. . .

(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 an applicable statute of limitation runs. They note, however, that the beginning date is stated to be after "substantial completion". That term is defined by S.C. Code §§ 15-3-630, which states, in relevant part:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

/s/ John Martin Foster
Attorney for Plaintiffs
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March 28, 2019

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA	]	IN THE COURT OF COMMON PLEAS
	]	
COUNTY OF YORK	]	SIXTEENTH JUDICIAL CIRCUIT
	]	
JAMES STEPHEN NIVENS and CAROLYN NIVENS,	]	
	]	
Plaintiffs,	]	MEMORANDUM
	]	
v.	]	ON RULE 59(e), S.C.R.C.P. MOTION
	]	
JB&E HEATING & COOLING, INC., a South Carolina corporation,	]	C.A. No. 17-CP-46-02339
	]	
	]	
Defendant.	]	
	]	

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

GENERAL STATUTE OF LIMITATIONS

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

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

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

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

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

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

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

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

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

> No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than eight years after substantial completion of the improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
>
> (1) an action to recover damages for breach of a contract to construct or repair an improvement to real property;
>
> (2) an action to recover damages for the negligent construction or repair of an improvement to real property;
>
> . . .
>
> (4) an action to recover damages for economic or monetary loss;
>
> (5) an action in contract or in tort or otherwise;
>
> (6) an action for contribution or indemnificatn for damages sustained on account of an action described in this section;
>
> . . .
>
> (9) an action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

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

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

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

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

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

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

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

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

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

U.C.C. STATUTE OF LIMITATION

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

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

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

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

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

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

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

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

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

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

case.

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

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

MAGNUSON-MOSS ACT LIMITATION

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

EFFECT OF LLR DECISION

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

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

The Hearing Officer determined that the State had 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 40-59-25S.[4], or a pattern of repeated failure by a residential builder or residential specialty

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

contractor to pay labor or material bills. . . .

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

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

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

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

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

Respectfully submitted,

/s/ John Martin Foster
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April 23, 2019

Rock Hill, South Carolina

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

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**SIXTEENTH CIRCUIT COURT**
COUNTY OF YORK)	
)	**CASE NO.: 2017-CP-46-02339**
James Nivens and Carolyn Nivens,)	
)	**RESPONSE TO MOTION**
Plaintiffs,)	**TO ALTER OR AMEND**
)	**JUDGMENT**
v.)	
)	
JB&E Heating & Cooling, Inc., a)	
South Carolina Corporation,)	
)	
Defendants.)	

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

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

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

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Rock Hill, South Carolina
April 9, 2019

P R O C E E D I N G S

* * *

THURSDAY, FEBRUARY 6, 2019

ROCK HILL, SOUTH CAROLINA

* * *

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

time.

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

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

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

The contract itself is set forth in the Defendant's

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

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

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

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

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

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

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

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

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

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

Mr. Foster, I will hear from you.

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

relying on it.

THE COURT: Is this the same one you filed?

MR. FOSTER: Yes, sir.

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

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

THE COURT: Okay.

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

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

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

is, of course, a factual issue.

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

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

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

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

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

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

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

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

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

Shall I proceed, sir?

THE COURT: Absolutely.

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

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

Repose.

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

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

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

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

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

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

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

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

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

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

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

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

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

What my client bought --

THE COURT: At all?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: The Gmail on March 8, 2011?

MR. FOSTER: Yes, sir.

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

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

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

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

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

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

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

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

THE COURT: What is a loop in this context?

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

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

MR. FOSTER: Yes, sir.

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

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

THE COURT: When did the clock start?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you, Mr. Foster.

THE COURT: Mr. Boyd.

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

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

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

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

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

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

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

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

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

Do you mind going through that with me again?

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

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

factors.

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

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

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

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

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

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

MR. BOYD: Yes, sir.

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

MR. BOYD: That's correct.

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

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

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

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

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

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

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

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

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

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

MR. FOSTER: Your Honor is reading the proposal?

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

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

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

THE COURT: That is zero taxable; correct?

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

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

THE COURT: Yes, sir.

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

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

THE COURT: Yes, sir.

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

Judicata.

THE COURT: Based on the LLR?

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

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

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

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

THE COURT: Thank you, Mr. Boyd.

Mr. Foster.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Why did your client sue the LLR?

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

THE COURT: This is the same issue; right?

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

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

That is what the LLR is about.

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

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

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

MR. BOYD: I believe that's correct.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: All right.

Mr. Boyd, any other basis for your motion?

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

I do have 12(b)(6).

THE COURT: Yes, sir.

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

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

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

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

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

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

THE COURT: Mr. Foster.

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

THE COURT: Yes, sir.

Mr. Boyd.

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

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

THE COURT: Mr. Boyd, I understand.

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

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

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

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

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

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

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

would be happy to do so.

THE COURT: Thank you, Mr. Foster.

Anything else, Mr. Boyd?

MR. BOYD: No, sir.

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

- - -END OF TRANSCRIPT- - -

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

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

THE COURT: Certainly.

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

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

LAW CLERK: That's right.

THE COURT: All right.

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

It is my understanding under the South Carolina

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

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

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

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

THE COURT: Okay. All right.

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

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

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

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

THE COURT: Where in the case are you reading?

MR. FOSTER: I beg your pardon?

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

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

THE COURT: Okay. All right.

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

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

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

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

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

MR. FOSTER: I beg your pardon, sir?

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: You mean the six year?

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

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

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

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

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

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

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

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

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

MR. BOYD: That's correct.

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

MR. BOYD: That would be contention.

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

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

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

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

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

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

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

THE COURT: No! No! Go ahead.

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

THE COURT: Well, when is that?

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

THE COURT: Anything else, Mr. Foster?

MR. FOSTER: I beg your pardon, sir?

THE COURT: Anything else before we ---

MR. FOSTER: Not unless the court wishes.

THE COURT: Mr. Boyd?

MR. BOYD: Nothing further, Your Honor.

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

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

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

THE COURT: Yes, sir. Thank you both.

(CONCLUSION OF THE HEARING ON MAY 31, 2019)

CERTIFICATE OF COUNSEL

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

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September 30, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2019-001061

James Stephen Nivens and
Carolyn Nivens, Appellants,

v.

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

CERTIFICATE OF SERVICE

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

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

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

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September 30, 2020