by a person or his own property.

37. The Plaintiff has failed to allege any unreasonable, unwarranted or unlawful use by the Defendant of his own property. Therefore the Fifth Cause of Action should be dismiss pursuant to Rule(12)(b)(6) of the South Carolina Rules of Civil Procedure.

**AS TO THE SIXTH CAUSE OF ACTION**

Negligent Misrepresentation

**FORS A FIRST DEFENSE**

38. The Sixth Cause of Action is barred by the Statute of Limitations of the South Carolina Code Annotated §15-3-530 and South Carolina Code Annotated §15-3-535 and other statutes.

**FOR A SECOND DEFENSE**

39. The Defendant reaffirms and reiterates all the allegations contained in the First Defense as fully as if set forth and repeated herein.

40. Answering Paragraphs Fifty-Seven (57) through Sixty-Two (62) of the Complaint, the Defendant would show that the geothermal components of the system were not defective and that no inappropriate materials or procedures were used in the installation of the geothermal system.

41. As to Paragraph Sixty-Three (63) of the Complaint, the Defendant denies any actions or alleged omissions, undertaken or omitted in reckless disregard of or indifference of the rights and interest of the Plaintiffs. The Defendant would further show that Paragraph Sixty-Three (63) of the Complaint fails to state a cause of action under Rule(12)(b)(6) of the South Carolina Rules of Civil Procedure and that the Complaint fails to specify to which cause of action that the claim for punitive damages applies.

**AS TO ALL CAUSES OF ACTION**

42. The Defendant reaffirms and reiterates all the allegations previously set forth in this Answer.

43. The matters alleged in the Complaint have previously been litigated before the South Carolina Department of Labor, Licensing and Regulation and before the Residential Builder's Commission in the matter of Hutchinson Neely d/b/a JB&E Heating and Cooling, Inc., Case #2012-146. The Plaintiffs were the Complainants in that case. The Commission found adversely to the Plaintiffs' contentions.

44. The Complaint is barred by the Doctrines of Res Judicata and Collateral Estoppel.

WHEREFORE having fully answered the Plaintiffs' Complaint the Defendant prays that the Complaint be dismissed with costs.

(electronic signature page to follow)

Rock Hill, South Carolina  
April 6, 2018

s/James W. Boyd  
S.C. Bar No. 824  
Attorney for Defendant  
1544 Ebenezer Road  
Post Office Box 36425  
Rock Hill, SC 29732  
(803) 328-2600  
jamesboyd@comporium.net

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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

MOTION FOR SUMMARY JUDGMENT

The above named Defendant through his undersigned attorney pursuant to Rule 55 S.C.R.C.P. moves the Court for Summary Judgment in this matter. The grounds for this Motion are as follows:

1. This action is barred by the South Carolina Statue of Limitations.
2. This action is barred by the Doctrines of res judicata and Collateral Estoppel.

**STATUTE OF LIMITATION**

3. On or about October 4, 2010, the Plaintiff contracted with the Defendant for the installation of a geothermal HVAC unit at 105 Mountainview Street, Clover, SC. The Defendant installed the unit. The last date that work was done on the system was in 2012. (Exhibit E) 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 improper installation of the unit. (Exhibit A)

4. On February 13, 2013, Panther Heating and Cooling, Inc. prepared an inspection report for the Plaintiff, identifying alleged defects in the installation of the HVAC system. (Exhibit B)
5. On July 23, 2014, the Hearing Officer of the Commission issued a recommendation that the Complaint be dismissed. (Exhibit C) The Hearing Officer's recommendation was adopted and a final Order, dated January 27, 2015. (Exhibit D) The Plaintiff filed his complaint on August 10, 2017.
6. South Carolina Code Annotated 15-3-530(1) provides for a three (3) year statute of limitations, "on an action upon a contract, obligation, liability, expressed or implied except those provided for in §15-3-520." South Carolina Code Annotated 15-3-530(5) provides a statute of limitations for three (3) years for assault, battery or any injury to the person or rights of another, not arising on contract and not enumerated by law and those provided for in §15-3-545. South Carolina Code Annotated 15-3-535 provides. "that all action initiated under §15-3-530(5) must be commenced within three (3) years after the person knew or by exercise of reasonable diligence should have known that he had cause of action."
7. South Carolina Code Annotated 39-5-150 provides that no action may be brought under the South Carolina Unfair and Deceptive Trade Practices Act more than three (3) years after the discovery of the unlawful conduct which is the subject of the suit. Panther Heating and Cooling issued its inspection report on February 13, 2013. The Plaintiff knew or should have known of any defects in the system installed by the Defendant on or before that date. The Plaintiff did not bring his action until August 10, 2017, well over four years from the date he knew or should have known of any alleged defects.

8. The statute of limitations runs from the date the injury is discoverable by the exercise of reasonable diligence. An injured party must act promptly when the facts and circumstances of the injury place a reasonable person on notice that a claim against another party might exist. That an injured party may not comprehend the extent of the injuries is immaterial. *Republic Contract Corporation v. SCDHPT*, 332 S.C. 197, 503 SE2nd 761 (SC App. 1998) Since the Plaintiff had notice of the alleged defects at the latest on February 13, 2013, the three (3) year statute of limitations bars the Plaintiff's actions.

**RES JUDICATA AND COLLATERAL ESTOPPEL**

9. The Plaintiff filed a complaint with the South Carolina Department of Labor Licensing Regulation on March 28, 2012. A full hearing was held on May 28, 201, on this matter. Both the Plaintiff and the Defendant testified at the hearing of this matter. On January 27, 2015, a final Order was issued by the Commission. The Commission ruled in favor of the Defendant. Although the case was captioned in the matter of Hutchinson Neely d/b/a JB&E Heating and Cooling, Inc. the Plaintiff is named as the complainant in the action. The same parties, facts and issues were involved in the administrative hearing as are involved in this lawsuit. The South Carolina Supreme Court is held that under the Doctrine of res judicata and Collateral Estoppel, the decision of an administrative tribunal precludes the litigation of the issues addressed by the tribunal in a collateral action. *Bennett v. S.C. Department of Corrections*, 305 S.C. 310, 408 SE2nd 230 (1991); *Parry v. State Law Enforcement Div.* 426 SE2nd 334, 310 S.C. 558 (SC App. 1992)

FOR ALL THE FOREGOING REASONS Summary Judgment should be granted  
on behalf of the Defendant in this case.

s/James W. Boyd  
S.C. Bar No. 824  
Attorney for Defendant  
1544 Ebenezer Road  
Post Office Box 36425  
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jamesboyd@comporium.net

Rock Hill, South Carolina  
January 24, 2019

ELECTRONICALLY FILED - 2019 Jan 24 9:23 AM - YORK - COMMON PLEAS - CASE#2017CP4602339

**EXHIBIT A**

**SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING & REGULATION  
BEFORE THE RESIDENTIAL BUILDERS COMMISSION**

In the Matter of:

**HUTCHISON NEELY  
d/b/a J B& E Heating and Cooling, Inc.**

License Number RBH.13,

Case # 2012-146,

Respondent.

**FORMAL COMPLAINT**

IT IS HEREBY ALLEGED THAT:

I.

Respondent is a residential specialty contractor with a currently active registration by the South Carolina Residential Builders Commission (the "Commission") to engage in the practice of residential specialty contracting in South Carolina. Respondent was registered at all times relevant to the complaint.

II.

The Commission has jurisdiction over Respondent and the subject matter contained in this Formal Complaint.

III.

Respondent has engaged in certain conduct in the business of residential building that violates provisions of the South Carolina Residential Home Builders Act (the "Home Builders Act"), S.C. Code Ann. § 40-59-10 *et seq.* (1976, as amended), the South Carolina Residential Construction Standards ("SCRCS"), the International Residential Code (the "IRC"), as well as provisions of S.C. Code Ann. § 40-1-10 *et seq.* (1976, as amended), including the commission of the following acts:

1. On or about October 4, 2010, Respondent contracted with a homeowner ("Complainant") for the installation of a geothermal HVAC unit in a single-family residence located at 105 Mountain View Street, Clover, South Carolina. The total contract price was \$7,265.00. On or about October 6, 2010, Complainant paid this amount in full.
2. Following installation of the HVAC unit, Complainant noticed that the system failed to properly heat the house in the winter and cool the house in the summer.

Page 1 of 3

3. On or about March 28, 2012, Complainant filed a complaint with the South Carolina Department of Labor, Licensing and Regulation (“LLR”). LLR assigned Investigator Andy Dempsey to review Complainant’s allegations.
4. Investigator Dempsey discovered that Respondent failed to pull a mechanical permit as required by the Town of Clover Building Code Department.
5. On or about February 13, 2013, Panther Heating & Cooling, Inc. (“Panther”) prepared an inspection report, a copy of which is attached as **EXHIBIT #1**. Panther’s report identified the following defects in the installation of the HVAC system, which prevented the geothermal system from operating properly:
  - a. The geothermal loop was inadequate for the equipment. The loop installed was approximately 25% of the linear footage required.
  - b. The hose kit from the flow center was too long. The flow center needed to be within three (3) – five (5) feet of the unit.
  - c. All loop piping from foundation wall to the flow center and from the flow center to the geothermal unit needed to be insulated.
  - d. The water flow control device needed to be installed on “Leaving Water” side of the unit.
  - e. Antifreeze needed to be added to the geothermal loop.

IV.

Respondent has not complied with the building codes and standards that govern the practice of residential building in South Carolina, as evidenced by the following:

1. Respondent’s actions in this matter constitute a violation of S.C. Code Ann § 40-59-110 (1976, as amended), in that he committed misconduct during the practice of residential specialty contracting.
2. Respondent’s actions in this matter constitute a violation of S.C. Code Ann § 40-1-110(f) (1976, as amended), in that he has committed a dishonorable, unethical, or unprofessional act that is likely to deceive, defraud, or harm the public.
3. Respondent’s actions in this matter constitute a violation of S.C. Code Ann § 40-59-240(C) (1976, as amended), in that he failed to pull a permit required by the local municipality.

V.

Pursuant to S.C. Code Ann. §§ 40-1-120, 40-59-110 and 40-59-120 (1976, as amended), the Commission is authorized to impose sanctions upon you if you are found guilty of misconduct in the practice of residential specialty contracting or if you have committed any

ground for disciplinary action defined by § 40-1-110 (1976, as amended). For such infractions, your license to engage in the business of residential specialty contracting in South Carolina may be revoked permanently, suspended, or restricted for a definite or indefinite period.

The Commission is also authorized to issue a reprimand or to take such other actions as may be warranted, such as: impose probationary terms, require on-site supervision, or require additional professional training, among other restrictions and limitations. In addition to any other sanctions, the Commission may impose a fine of up to \$2,500.00 per offense and may also direct you to pay the costs of the investigation and prosecution. Further, the Commission may seek equitable relief to enjoin violations of the Home Builders Act pursuant to S.C. Code Ann. §§ 40-1-100 and 40-59-210 (1976, as amended).

WHEREFORE, the Commission shall consider these allegations and make such disposition as may be appropriate. You may respond and present evidence and argument on all issues involved. You may appear alone or with legal counsel.

SOUTH CAROLINA DEPARTMENT OF  
LABOR, LICENSING AND REGULATION  
RESIDENTIAL BUILDERS COMMISSION



ZUBIN BILLIMORIA  
Assistant General Counsel  
P.O. Box 11329  
Kingstree Bldg., 110 Centerview Drive  
Columbia, SC 29211-1329  
(803) 896-4321

March 7, 2014

**PANTHER HEATING & COOLING, INC.  
903 WEST MAIN ST.  
P.O. BOX 3587  
ROCK HILL, SC 29732  
(803) 327-2700**

February 13, 2013

**Steve Nivens  
105 Mountain View Street  
Clover, SC 29710**

Dear Steve,

The following scope of work is necessary to get your geothermal system operating properly:

- Geothermal loop is inadequate for the equipment
  - Install new horizontal loop field properly sized to match equipment
  - Estimated to be approximately 25% of linear footage required
- Hose kit from flow center is too long – need to move flow center within 3-5 feet of unit
- Existing flow center (FC-2 equivalent) should be adequate for new loop
- All loop piping from foundation wall to flow center and from flow center geothermal unit needs to be insulated
- Water flow control device should be installed on Leaving Water side of unit
- Antifreeze should be added to the geothermal loop.

Please let me know if you have any questions.

Thank you for this opportunity.

Sincerely,

*Mike Geddings*

**Mike Geddings  
Panther Heating & Cooling, Inc.  
(803)327-2700**

SCAS

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RECEIVED

**SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING & REGULATION  
BEFORE THE RESIDENTIAL BUILDERS COMMISSION**

In the Matter of:

**HUTCHISON NEELY  
d/b/a J B & E Heating and Cooling, Inc.**

License Number RBH.13,

Case # 2012-146,

Respondent.

**HEARING OFFICER'S  
RECOMMENDATION**

This matter came before John C. Curl, a hearing officer appointed by the Residential Builders Commission (the "Commission") for a hearing on May 28, 2014, as a result of the Notice of Hearing and Formal Complaint served upon the Respondent on March 7, 2014 and filed with the Commission. The hearing was held pursuant to S.C. Code Ann. § 40-59-90, S.C. Code Ann. § 40-1-70(6), and the provisions of the Administrative Procedures Act, S.C. Code Ann. § 1-23-10, *et seq.* (1976, as amended), for a recommendation to the Commission based upon the evidence presented at the hearing. John P. Carroll, Esq., with the Office of Disciplinary Counsel, represented the State. The Respondent appeared, and after being advised of his right to counsel, waived that right, executing a waiver of attorney form.

In the Formal Complaint, the Respondent was charged with violations of S.C. Code Ann. §§ 40-59-110, 40-1-110(1)(f) and 40-59-240(C) (1976, as amended) with respect to the installation of a geothermal HVAC unit ("the System") at a single-family residence located at 105 Mountain View Street, Clover, South Carolina ("Subject Property"), that was owned by James Steven (Steve) Nivens ("Homeowner").

Prior to the taking of testimony, the State withdrew the allegation of a violation of S.C. Code Ann. § 40-59-240(C) (1976, as amended), as that matter has been resolved. The State also asked that the Homeowner be authorized to call on Respondent's bond, if code or standards violations were found by the Commission in regards to the geothermal system.

**WITNESSES AND EXHIBITS**

Testifying on behalf of the State were John Andrew (Andy) Dempsey, Investigator for the South Carolina Department of Labor, Licensing & Regulation ("LLR"); James Steven Nivens, Homeowner; and Michael Geddings, of Panther Heating and Cooling, Inc.

Respondent testified on his behalf and presented no additional witnesses.

The following Exhibits were introduced by the State and accepted into evidence without objection:

State's Exhibit 1: May 28, 2014 Waiver of Attorney form signed by Respondent.

State's Exhibit 2: March 7, 2014 Formal Complaint, Certificate of Service, March 13, 2014 signed certified mail receipt and May 16, 2012 Notice of Complaint to Respondent.

State's Exhibit 3: August 21, 2010 Proposal for removal of old furnace and ductwork, installation of new ducts system and Climate Master Unit with closed loop totaling 1000 linear feet, and back up heat strips at Subject Property between Homeowner and Respondent for the total amount of \$15,280.00; October 4, 2010 invoice for removal of old furnace and ductwork, installation of new duct system and Climate Master Unit with closed loop totaling 1000 linear feet, at Subject Property between Homeowner and Respondent in the amount of \$7,265.00, noted as paid on October 7, 2010; October 11, 2010 invoice for removal of old furnace and ductwork, installation of new duct system and Climate Master Unit with closed loop totaling 1000 linear feet, at Subject Property between Homeowner and Respondent in the amount of \$1,915, noted as paid on October 12, 2010; October 11, 2010 invoice for unit and piping at Subject Property between Homeowner and Respondent in the amount of \$7,265.00, noted as paid on October 12, 2010.

State's Exhibit 4: LLR data base information regarding Respondent's bond status as of the time of work at Subject Property.

State's Exhibit 5: February 13, 2013 letter from Mike Geddings of Panther Heating and Cooling, Inc. to Homeowner regarding scope of work proposed to Homeowner's geothermal system, and March 5, 2013 Geolink Project Report for Homeowner regarding geothermal system.

State's Exhibit 6: Manufacturer's guide to Tranquility 20 Series Climate Master.

State's Exhibit 7: March 8, 2011 email from Respondent to Homeowner regarding returning to Subject Property to increase loop.

The following exhibits were introduced by Respondent and accepted into evidence without objection:

Resp. Exhibit 1: Manual J EMS Heat Loss/Heat Gain Calculation by Respondent's Company regarding geothermal system installation at Subject Property.

Resp. Exhibit 2: August 6, 2010 Geodesigner System Analysis prepared for Homeowner regarding geothermal system installation at Subject Property.

Resp. Exhibit 3: August 19, 2010 invoice from Merchant Chemicals and solvents regarding materials used in Subject Property, two photographs of Methanol label; September 3,

2010 invoice from C.C. Dickson Co. regarding August 18, 2010 order of pipe used for geothermal system installation at Subject Property.

### FINDINGS OF FACT

1. At all times relevant to this matter, Respondent was duly licensed by the Commission as a residential specialty contractor heating and air conditioning in South Carolina, number RBH.13, that is current. Respondent was licensed at all times relevant to the complaint.
2. The Commission has jurisdiction over Respondent and the subject matter contained herein.
3. On October 4, 2010, Respondent contracted with James (Steve) Nivens ("Homeowner") for the installation of a geothermal HVAC unit ("System") in a single-family residence located at 105 Mountain View Street, Clover, South Carolina ("Subject Property"). The total contract price was \$7,265.00. On or about October 6, 2010, Complainant paid this amount in full.
4. Following installation of the System, Homeowner noticed that the system did not adequately heat Subject Property in the winter or cool it in the summer.
5. Homeowner testified he discussed the problems with Respondent, who returned to Subject Property two or three times to make adjustments, but that the heating and cooling issues were not resolved.
6. Respondent testified he returned to Subject Property at least two times after Homeowner reported having problems with the System, modified the pump by changing it from a single stage to a dual stage at his expense, and flushed the system to insure there was no air that might impede its efficiency.
7. Homeowner testified that Respondent suggested adding more loop to the system, but did not do so.
8. Respondent testified that while he considered adding more loop at one point after Homeowner reported having problems with the System, he determined that would not improve the efficiency of the system and decided not to do so.
9. Homeowner testified that after several telephone calls from him Respondent quit answering the calls, did not communicate further and did not make any further modifications or adjustments to the system.
10. Respondent testified that he did stop responding to Homeowner's telephone calls, as the communication escalated.

11. Homeowner testified that Subject Property was built in the 1800's, and while he insulated the floors and attic, the walls were not insulated.
12. Respondent communicated with the manufacturer's representative for Climate Master prior to installation of the System, who also recommended that auxiliary heating be installed in Subject Property, based on the age of Subject Property and the lack of insulation in the walls.
13. Respondent testified that he told Homeowner from the inception of the project that auxiliary heating would be needed for Subject Property, and included the price for installation of heat strips for back up heat in his original proposal to Homeowner.
14. Homeowner testified that no one had done any work on or made any modifications to the System other than Respondent.
15. LLR Investigator Andy Dempsey testified that Respondent was an HVAC Commission licensee, and that he had an active bond at the time this work was done on Subject Property.
16. Investigator Dempsey testified that this matter was initially investigated, then closed, then re-opened when Homeowner provided LLR with an inspection report from Panther Heating & Cooling. Investigator Dempsey did not have the expertise to evaluate the System, and the investigation could not proceed without an outside evaluation.
17. Investigator Dempsey notified Respondent when the case was re-opened and the reason for re-opening it, but did not send any additional notice of deficiency. He could not say if Respondent was provided a copy of the inspection report from Panther Heating and Cooling prior to the Formal Complaint being prepared and served upon Respondent.
18. Respondent testified that the first time he saw the report from Mr. Geddings was when he received the Formal Complaint.
19. Investigator Dempsey testified that he relied upon the Panther report to determine that the System's loop should have been 1800 feet as opposed to the 1200 feet that Respondent installed, which was the basis for his conclusion that Respondent violated 2006 IRC M1401.1, failing to install the System in accord with the manufacturer's instructions and the requirements of the code.
20. Michael Geddings, owner of Panther Heating and Cooling, Inc. ("Panther") was admitted as an expert in regards to geothermal installation. He testified that he was certified by IGSHPA, the International Ground Source Heat Pump Association, has trained people within his company to install geothermal systems, and has installed at least fifty geothermal heating and cooling systems.
21. Mr. Geddings testified that his experience was not with the Climate Master brand geothermal heating and cooling systems, but with Water Furnace.

22. Mr. Geddings testified that he inspected the geothermal system at Subject Property, and prepared a report. In that report he stated that the following defects prevented the system from properly operating:
- a. The geothermal loop was inadequate for the equipment. The loop installed was estimated to be approximately 25% of the linear footage required.
  - b. The hose kit from the flow center was too long. The flow center needed to be within three (3) – five (5) feet of the unit.
  - c. All loop piping from foundation wall to the flow center and from the flow center to the geothermal unit needed to be insulated.
  - d. The water flow control device needed to be installed on “Leaving Water” side of the unit.
  - e. Antifreeze needed to be added to the geothermal loop.
23. Mr. Geddings testified that he estimated the length of the existing loop to be only 25% of the linear feet needed, based upon where the earth had been disturbed, what he was told by Homeowner, and the temperature of the fluid in the pipe. He testified that it was not possible to get an accurate reading due to the freezing of the loop on the day of his inspection. It was his opinion based upon the Geolink calculations that 1840 feet of loop would be necessary for the System at Subject Property to properly operate but stated that the amount of loop needed would change based upon equipment sizing, soil type, pipe diameter and the depth of the loop. He stated that a ten percent factor on either side of the recommended calculation would be his rule of thumb.
24. Mr. Geddings testified that he made his calculations regarding the adequacy of the System with Geolink, which is a computer program, specific to one particular manufacturer, Water Furnace. The Geolink design report incorporated the Water Furnace logo and name on each page of the report.
25. The System installed at Subject Property was a Climate Master, and the computer program used to make calculations specific to Climate Master is called Geodesign.
26. Respondent testified that he used Geodesign to do the calculations for the System, after doing the Manual J heat/gain loss calculation. After Homeowner reported problems, Respondent testified that he did the calculations two additional times to verify their accuracy, and that while he could vary them a bit, they were substantially the same and were what he installed at Subject Property.
27. Respondent testified that he did not believe the loop was too small, based upon his Manual J and Geodesign calculations. He testified that his calculations indicated 1130 linear feet of loop was required, and he installed 1200 linear feet.
28. Mr. Geddings testified that the Geolink calculation he did regarding the System indicated that the hose kit was too long and the flow center needed to be within three to five feet of the

unit, utilizing for his calculation a unit pipe diameter of one inch and ten feet and two elbows of hose kit.

29. Respondent testified that he used 3/4 inch pipe in the System, and not the one inch pipe assumed by Mr. Geddings in his Geolink calculations. The invoices submitted by Respondent regarding materials used on the job reflect that Respondent ordered 3/4 inch pipe on August 18, 2010 and was invoiced for that pipe on September 3, 2010.

30. Respondent testified that he installed the hose kit from the flow center at a distance of eight or nine feet as he wanted to mount the pump kit to something sturdy and the closest stable object was a pillar. He upped the pump to accommodate the longer hose. He stated that the length of the hose kit changes according to the manufacturer, and the length he used was appropriate for the System installed at Subject Property.

31. Mr. Geddings testified that the Geolink indicates the number of gallons needed to go through the system and that there needed to be a control device to monitor this, and that in his observation it was not present on the System at Subject Property.

32. Respondent admitted that he had removed the water flow control device from the System when he returned to Subject Property as it appeared to have been broken when insulation was added under the house subsequent to the installation of the system, and failed to replace it. He admitted that he should have done so.

33. Mr. Geddings further testified that he did not know for certain and could only speculate there was no antifreeze in the loop, based upon the fluid being frozen.

34. Respondent testified that he put the required amount of methanol anti-freeze into the system at Subject Property. He testified that when Homeowner reported problems to him with the system, he returned to Subject Property, checked that it was correct, then returned and flushed the system and re-added methanol anti-freeze.

35. Respondent denied that the System could have been frozen at the time of Mr. Gedding's inspection, as he testified that it would not be working at all and would have shut down if the fluid were not circulating due to being frozen. He testified that ice collecting on the outside of the pipe is normal, and is not indicative that the fluid inside the pipe is frozen as well.

36. Mr. Geddings admitted that he did not install Climate Master equipment and could not say if the manual requires insulation of the pipe.

37. Respondent testified that the manual for the Climate Master system did not indicate the line needed to be insulated, and that in fact, that insulating the line would impede the heat exchange that is part of how the System operates.

38. Mr. Geddings stated he could not say for certain if the System at Subject Property was operating to manufacturer's specifications because it was not an operating system at the time he

- did his inspection, and that he would have to do a true heat loss/gain calculation to know, which could not be done at the time of his inspection due to the freezing of the fluid.
39. Mr. Geddings further testified that it was his opinion that a geothermal system could be designed to adequately heat and cool a structure that did not have an adequate envelope.
40. Mr. Geddings testified that he was familiar with other geothermal systems installed by Respondent and believed that they did not operate properly.
41. Mr. Geddings stated that he believed the 4 ton BTU unit was correctly sized, and other than the issues in his report the System was correctly installed.
42. Mr. Geddings testified that in his opinion the cost to make Homeowner's geothermal system operate properly would be approximately \$13,000.00 if he did the trenching for the additional loop installation or \$6,200.00 if Homeowner dug the trenches.
43. Mr. Geddings testified that while he recommends to his customers that an auxiliary heat source be installed where a geothermal system is being used in a home with high heat loss, that would be for emergency purposes only and not to be used on a routine basis to supplement the geothermal system.
44. Respondent testified that he has installed geothermal systems for twenty years, and was trained to install them through Bowater, Georgia Pacific and Climate Master.
45. Respondent testified that after he did his Manual J calculations, Homeowner added insulation to the floor at Subject Property. However, Respondent testified he didn't believe that adding that insulation would significantly impact his calculations, as in heating the main issues are the roof, walls and windows.
46. Respondent testified that he offered to return to Subject Property and install auxiliary heating after Homeowner reported problems, but Homeowner declined the offer.

#### CONCLUSIONS OF LAW

1. The State did not prove that Respondent's actions in this matter constitute a violation of S.C. Code Ann § 40-59-110 (1976, as amended) or S.C. Code Ann. § 40-1-110(f) (1976, as amended), in that the allegations of misconduct rested upon one IRC violation, 2006 IRC M1401.1, not installing the System in accordance with the manufacturer's recommendation. The State's expert witness admitted that he had never installed a Climate Master system, admitted he didn't know the size of the loop installed, admitted he was speculating regarding the anti-freeze content of the loop, based his calculation on one inch pipe when 3/4 inch pipe was used, and admitted he didn't know the Climate Master manual's instructions regarding insulation. Respondent produced credible, reliable evidence that he properly performed the necessary

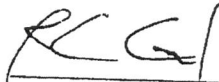
calculations to determine the size of the System and loop, properly installed the equipment in accordance with the manufacturer's specifications, and advised Homeowner prior to the installation of the System that auxiliary heating would be needed to supplement the System.

**RECOMMENDATION**

1. The Complaint should be dismissed.

**RESPECTFULLY SUBMITTED,**

**RESIDENTIAL BUILDERS COMMISSION**



**John C. Curl**  
**Hearing Officer**

July 23, 2014.

**EXHIBIT E**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

**AFFIDAVIT**

Personally appeared before me, Hutchinson Neely, who being duly sworn, states as follows:

I am employed by JB&E Heating and Cooling, Inc. and I am familiar with the facts and issues in this case. James Nivens and I discussed the problems that he alleged with his heating and cooling system on several occasions. The last time we discussed the problems in which I took any action was in 2012.

Hutchinson Neely  
Hutchinson Neely

SWORN to before me this 23 day of  
January, 2019.

Kathy A. Carpenter  
Notary Public for South Carolina  
My Commission Expires: 8/26/25

**EXHIBIT D**

ELECTRONICALLY FILED - 2019 Jan 24 9:23 AM - YORK - COMMON PLEAS - CASE#2017CP4602339

**SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING AND REGULATION  
BEFORE THE SOUTH CAROLINA RESIDENTIAL BUILDERS COMMISSION**

**In the Matter of:**

**HUTCHISON NEELY,  
d/b/a JB & E Heating and Cooling, Inc.**

**License No. RBH . 13**

**Respondent**

**OIE Case # 2012-146**

**FINAL ORDER**

This matter came before the Residential Builders Commission (the "Commission"), for a Final Order hearing on November 12, 2014 as a result of the Notice of Hearing and Hearing Officer's Recommendation served upon the Respondent on September 3, 2014 and filed with the Commission. The hearing was held pursuant to S.C. Code Ann. §§ 40-1-90, 40-59-90, §40-1-70(6), and the provisions of the Administrative Procedures Act, S.C. Code Ann. § 1-23-10, *et seq.* (1976, as amended) to review the attached Hearing Officer's Recommendation (Recommendation) in the above referenced matter and to issue a Final Order.

ODC Atty:	John P. Carroll	Resp. Counsel:
Witnesses:	Hutchison Neely James Nivens	Respondent Appeared: Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>

Recusals:

The Commission hereby takes the following action with respect to the Recommendation:

**Hearing Officer Findings of Fact and Conclusions of Law Are:**

Adopted in their entirety  Rejected and Remanded for further consideration as indicated below :

Adopted as modified below :

Findings of Fact: \_\_\_\_\_

Conclusions of Law: \_\_\_\_\_

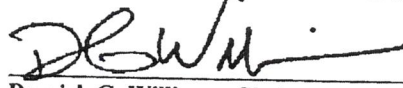
**Hearing Officer Recommended Sanctions Are**

Adopted in their entirety  Modified as stated below :

\_\_\_\_\_

**AND IT IS SO ORDERED.**

**RESIDENTIAL BUILDERS COMMISSION**



**Derrick G. Williams, Chairman**

January 27, 2015

STATE OF SOUTH CAROLINA ]  
COUNTY OF YORK ]

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

JAMES STEPHEN NIVENS and ]  
CAROLYN NIVENS, ]  
Plaintiffs, ]

AFFIDAVIT

v. ]

JB&E HEATING & COOLING, INC., ]  
a South Carolina corporation, ]  
Defendant. ]

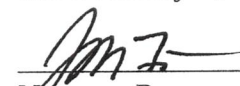
C.A. No. 17-CP-46-02339

PERSONALLY appeared before me JAMES STEPHEN NIVENS, who, being duly sworn, deposes and says:

1. He is the named Plaintiff in the above civil action. He executed the verified Complaint herein.
2. In preparation for the upcoming hearing, he noticed mistakes in the allegations of the Complaint, and specifically in Paragraphs 7 and 11. It is the intent of this Affidavit to supplement the Plaintiffs' Complaint and to correct it.
3. He noticed the deficiencies in the equipment and work provided by the Defendant JB&E HEATING & COOLING, INC. after September, 2010.
4. In response to that discovery, he contacted Mr. Hutchison Neely, the principal of the Defendant Corporation. Those contacts extended from the time of his discovery until the time of his LLR Complaint referenced below.
5. In response to his contacts with Mr. Neely, which extended over many months, he was repeatedly promised examination or repairs by the Defendant.
6. After many such contacts and reiterations of the Defendant's promise to examine or repair, he filed his Complaint with the South Carolina Department of Labor, Licensing and Regulation in 2012.
7. That Complaint was disposed of by the LLR Department by Order entered July 23, 2014.

  
James Stephen Nivens

SWORN TO and subscribed before me  
this February 4, 2019.

  
NOTARY PUBLIC FOR SOUTH CAROLINA  
My Commission expires: 07/30/2019

STATE OF SOUTH CAROLINA	]	IN THE COURT OF COMMON PLEAS
	]	
COUNTY OF YORK	]	SIXTEENTH JUDICIAL CIRCUIT
	]	
JAMES STEPHEN NIVENS and CAROLYN NIVENS,	]	
	]	
Plaintiffs,	]	MEMORANDUM IN RESPONSE
	]	
v.	]	TO MOTION FOR SUMMARY JUDGMENT
	]	
JB&E HEATING & COOLING, INC.,	]	C.A. No. 17-CP-46-02339
a South Carolina corporation,	]	
	]	
Defendant.	]	
	]	

The Defendant JB&E HEATING & COOLING, INC. moves for summary judgment on two grounds: statute of limitations and the effect of the earlier administrative hearing before the Department of Labor, Licensing and Regulation (hereafter “LLR”).

STATUTE OF LIMITATIONS

The Defendant rightly cites the date of the original contract on the Plaintiffs’ geothermal system and unit as being 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;<sup>1</sup>

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.

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

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 examination repair repeatedly given to him.<sup>2</sup> 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:

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 is attached hereto as an Exhibit.

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 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 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 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 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.<sup>3</sup> 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.

As to the First Cause of Action under the Magnuson-Moss Act, that Act contains no statute of limitations. In virtually all cases dealing with that Act, the Courts have looked to the State UCC 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 Defendant also pleads the effect of the LLR Decision included in its Motion. 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 nor 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<sup>4</sup>, or a pattern of repeated failure by a residential builder or residential specialty contractor to pay labor or material bills. . . .

The Hearing Officer did not try the issue of the Defendant's compliance with S.C. Code §

3. Copies of the Defendant's Proposal and Invoice are attached hereto.  
4. § 40-59-25 deals with roofing contracts and insurance coverage; it thus has no application here.

40-59-240(f), which requires compliance with County licensing and Codes.

The Defendant did not obtain a building permit and was fined for that inaction.<sup>5</sup>

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 Plaintiffs contend that 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.

Respectfully submitted,

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

The Guardian Building  
223 East Main Street, Suite 520  
Rock Hill, SC 29730

Post Office Box 106  
Rock Hill, SC 29731-6106

803 324-8100  
803 324-8109: Fax  
jmfoster@comporium.net

February 5, 2019

Rock Hill, South Carolina

5. A copy of the assessed Penalty is attached hereto and incorporated herein.

**J B & E Heating and Cooling, Inc.**

P O Box 968  
 Rock Hill, SC 29731  
 803-325-1058

**Proposal**

Date	Proposal #
8/21/2010	10976p

Customer
Steve Nivens 105 Mountain View Clover, SC 29710

P.O. No.	Terms	Job Location
closed loop	Due on Completion	

Item	Description	Total
Proposal	Remove old oil furnace and ductwork Install new duct system Install Climate master Unit TSH048AGC01ALSS under house Plumbing for unit - closed loop and wiring for unit Install closed loop in yard 4 loops at 250' each or 3 loops at 200' Start up and check out system Warranty 10 years all major parts 5 years on small parts 1 year labor	14,530.00
Additions →	50 years on closed loop piping under ground Add 15 KW heat strips for back up heat and the power for back up heat 7% State/Local	750.00 0.00

Payment Terms: 1/3 to Begin, 1/3 when half units set and 1/3 upon completion

**Total** \$15,280.00

Acceptance of Proposal-The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Signature \_\_\_\_\_

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration, deviation or unforeseen- necessary changes from above specifications involving extra cost will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delay beyond our control. Owner to carry fire, tornado and other necessary insurance. To keep warranties valid, units have to be serviced seasonally. Proposal active for 30 days.

Phone #	Fax #	E-mail
803-325-1058	866-775-5763	JBEH@comporium.net

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**J B & E Heating and Cooling, Inc.**  
**P O Box 968**  
**Rock Hill, SC 29731**  
**803-325-1058**

# Invoice

DATE	INVOICE #
10/4/2010	8945533

**PAID**  
**10/07/2010**

BILL TO

Steve Nivens  
 105 Mountain View  
 Clover, SC 29710

Call and we can process your payment over the phone. We do have a 1.5% processing fee.

**Balance Due**

ITEM		Due on Completion		closed loop
Install	Remove old oil furnace and ductwork Install new duct system Install Climate master Unit. TSH048AGC01ALSS under house Plumbing for unit--closed loop and wiring for unit Install closed loop in yard 4 loops at 250' each or 5 loops at 200' Start up and check out system Warranty 10 years all major parts 5 years on small parts 1 year labor 50 years on closed loop piping under ground	14,530.00	0.5	7,265.00
		<b>Subtotal</b>		\$7,265.00
		<b>Sales Tax (7.0%)</b>		\$0.00
<b>RECOMMENDATIONS</b> Units should be serviced twice annually.		<b>Total</b>		
I have authority to order the work outlined above which has been satisfactorily completed. I agree that Seller retains title to equipment/materials furnished until final payment is made. If payment is not made as agreed. Seller can remove said equipment/materials at Seller's expense and or impose a 2% liquidation fee on the entire amount contained in the Seller/Buyer transaction. Any damage resulting from said removal shall not be the responsibility of Seller.		Phone #	E-mail	
		803-325-1058	jbeh@comporium.net	
Customer Signature		Date		
		Limited Warranty: All materials, parts and equipment are warranted by the manufactures' or suppliers' written warranty only. All labor performed by the above named company is warranted for 30 days or as otherwise indicated i writing. The above named company makes no other warranties. express or implied, and its agents or technicians are not authorized to make any such warranties on behalf of the above named company.		

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**J B & E Heating and Cooling, Inc.**  
**P O Box 968**  
**Rock Hill, SC 29731**  
**803-325-1058**

# Invoice

DATE	INVOICE #
10/11/2010	80206

**PAID**  
**10/12/2010**

BILL TO

Steve Nivens  
 105 Mountain View  
 Clover, SC 29710

Call and we can process your payment over the phone. We do have a 1.5% processing fee.

Balance Due

	Due on Completion		closed loop
--	-------------------	--	-------------

ITEM			
Install	Remove old oil furnace and ductwork Install new duct system Install Climate master Unit, TSH048AGCO1ALSS under house Plumbing for unit--closed loop and wiring for unit Install closed loop in yard 4 loops at 250' each or 5 loops at 200' Start up and check out system Warranty 10 years all major parts 5 years on small parts 1 year labor 50 years on closed loop piping under ground	3,830.00	0.5 1,915.00

**Subtotal**  
**Sales Tax (7.0%)**

**RECOMMENDATIONS**  
 Units should be serviced twice annually.

I have authority to order the work outlined above which has been satisfactorily completed. I agree that Seller retains title to equipment/materials furnished until final payment is made. If payment is not made as agreed, Seller can remove said equipment/materials at Seller's expense and or impose a 2% liquidation fee on the entire amount contained in the Seller/Buyer transaction. Any damage resulting from said removal shall not be the responsibility of Seller.

Phone #	E-mail
803-325-1058	jbeh@comporium.net

**Limited Warranty:** All materials, parts and equipment are warranted by the manufactures' or suppliers' written warranty only. All labor performed by the above named company is warranted for 30 days or as otherwise indicated i writing. The above named company makes no other warranties, express or implied, and its agents or technicians are not authorized to make any such warranties on behalf of the above named company.

Customer Signature \_\_\_\_\_ Date \_\_\_\_\_

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**J B & E Heating and Cooling, Inc.**  
**P O Box 968**  
**Rock Hill, SC 29731**  
**803-325-1058**

# Invoice

DATE	INVOICE #
10/11/2010	80206

**PAID**  
**10/12/2010**

BILL TO

Steve Nivens  
 105 Mountain View  
 Clover, SC 29710



Call and we can process your payment over the phone. We do have a 1.5% processing fee.

**Balance Due** \$ 5,000.00

ITEM	DESCRIPTION	Due on Completion	closed loop
Parts	Unit and piping	5,000.00	5,000.00
		<b>Subtotal</b>	\$6,915.00
		<b>Sales Tax (7.0%)</b>	\$350.00
<b>RECOMMENDATIONS</b> Units should be serviced twice annually.		<b>Total</b> \$7,265.00	
I have authority to order the work outlined above which has been satisfactorily completed. I agree that Seller retains title to equipment/materials furnished until final payment is made. If payment is not made as agreed, Seller can remove said equipment/materials at Seller's expense and or impose a 2% liquidation fee on the entire amount contained in the Seller/Buyer transaction. Any damage resulting from said removal shall not be the responsibility of Seller.		Phone #	E-mail
		803-325-1058	jbeh@comporium.net
Customer Signature		Date	
		<p>Limited Warranty: All materials, parts and equipment are warranted by the manufactures' or suppliers' written warranty only. All labor performed by the above named company is warranted for 30 days or as otherwise indicated i writing. The above named company makes no other warranties, express or implied, and its agents or technicians are not authorized to make any such warranties on behalf of the above named company.</p>	

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James nvens <jsnlvns@gmail.com>

**Loop**

1 message

**J B & E Heating and Cooling, Inc** <jbeh@comporlum.net>  
To: jsnlvens@gmail.com

Tue, Mar 8, 2011 at 8:47 AM

Steve,  
I would like to come out and this week to increase your loop. Can you just touch base and let us know the condition of the ground with all this rain.  
Hutch Neely

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S.C. DEPARTMENT OF LABOR, LICENSING AND REGULATION  
 RESIDENTIAL BUILDERS COMMISSION  
 P.O. Box 11329  
 Columbia, SC 29211-1329

**CITATION AND NOTIFICATION OF PENALTY  
 NOTICE TO CEASE VIOLATION OF LAW**

HUTCHISON NEELY  
 J B & E HEATING & COOLING

License Number: RBH. 13

Issuance Date: 12/3/2012  
 Complaint #: 2012-146

*This citation describes alleged violation of §40-59-5, et seq., South Carolina Code of Laws, 1976, as amended. The penalties listed are based on these violations. You must immediately cease and desist from further violation until such time, if ever, as proper authorization is issued by the S.C. Residential Builders Commission. You must pay the proposed penalties pursuant to §40-59-105. Any citation and/or penalty assessed by a representative of the South Carolina Department of Labor, Licensing and Regulation may be appealed by requesting, in writing, an administrative review. Such requests must be addressed to: Residential Builders Commission Administrator, South Carolina Department of Labor, Licensing and Regulation, PO Box 11329, Columbia, SC 29211-1329, and must be mailed within 10 calendar days from receipt of this Citation and Notification of Penalty. This citation concerns application of the South Carolina Residential Builders Act and Regulations and does not necessarily resolve all aspects of any disciplinary action currently pending before the Board or which may be filed in the future. Failure to make a timely request for review will result in the citation becoming a final order of the Residential Builders Commission.*

ITEM	SECTION(S) VIOLATED	DESCRIPTION	PENALTY
X	§40-59-220	Unlicensed practice. Practice of Residential building at: on:	
	§40-59-220	Unlicensed practice of Specialty contracting at: on:	
	§40-59-240(A)	Practice of Specialty contracting outside the scope of the registration (S.C. Regulation 106-3) at: on: by engaging in:	
	§40-59-240(C)	Failure to obtain a building permit for construction at: [REDACTED]	
	§40-59-240(D)	Undertaking a Specialty contract which exceeds \$5000 without bond for construction at:	
	§40-1-110(c)	Aiding or abetting violation of licensing requirements by: at: on:	

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 CRK - COMMON PLEAS - CASE#2017CH0602339

\$500.00

I certify that I explained the requirements of law and that the respondent must immediately cease and desist from further violation until such time, if ever, as proper authorization is issued by the S.C. Residential Builders Commission. I also provided the necessary application forms to be completed and forwarded to the Commission by the respondent.

**TOTAL PENALTY: \$500.00**

Please make check or money order payable to S.C. Department of Labor, Licensing and Regulation; and indicate citation number on remittance.

Andy Dempsey, Investigator

Copy received:

Signature of Respondent \_\_\_\_\_ Date \_\_\_\_\_

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

NOTICE and MOTION:  
TO ALTER OR AMEND JUDGMENT

Pursuant to:  
RULE 59(e), S.C.R.C.P.  
C.A. No. 17-CP-46-02339

To: The Defendant and  
James W. Boyd  
Attorney for Defendant  
1544 Ebenezer Road  
Rock Hill, S.C. 29732

You or your attorney should appear before this Court to present evidence or argument, if any you have, relating to the Motion herein, as follows:

DATE AND TIME: To be set by the Clerk of the Court, or as soon thereafter as counsel may be heard.  
PLACE: York County Historical Courthouse  
2 South Congress Street  
York, South Carolina 29745,  
or at such other place as the Court or Clerk may designate

Pursuant to Rule 59(e), S.C.R.C.P., the Plaintiffs, by and through their attorney, move this Court:

For an Order reopening the Order granting Summary Judgment dated and filed March 18<sup>th</sup>, 2018, amending the findings of fact and conclusions of law or making new findings and conclusions, and directing the entry of a new Order; and

For such other and further relief as this Court may deem just and proper.

on the grounds that the Order of the Court is contrary to law and the evidence as proven at trial, on the following bases:

## BACKGROUND:

The date of the original contract on the Plaintiffs' geothermal system and unit as being October, 2010. Problems with the system resulted in communications between the parties. A copy of the Defendant's e-mail dated March 8, 2011 confirming these dealing was attached to the Plaintiffs' Memorandum in Opposition and is and incorporated herein by this reference. In the Hearing Officer's Recommendation to the Labor, Licensing and Regulation Department, incorporated as an Exhibit to the Defendant's Motion for Summary Judgment and incorporated herein by this reference, the parties' evidence is stated as follows:

9. Homeowner testified that after several telephone calls from him Respondent quit answering the calls, did not communicate further and did not make any further modifications or adjustments to the system.
10. Respondent testified that he did stop responding to Homeowner's telephone calls, as the communication escalated.

The Plaintiff JAMES STEPHEN NIVENS states, in his Affidavit filed prior to the last Motion hearing, as follows:

5. In response to his contacts with Mr. Neely, which extended over many months, he was repeatedly promised examination or repairs by the Defendant.
6. After many such contacts and reiterations of the Defendant's promise to examine or repair, he filed his Complaint with the South Carolina Department of Labor, Licensing and Regulation in 2012.<sup>1</sup>
7. That Complaint was disposed of by the LLR Department by Order entered July 23, 2014.

There is no evidence contradicting the facts recited above.

After argument on February 7<sup>th</sup>, 2019, this Court issued its Order granting Summary Judgment dated and filed March 18<sup>th</sup>, 2019.

## ARGUMENT:

<sup>1</sup> The Defendant has, to date, been unable to confirm the date of his complaint to the LLR, but accepts the Defendant's date of March 28, 2012.

The Court has applied 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;<sup>2</sup>

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.

By his Affidavit, Mr. NIVENS asserts the promises of examination and repair repeatedly given to him.<sup>3</sup> 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;

<sup>2</sup> S.C. Code § 15-3-520 deals with actions upon bonds and sealed instruments.

<sup>3</sup> The Defendant's admission of discussions on further work on the geothermal unit is stated as Finding of Fact No. 46., p.7 of the LLR Hearing Officer's Recommendation, July 23, 2014 (referenced above).