THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

RECEIVED
DEC 10 2014
SC Court of Appeals

Appellate Case No. 2014-000821

THE WINTHROP UNIVERSITY TRUSTEES
FOR THE STATE OF SOUTH CAROLINA, Respondent,

v.

PICKENS ROOFING AND SHEET METALS, INC., Appellant.

INITIAL BRIEF OF RESPONDENT

Zachary M. Jett, Esq.
SC Bar. No.: 100484
Peter M. Vogt, Esq.
Admitted *Pro Hac Vice*
Butler Pappas Weihmuller Katz
Craig, LLP
11620 N. Community House Road
Charlotte, NC 28277
(704) 543-2321/(704) 543-2324
Attorneys for Respondent

Kirby D. Shealy, III, Esq.
Lyndey Ritz Zwing, Esq.
Adams and Reese LLP
P.O. Box 2285
Columbia, SC 29202
813 254 4190
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CASES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO STRIKE JUROR 25 FOR CAUSE AND DENYING PICKENS' MOTION FOR NEW TRIAL

II. THE TRIAL COURT DID NOT ERR IN DENYING PICKENS' MOTION FOR DIRECTED VERDICT AS PROOF OF THE FIRE'S IGNITION SOURCE WAS NOT REQUIRED TO PROVE PICKENS' BREACH OF CONTRACT AND COMMON-LAW DUTY CAUSED DAMAGES

III. THE TRIAL COURT PROPERLY AND SUFFICIENTLY RESPONDED TO THE JURY'S REQUEST TO BE RECHARGED ON THE "DEFINITION OF PROXIMATE CAUSE"

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN BIFURCATING THE TRIAL

V. THE TRIAL COURT DID NOT ERR IN DENYING PICKENS' MOTION FOR DIRECTED VERDICT WHERE DIRECT AND CIRCUMSTANTIAL EVIDENCE SUPPORTED LIABILITY AND DAMAGES WERE NOT SPECULATIVE

VI. THE TRIAL COURT DID NOT ERR IN FAILING TO APPLY COMPARATIVE FAULT REDUCTION TO CONTRACT ACTION

VII. THIS COURT SHOULD AFFIRM FOR ANY GROUND APPEARING ON THE RECORD

STATEMENT OF THE CASE

Winthrop filed suit against Pickens for breach of contract and negligence.

On September 5, 2012, The Winthrop University Trustees for the State of South Carolina ("Winthrop") sued Pickens Roofing and Sheet Metals, Inc. ("Pickens") in the Court of Common Pleas for the Sixteenth Judicial Circuit. (Complaint, p. 1.) In the complaint, Winthrop asserted the following facts relevant to this appeal:

- Pickens and Winthrop entered a contract requiring Pickens to replace a roof on the university campus;
- Express provisions limited Pickens to the storage of its construction materials to two areas, one on the ground in front of the building, the second at a parking lot about a half mile away. In addition, applicable building codes and industry standards forbade Pickens from storing combustible construction materials on the flat roof adjacent to its work area;
- Pickens stored combustible construction materials on the flat roof in violation of the contract and industry standards;
- A fire occurred on March 6, 2010, causing substantial damage to the buildings.

(Complaint, pp. 2-6.) Winthrop raised three counts for relief, two of which are pertinent here. In Count I, Winthrop alleged that Pickens breached the contract by storing the combustible construction materials on the roof, and that the breach of contract caused the damage. (Complaint, pp. 2-3.) In Count III, Winthrop alleged that Pickens was negligent in improperly storing the combustible construction materials on the roof, or permitting such materials to be stored on the roof, in violation of applicable safety codes, and that the negligence caused the damage. (Complaint, pp. 5-6.) Winthrop later established it

suffered $7,223,343.14 in damages from the fire—an amount Pickens did not dispute. (T. 879:1-T. 880:1.)

The contract only authorized storage of materials in specific locations on the ground. The Specifications were part of the contract. (T. 345:2-4.) Section 1.9(D) of the Specifications stated:

> D. Prior to starting work, obtain approval from Owner for locations of work operations at ground level, such as material storage, hoisting, dumping, etc. Restrict work to approved locations.

(Pl. Ex. 1, p. 1500-2.) Prior to starting work, the Specifications limited Pickens to two areas for storage—a part of a nearby parking lot, and a "lay down" area on the ground in front of the building. (T. 332:5-9, T. 353:23-T. 354:5.; PL. Ex. 1, p. 1500-2-3, "Pickens _ 665, 667.") This coincided with a "Change Order" between the parties that eliminated what would have been a third location for storage of materials—on the ground and again near Bancroft Hall. (T.429:1-11; Pl. Ex. 1, p. "Pickens_497-498."). Nothing in the specifications authorized storage of materials on the flat roof adjoining Bancroft Hall and Owens Hall. (T. 332:2-4; T. 333:9-14; Pl. Ex. 1.) Winthrop did not authorize storage of materials on the roof. (T. 317:18-22.)

The Specifications also provided that the owner, Winthrop, would have no responsibility for supervising or inspecting Pickens' work to ensure Pickens complied with its contractual obligations:

> C. The words "supervise" and "inspect" wherever used herein in connection with the duties or activity of the Owner shall in no way, expressed or implied, relieve the contractor from his responsibilities for the safety of the workmen, the preservation of the work or proper performance under this contract. The Owner shall not be responsible for the safety of the workmen, the safeguarding of the work, or the proper performance of the Contractor.

D. No Inspector shall have the power to waive the obligation resting upon the Contractor to furnish good material and do good work as herein prescribed. Any failure or omission on the part of any Inspector to the Engineer to observe, object to or condemn any defective material or work shall not release the Contractor from the obligation to at once tear out, remove, and properly replace or rebuild the same at any time upon discovery of the defect and upon notice from the Owner or Engineer to do so.

(Pl. Ex. 1, p. 1400-3.)

The contract further required Pickens to comply with all applicable fire and safety codes. Section 1.9 of the Specifications, titled "PROTECTION OF BUILDINGS AND PROPERTY," required, *inter alia*, the following of Pickens:

L. Initiate, maintain and supervise all safety precautions and programs in connection with work. Take all necessary precautions for the safety of, and provide the necessary precaution to prevent damage, injury or loss to:

1. All employees on the work and other persons who may be affected thereby.
2. All the work and all materials or equipment to be incorporated therein, whether in storage on or off the site.
3. Other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.
4. **Comply with all applicable laws, ordinances, rules, regulations and orders of any public body having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss.** Erect and maintain, as required by the conditions and progress of the work, all necessary safeguards for safety and protection. Remedy all damage, injury or loss to any property caused, directly or indirectly in whole or in part, by the Contractor, and Subcontractor or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable.

(Pl. Ex. 1, p. 1500-3) (emphasis added).[1] Pickens agreed that the International Fire Code, and the National Fire Protection Association Code Section 241 ("NFPA 241"), were "the law" or "had the force of law." (T. 64:17-23.) The vice-president of Pickens agreed that the South Carolina Fire Code applied to the work Pickens performed. (T. 355:19-22.)

NFPA 241 prohibited storage of combustible construction materials within thirty feet of the building. NFPA 241 was expressly incorporated into the contract (Pl. Ex. 1, p. 1700-3, § 3.4(A).) NFPA 241, "Standard for Safeguarding Construction, Alteration, and Demolition Operations," states in Section 8.3.3, "Yard storage of equipment to be installed or combustible construction materials shall not be stored closer than 30 ft (9 m) from the structure under construction or alteration." (T. 668:11-12; 772:7-16.) Pickens agreed that the International Fire Code "was the law." (T. 64:18-19.) Importantly, the contract required Pickens to ensure compliance with the contract and its Specifications. (Pl. Ex. 1, p. 1400-3.)

Jury selection. The trial proceedings began on March 17, 2014, and ran through March 21, 2014, before the Honorable Lee S. Alford in York County, South Carolina.

For-cause challenges were handled off-the-record. (T. 49:22-T. 50:15.) Pickens apparently used a peremptory strike to strike Juror Number 25. (T. 58:15-18.) Pickens later placed a previous objection to Juror Number 25 on the record. (T. 55:9-23.) Pickens argued that she should have been stricken for cause because she was "a student at Winthrop University" who had heard about the fire and talked with others around the time it occurred. (T. 55:11-13.). The trial court explained it had denied the for-cause

[1] The parties stipulated to the admission and authenticity of exhibits before trial, and so they were admitted without objection. (T. 188:22-T. 189:5; T. 285:20-T. 286:2.)

challenge because Juror Number 25 was not a Winthrop employee, had not heard about the lawsuit, and agreed she could decide the case based on the evidence presented. (T. 56:2-T. 59:6.) Further, the court noted there was no prejudice because Pickens used a peremptory strike and she was not on the jury. (T. 59:4-6.)

The court addressed pretrial motions on bifurcation of the liability and damages issues for trial. Winthrop filed a motion in limine asking that the trial court bifurcate the issues of liability and damages. (Pl. Motion in Limine, p. 4.) Winthrop explained that it planned to call numerous additional witnesses on the issue of damages, and there was no genuine issue as to the extent of its damages. (Pl. Motion in Limine, p. 4.) It explained that the damages testimony could add several days to the expected length of the trial. (Pl. Motion in Limine, p. 4.)

The parties discussed the motion with the trial court in chambers. (T. 60:21-24.) The trial court granted the motion. (T. 60:7-16.) It asked Pickens to place on the record its objections to the court's ruling. (T. 60:7-10; T. 62:3-5.) Pickens only generally stated that it opposed the request for bifurcation, providing no factual or legal basis. (T. 60:20-24.)

At trial, Chief Fire Marshal Otis Driggers testified as to the cause and origin of the fire; the parties agreed the fire originated on the flat roof. (T. 181:3-7.) Chief Driggers, the Rock Hill Fire Department's fire investigator, investigated the 2010 fire at Winthrop. (T. 181:16-18; T. 185:1-3.) He testified that Officer Howe of the Winthrop Police Department had to unlock doors to the roof to let firefighters get to the roof to

fight the fire.[2] (T. 186:12-19; T. 188:5-7; T. 223:2-4.)[3] Chief Driggers testified that the fire originated on the flat roof area between the Bancroft and the Owens buildings. (T. 193:23-T. 194:15; T. 199:12-13; T. 205:17-20.) The parties later stipulated that the fire originated on the flat roof. (T. 712:25-T. 713:2.) Chief Driggers demonstrated the scene of the fire with pictures. (T:188:14-T.191:3; Pl. Ex. 52A-D, 54A-G.)

Chief Driggers ruled out a fan on the roof, building mechanical systems, and electrical wiring in the general area as possible causes of ignition—there were no other visible possible sources. (T. 202:18-19; T. 203:2-5; T. 203:8-13; T. 204:9-11; T. 212:22-24; Pl. Ex. 54-G, 54-F.) After the fire, all that remained on the roof was metal. (T. 214:2-4.) He did not expect to find any combustibles—roofing paper, wooden pallets, or shingles—because they would have been destroyed by the fire. (T. 221:2:15.) In his report, he concluded that the fire started on the flat roof, that access to that area was secured, and that Pickens had stored roofing supplies in that area. (Pl. Ex. 40A.)

Chief Driggers interviewed Pickens' employees Randal Pruitt and Brandon Lusk, who told him they were on the flat roof prior to the fire. (T. 198:20-21.) Those employees told him that there were roofing materials on the flat roof before the fire. (T. 199:23-T. 200:2.) More specifically, Lusk told him there "were rolls of felt paper, louvers, copper flashing and other hip-ridge flashing materials." (T. 200:6-8.) Pruitt told him "[t]hey had stored roofing materials in the area of the flat roof such as copper flashing, rolls of roofing paper, metal flashing." (T. 200:15-21.) Chief Driggers testified that roofing paper is a combustible material. (T. 205:7-8.)

---

[2] Pickens objected. The trial court "sustain[ed] the objection as to any other hearsay." (T. 188:8-12.) Pickens did not move to strike this testimony.

[3] Officer Howe also testified, and confirmed that he unlocked the doors for the firefighters to get to the roof to fight the fire. (T. 395:12-15.)

There was evidence that Pickens should not have stored materials on the flat roof. Robert Pickens, one of the owners of Pickens Roofing, testified and agreed that "specifications are mandatory criteria guideline – standards, whatever you want to call them for, Pickens to follow." (T. 345:18-21.) He admitted Pickens made more money as a result of Winthrop's limiting the storage of materials to one lay-down area near the building, and that this change did not prohibit Pickens from complying with the specifications and all applicable laws and codes. (T. 366:10-24.) Mr. Pickens was wholly unfamiliar with NFPA 241, s. 8.3.3., before the fire occurred. (T. 357:2-3.)

Mr. Pickens further admitted no one from Winthrop told him it was acceptable to store combustible materials on the flat roof. (T. 367:3-7.) He admitted that, under the contract, it was solely Pickens' responsibility to carry out the job and meet the Specifications. (T. 370:8-10.) He agreed that rolls of paper should not have been on the roof. (T. 378:4-T. 379:3.)

Clint Robinson, Pickens' project manager, testified that the Specifications were part of the job and became part of the contract. (T. 311:4-6, 331:14-18; Pl. Ex. 1, 2.) The contract and Specifications provided for two storage areas—one about a half-mile away, and a 50 by 50 foot area on the ground adjacent to the building. (T. 312:11-19, T. 332:15-17; Pl. Ex. 1, 2.) The contract originally provided for a third area, but Winthrop negotiated a change order with Robinson to eliminate that area, for a higher contract price. (T. 312:23-T. 314:6; Pl. Ex. 2.) Robinson admitted that nothing in the Specifications authorized storage of materials on the flat roof. (T. 316:12-19; T. 333:9-14.) He also admitted no one from Winthrop ever authorized such storage. (T. 317:18-22.)

The evidence was Pickens stored combustible construction materials on the flat roof in breach of express provisions of the contract; and that a lift previously used to move materials to the roof was "long gone" a month before the fire. Clint Robinson admitted that Pickens stored materials, including "rosin paper" on the flat roof. (T. 319:19-22.) The last time he was on the roof was a week or two prior to the fire. (T. 320:2.) At that time there were wooden pallets on the roof. (T. 320:5:14.) There were sheet metal, fasteners, rolls of felt, and maybe shingles on the pallets. (T. 320:8-11.) He said, "there was definitely material being stored there, yes." (T. 321:22-23.) Randall Pruitt, Pickens' supervisor, admitted there was felt roofing paper on the flat roof on the day prior to the fire. (T. 266:13-T. 267:6.) Matthew Pruitt, Randall Pruitt's nephew and Pickens' "helper," testified there was felt paper, shingles, and other materials stored on the flat roof the day before the fire. (T. 297:1-T. 299:22.)

Brandon Lusk, another "helper," testified it was difficult bringing roofing materials from the staging area on the ground up to the roof. (T. 274:10-12.) There was only one lift, which was owned by the company Pickens hired to tear the asbestos shingles off the roof. (T.283:8-17.) When that company doing asbestos removal was on site, it allowed Pickens' crew to share the lift to haul materials up to the roof. (T.283:8-17.) Sometimes Pickens just used ladders set up in front of the building instead of using the lift. Lusk described the work of carrying roofing materials up the ladder as "hard." (T.275:15-20.) The company doing asbestos removal was "long gone" a month before the fire, taking the lift with them. (T.275:3-11; T.283:8-17.) At the time of the fire, Pickens did not have access to the lift to haul materials up to the roof. (T.275:3-11; T.283:8-17; Pl. Ex. 59G.)

Winthrop's expert established that the fire starting on the flat roof would not have spread to the adjoining roofs and likely self-extinguished but for the storage of combustible construction materials on the flat roof. Daniel Arnold is a registered fire protection engineer. (T. 614:17.) He testified for Winthrop as an expert in fire protection and analysis, including fire spread analysis. (T. 621:8-10.) Among his many qualifications, he is a member of the National Fire Protection Association. (T. 617:19-20.)

Mr. Arnold testified that the fire starting on the flat roof, in the absence of other combustibles being present, would not have reached a flame height high enough to spread to the eaves of the adjoining roofs. (T. 651:7-13; T. 652:10:15; T. 657:6-17; T. 659:5-13; 661:5-10; T. 665:9-16; T. 666:2-4; T. 672:18-22.) Mr. Arnold discussed the importance of several photographs to the jury, including some showing how high the flame from the flat roof reached. Some of them showed flames reaching through and above a scupper. (Pl. Ex. 64B-64GG; T. 650:5-664:25.) He explained, "if it was just solely a TPO roof, or just a flat roof absent of combustibles you wouldn't have this kind of flame height on that roof." (T. 652:10-15.) Other pictures showed damage, which Mr. Arnold said "Flame height of two and half to three feet of some duration. It burned a long time at that location because the fire department was already there and had opened windows. So there was a substantial amount of fuel on that roof." (T. 654:19-23; Pl. Ex. 66B-66G.) Mr. Arnold testified there was evidence of combustible roofing materials on the flat roof, and that the storage of those materials caused the damage. (T. 658:10-21; 659:5-13.) He testified the cause of ignition was not relevant in this case:

> For a fire of that magnitude on that substance to exist, to occur, you had to have fuel sufficient to do that.

The means of ignition in most fires while important it's often the fuel that's there that creates the damage. So, it's based on that. That my opinion is that but for those combustibles the damage that I saw and the spread of the fire to the roof wouldn't have occurred.

Q: So, if I took a cigarette and I threw it down on the flat TPO roof and there was nothing else there what would happen?

A: I would expect that fire to self-extinguish and certainly not create the fire that we see here.

Q: Why?

A: Because roofs are a regulated component of building construction. For hundreds of years we have been been [sic] concerned with fire spreading from building to building by embers landing on a roof, whether it be your neighbor's house or a building down the block. We burn cities down as a result of that. So the roof construction is regulated and protected against an assault from fire above, and the an [sic] assult includes testing those materials for their ability to withstand those kinds of ignition sources.

Q: So, if I took a roofer's torch and there were no other combustibles on that flat roof and I started a fire on that flat roof, would it spread to the adjoining pitched roofs?

A: It would not. If you remove that torch it would not.

(T. 658:7-T. 660:7.)

Mr. Arnold also testified that the International Fire Code and, by incorporation, NFPA 241, were adopted in South Carolina. (T. 666:11-667:25.) After reading sections of NFPA 241, he informed the jury that roofing paper, shingles, and wooden pallets were considered combustible construction materials. (T. 670:10:15.) He also explained that it was impossible to store materials on the flat roof, and have that storage be more than 30 feet from either Bancroft Hall or Owens Hall. (T. 670:20-24.)

Mr. Arnold read section 315.3 of the International Fire Code, which stated, "Combustible materials stored or displayed outside of buildings that are protected by

automatic sprinklers shall not be stored or displayed under non-sprinkler eaves, canopies or other projections or overhangs." (T. 671:23-T. 672:3.) Mr. Arnold testified that the Winthrop buildings were protected by automatic sprinklers on the interior, but those sprinklers did not protect the building from fires that started on the exterior. (T. 672:4-9.) He could not say exactly where the combustibles were stored on the flat roof, but he testified "they were within [the proximity] of those eaves sufficiently to allow the fire to get to the roof structure through that path." (T. 672:18-22.)

Pickens moved for directed verdict. (T. 699:3-T. 700:21.) Pickens argued that Winthrop failed to prove causation because "[t]here has been no evidence introduced as to how this fire began." (T. 699:8-9.) Pickens claimed Winthrop was relying on "what is known as the spread theory of liability and that theory of liability has not been recognized in South Carolina." (T. 699:9-12.) Winthrop responded there are "many, many cases in South Carolina that deal with negligence and breach of contract, and what we have in this case is but for storage on the flat roof this fire would not have spread." (T. 701:1-8.) The trial court denied the motion, and Pickens rested without putting on any evidence. (T. 710:24-T. 711:1; T. 713:10.)

The jury requested to be recharged on "proximate cause" in the liability phase. The trial court fully charged the jury on breach of contract, negligence, and proximate cause, among other charges. (T. 758:23-T:785:2.) The court instructed the jury that foreseeability was required for negligence. (T. 775:11-25.) Pickens raised no objections to the instructions given.

During deliberations, the jury asked to be recharged on the "definition of proximate cause." (T. 790:23; Court Ex. 1.) The court gave a definition of "proximate

cause," to which Pickens objected because the court did not also instruct the jury on foreseeability. (T. 792:14-T. 794:11.) The court overruled the objection. (T.794:12-22.) The jury also requested to be recharged on the provision of the International Fire Code requiring Winthrop to designate a person to be a "Fire Prevention Program Superintendent" during the course of the re-roofing project. (T. 790:25-T. 792:13.)

The jury reached a verdict in the liability phase of the trial: The jury found Pickens breached its contract, and was negligent. (Verdict Form 1; T.795:7-T.796:14.) The jury found both the breach of contract and negligence were a cause of Winthrop's damages. (Verdict Form 1; T.795:7-T.796:14.) The jury also found Winthrop comparatively negligent, assigning 60% of the negligence to Pickens and 40% to Winthrop. (Verdict Form 1; T.795:7-T.796:14.)

Winthrop presented evidence of the amount of damage during the damages phase; Pickens presented no evidence. Winthrop presented testimony from six witnesses to substantiate its damages. (T. 800:3, T. 813:14, T. 833:16, T. 840:4; T. 844:19; T. 848:5[4].) Mr. Wesley Love, a project manager for Winthrop, photographed all the damage to several buildings caused by fire, smoke, or water used to put out the fire. (T. 800:8-T. 801:22, Pl. Ex. 67.) The photographs showed substantial damage to Bancroft Annex, its rooms, and its contents (technology and art) caused mostly by water pouring in. (T. 802:15-T:808:13.) The other witnesses established the amounts paid to contractors to repair the damage caused by the fire. (T. 813:1-T:855:1.) Winthrop also had admitted into evidence a binder of documentation establishing the specific amount of damages by category, including damage to the roofs. (T. 832, T. 884:7-10; Pl. Ex. 67.)

[4] Mr. John Murphy's deposition was read to the jury in lieu of live testimony. (T. 848:5.)

The jury had this binder during their deliberations. Included within the binder were invoices for the damages to the flat roof. (Pl. Ex. 67, Tab 22A- Bates # 3918.)

Pickens did not ask any questions of any of Winthrop's witnesses. (T. 810:3; T. 834:1; T. 839:12; T. 843:25; T. 847:8; T. 855:5-7.) Pickens also did not present any of its own witnesses or evidence. (T. 855.)

Pickens renewed its motion for directed verdict again. Pickens again argued there was no evidence as to how the fire started. (T. 856:4-10.) Pickens also argued that Winthrop failed to prove how much of the damage was caused by Pickens' actions versus how much would have been caused without the combustible materials on the roof. (T. 856:11-T. 857:1.) Again, the trial court denied the motion, finding there was "plenty of evidence" for the jury "to form a basis as to the damages and what caused them and how it was done and the amount of damages." (T. 862:16-25.)

In closing arguments, Winthrop argued that it had established it suffered $7,223,343.14 in damages. (T. 879:1-23.) Pickens told the jury, "you didn't hear us contest any of those numbers." (T. 879:25-T. 880:1.) Pickens merely argued, "you have been offered no way to determine what damages were caused by what Pickens did versus would have been caused anyway." (T. 880:5-7.)

The jury was instructed only to determine Winthrop's damages, without objection. As to damages, the jury was given a verdict form with a single question: "We the Jury find damages in the amount of $_____." (Verdict Form 2, T. 882:20-21.)

The court also instructed, without objection:

> Now, let me say insofar as the negligence action you have split liability in that case, but you do not be [sic] concerned about that. What you are to determine is the total amount of damages suffered by plaintiff. If there should be any reduction in that that would be for the Court to determine.

> Not for you. You are to determine the total amount of damages suffered by the plaintiff and that is the amount that you write in there. Don't try to reduce it in any way. Just put the total amount. If there is any reduction in that the Court would take care of that. Just put the full amount of damages you find suffered by the plaintiff.

(T. 883:4-15.) Neither party had any exceptions or additional requests. (T. 884:3-6.)

The jury found Winthrop proved its damages. The jury awarded Winthrop $7,223,343.14. (T. 886:8; Verdict Form 2.) There being no questions from either party, the jury was released. (T. 886:14-T. 887:23.)

Pickens raised several post-verdict motions. Pickens again argued the verdict should not stand because there was no evidence on the cause of ignition or distinguishing the damages caused by the materials being on the roof versus what would have occurred otherwise. (T. 888:6-16.) Pickens also moved for a new trial, arguing bifurcation improperly forced the jury to consider proximate cause and damages separately, and "based on the denial of our motion to strike the juror for cause." (T. 888:17-T. 889:6.) Pickens then asked the court to apply the comparative negligence determination to the breach of contract action when it entered judgment. (T. 889:7-22.)

Winthrop responded there was ample evidence to support the jury's verdict, (T. 890:2-T. 891:13), that there was no legal basis to apply negligence principles to breach of contract, (T. 891:14-20), and that Pickens' objection to bifurcation was not raised earlier, there was no prejudice, and the decision was within the trial court's discretion. (T. 891:21-T. 892:2.)

The trial court denied all of Pickens' motions. (T. 892:3-T. 900:11.) The court placed its reasoning on the record:

- Juror issue: Pickens had sought to strike two jurors for cause. The court struck

one—an employee of Winthrop. The court declined the other—a student at Winthrop—because there was no similar "close connection," and the student said she could be impartial and decide the case on the evidence at trial. Further, Pickens had used a peremptory strike on her, so no prejudice had been shown. And Pickens never showed any prejudice. (T. 892:3-T. 894:8.)

- Directed verdict: "The Court reiterates, this is not a fire spread case. It is a case of a fire at the worksite, and the whole worksite there, is what it is. And so the Court denies the judgment JNOV on that basis." (T. 894:9-22.)
- Form of the judgment: The jury provided a sixty/forty split on the negligence charge. However, the plaintiff has a right to elect its remedy from one of its two causes of action. And on the contract action, there is no allegation that Winthrop breached the contract. There is no offset allowed. (T. 894:23-T. 897:4.)
- Bifurcation: Pickens did not raise the same objection before the outset of trial that it did in its post-verdict motion. And there was no prejudice where Pickens was "free to raise the issue of damages, the full amount of damages, what's involved before the jury in opening statement. And the plaintiff said he intended to do that and he did." Further, bifurcation was appropriate for a myriad of reasons in this case. (T. 897:16--900:8.)

Winthrop elected the breach of contract remedy, and the trial court entered judgment accordingly. (T. 895:20-21.) Because Winthrop elected breach of contract, the trial court awarded the full amount of damages in the judgment without any setoff. (T. 897:1-4.) It entered judgment for Winthrop in the amount of the jury verdict, $7,223,343.14. (Judgment.)

STANDARD OF REVIEW

Generally, "The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law. A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the findings of the jury." *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 412, 717 S.E.2d 765, 769 (Ct. App. 2011) (quoting *Felder v. K-Mart Corp.*, 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989)).

Issue I: The grant or denial of new trial motions rests within the sound discretion of the circuit court and its decision should not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989); *Boozer v. Boozer*, 300 S.C. 282, 283, 387 S.E. 2d 674, 675 (Ct. App. 1988). Further, the decision to strike a juror for cause is within the sound discretion of the trial judge. *See State v. Woods*, 345 S.C. 583, 590, 550 S.E.2d 282, 285 (2001).

Issue II: On a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). An appellate court should reverse a trial court's ruling on a directed verdict only where there is no evidence to support the ruling or where the ruling is controlled by an error of law. *Id.; see also Jones v. Lott*, 379 S.C. 285, 288-289, 665 S.E.2d 642, 644 (Ct. App. 2008) *aff'd*, 387 S.C. 339, 692 S.E.2d 900 (2010).

Issue III: Jury instructions must be considered as a whole and if as a whole they

are reasonably free from error, isolated portions which might be misleading do not constitute reversible error. *State v. Barksdale*, 311 S.C. 210, 216, 428 S.E.2d 498, 501 (Ct. App. 1993).

Issue IV: As Pickens acknowledges, "the trial court is given 'broad discretion' in considering whether to grant a motion to bifurcate." (Appellant's Brief, p. 35.) An appellate court will not disturb a trial court's decision to bifurcate absent an abuse of discretion. *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998).

Issue V: In ruling on motions for directed verdict, or [JNOV], the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. *Steinke v. S.C. Dep't of Labor, Licensing & Reg.*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999); *see also Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002)("In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence.") (quoting *Sims v. Giles*, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001)). When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Id.* Further, an appellate court should only reverse the trial court's ruling on a directed verdict or JNOV motion where there is no evidence to support the ruling or where the ruling is controlled by an error of law. *Clark v. S.C. Dep't of Public Safety*, 362 S.C. 377, 382-383, 608 S.E.2d 573, 576 (2005); *Hinkler v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

Issue VI: Whether "comparative negligence" applies to a breach of contract action is a question of law, and thus is entitled to *de novo* review. *See Proctor v. Steedley*, 398 S.C.561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012).

ARGUMENT

Introduction

Winthrop sued Pickens, a roofing contractor, for fire damage to its buildings caused by Pickens' storage of combustible materials on a flat roof during a re-roofing project at the University. (Complaint, p. 1.) There is no dispute that the fire started on the flat roof adjoining the building upon which Pickens was working. (T. 712:25-T. 713:2.) The contract between Winthrop and Pickens provided for the storage of material on the ground at the front of the building in a designated fenced in area, or at a parking lot a half mile away. (T. 312:11-19; T. 332:15-17.) The parties further agreed that certain fire codes prohibiting storage of combustible materials applied. (T. 64:17-20; T. 355:19-22.) Winthrop's expert, Mr. Arnold, testified at length that any fire on the flat roof would not have spread to the adjoining roofs and likely self-extinguished but for the storage of combustible roofing materials on the roof. (T. 651:7-13; T. 652:10:15; T. 657:6-17; T. 658:7-T. 660:7, T. 659:5-13; 661:5-10; T. 665:9-16; T. 666:2-4; T. 672:18-22.) Pickens presented no evidence to the contrary. In finding that Pickens breached the contract and was negligent, the jury necessarily found that Pickens was improperly storing materials on the roof. (Verdict Form 1.) Pickens does not appeal that finding.

Pickens' only defense to the merits below was to argue Winthrop was required to prove the source of ignition of the fire in order to obtain an award for Pickens' breach of contract or negligence. (T. 699:8-9.) The trial court repeatedly rejected this argument

based on the direct and circumstantial evidence Winthrop presented. (T. 710:24-T. 711:1.) Pickens raises that issue along with several procedural arguments on appeal.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO STRIKE JUROR 25 FOR CAUSE AND DENYING PICKENS' MOTION FOR NEW TRIAL

A. Pickens cannot establish prejudice as a matter of law by failing to demonstrate that it was deprived of a subsequent strike to a prospective juror.

Pickens claims to have been prejudiced by using a peremptory strike to strike Juror 25. To establish prejudice the party must demonstrate that it was deprived of a subsequent strike it would have exercised but for the forced strike. *Green v. Maynard*, 349 S.C. 535, 538-39, 564 S.E.2d 83, 84 (2002). To preserve such a claim for appeal, the party must state an objection on the record to a subsequently presented juror. *Id.* at 538-539. Here, Pickens cannot show prejudice because there is no objection on the record to a subsequently presented juror. Thus, on this basis alone, Pickens' arguments fail and appeal on these grounds is utterly without merit.

B. Pickens failed to preserve any argument that Juror 25 should be stricken because she was a "student researcher."

Pickens argues the trial court erred in not striking Juror 25 for cause because she said she was a "student researcher" for Winthrop. But Pickens never raised this objection below. In the trial court, Pickens argued that Juror 25 should be stricken because she was "a *student* at Winthrop University," that she saw the fire on the news and discussed it with others at the University at the time, and "that gave her a perspective on this case that other jurors would not have." (T. 55:9-23.)

Only the specific grounds Pickens argued below are preserved for appeal. *See Allegro, Inc. v. Scully*, 400 S.C. 33, 44, 733 S.E.2d 114, 120 (Ct. App. 2012) (remanded

on other grounds, 408 S.C. 200, 758 S.E.2d 716) ("For an objection to be preserved for appellate review . . . it must be made with sufficient specificity 'to inform the trial court of the point being urged by the objector.'"). Thus, Pickens failed to preserve the first argument it makes on appeal. *See State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005); *Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 306, 529 S.E.2d 45, 56 (Ct. App. 2000)(finding arguments must be conducted on the record to be preserved for appellate review); *Creach v. Sara Lee Corp.*, 331 S.C. 461, 464, 502 S.E.2d 923, 924 (Ct. App. 1998). Any objection to Juror 25 based on an alleged "employment" status has been waived.

Assuming this argument was preserved, it is also meritless. There is nothing in the record to indicate that Juror 25 was a current or former "employee" or was paid for her services. She stated only that she was a "student researcher." (T.27:7-8.) Pickens' failure to request additional voir dire to clarify Juror 25's "employment" status waives any objection on this basis on appeal. *See State v. Ivey*, 331 S.C. 118, 122, 502 S.E.2d 92, 94 (1998) (ruling defendant should have immediately moved for permission to make additional inquiries of juror following trial judge's examination of her to preserve objection for appeal).

C. The trial court did not abuse its discretion in failing to strike Juror 25 for cause and Pickens failed to show prejudice.

None of Pickens' remaining grounds establish that the trial court abused its discretion in not striking Juror 25 for cause. South Carolina law provides as follows regarding striking a juror for cause:

> The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any

> opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.

S.C. Code Ann. 14-7-1020 (1976).

Pickens argues that Juror 25 was "biased" because she "...had personal knowledge of the facts." (Appellant's Brief. p. 15.) But knowledge is not the equivalent of bias. When asked what she knew, Juror 25 stated, "The fire, the incident, things that were said about how it occurred, and so forth." (T.28:8-12.) Juror 25 knew that the fire occurred but plainly stated it would not affect her ability to render a fair and impartial decision based solely on testimony and evidence presented at trial. (T. 28:5-20). She had not formed any opinions on the matter. As stated by the trial court:

> "She did indicate that she had been up there I think when this was going on and she had talked to some other people about it. That is professors had said something about the fire. She had talked to some other students. That they were kind of inconvenienced by the fire and caused them some problems in that regard. She did say that. And she did have some connection with Winthrop. However, she stated when I asked her specifically about whether she could put aside anything she had heard about the fire. **She didn't say she heard anything about the case.** Just that there was a fire and it displaced people and the building was burned...."

(T. 56:11-23.)

As recognized by Pickens, jurors may be qualified where they have knowledge of the incident at issue but where they have not formed any concrete opinions on the matter. Thus, the juror is qualified because she has no demonstrable bias.

In *R.K. Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1997), the Supreme Court of South Carolina addressed the issue of excluding jurors for cause due to their knowledge of issues in the case. The Court ruled that mere exposure to pretrial

publicity does not automatically disqualify a prospective juror. Again, impartiality does not require ignorance of the incident in question.

Similarly, in *Rook v. Kimbrough*, 297 S.C. 156, 375 S.E.2d 318 (Ct. App. 1988), the appellants claimed that the trial court erred in failing to strike for cause, any prospective juror who was being or had been treated, or whose family members had been treated by the respondent physicians in a medical malpractice action. During voir dire, some of the prospective jurors indicated that they themselves or a close relative had been treated by the respondents. The trial court individually questioned the jurors and each responded that his or her connection to the physicians being sued in the case would not prejudice or prevent him or her from reaching a true and just verdict in the cause. The appellate court found no abuse of discretion by the trial court in impaneling those jurors. *Id.* at 158.

In sum, the trial court did not abuse its discretion in refusing to strike Juror 25 for cause. Juror 25's knowledge of the fire did not render her biased. She did not state that she had formed any opinions on the matter, only that she had heard about it. (T.28:11-12.) She specifically testified that she could render a fair and impartial verdict based on the evidence. (T.28:13-20.) Further, Pickens failed to state any objection other than her status as a student at the time of voir dire. (T.55:9-23.) Pickens also failed to request additional voir dire or state an objection to a subsequently presented juror after striking Juror 25. Thus, these objections are not preserved for appellate review and Pickens cannot demonstrate prejudice. The final judgment for Winthrop should not be reversed on this basis.

II. THE TRIAL COURT DID NOT ERR IN DENYING PICKENS' MOTION FOR DIRECTED VERDICT AS PROOF OF THE FIRE'S IGNITION SOURCE WAS NOT REQUIRED TO PROVE PICKENS' BREACH OF CONTRACT AND COMMON-LAW DUTY CAUSED DAMAGES

A. Proof of ignition source was unnecessary to establish liability under contract or tort.

Pickens' primary argument is based on its erroneous conclusion that Winthrop had to prove that "Pickens caused the fire to ignite." (Appellant's Brief, pp. 17-18.) This is not true, under either the breach of contract action or the negligence action.

1. Breach of contract.

This Court has set forth the requirements for an action for breach of contract:

> "This being an action for the breach of contract, the burden was upon the [plaintiff] to prove the contract, its breach, and the damages caused by such breach." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id.* "The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed." *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App.1996). "The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach." *Id.*

Maro v. Lewis, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (Ct. App. 2010).

Pickens challenges the judgment on appeal arguing that Winthrop failed to prove Pickens' actions ignited the fire. Pickens is mistaken as to Winthrop's burden of proof. Winthrop had to establish that Pickens' breach of contract caused *the damage*, not that it *caused the ignition of a fire*. *See id.* This is an important distinction. The only reason **this** fire was able to sustain, grow, and ultimately cause millions of dollars of damage to the building was because Pickens breached the contract by storing combustible construction materials on the flat roof. The evidence proved that **this** fire starting on the

flat roof, without any combustibles on the flat roof, would not have spread to adjoining roofs and likely self extinguished. (T. 658:7-T. 660:7.) Thus, all the damage flowed naturally from Pickens' breach of the contract, i.e., breach of the express provision limiting storage of construction materials to two locations on the ground. (Pl. Ex. 1, p. 1500-2.) The source of ignition is irrelevant—the cause of the damage was Pickens' actions. Further, the jury had substantial competent evidence of the dollar amount of damage caused by Pickens' breach of the express provisions of the contract and code. (Pl. Ex. 67.)

2. Negligence

"To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty." *Vinson v. Hartley*, 324 S.C. 389, 399, 477 S.E.2d 715, 720 (Ct. App. 1996).

Again, the only element to which Pickens' argument on proximate cause relates is the damage element.[5] Proximate cause requires proof of both causation in fact and legal cause. *Id.* at 400. Pickens focuses on "legal cause," which has an element of foreseeability—A plaintiff must show "the injury in question occurred as a natural and probable consequence of the defendant's negligence." *Id.* "The plaintiff need not prove that the person charged with negligence should have contemplated the particular event which occurred. It is sufficient that he should have foreseen his negligence would

[5] Winthrop established both duty and a breach of that duty by evidence described in the statement of case and facts, and the jury necessarily found for Winthrop in finding Pickens negligent. (Verdict Form 1.) Pickens does not raise any issues on appeal regarding the jury's findings.

probably cause injury to someone." *Id.* (internal citation omitted).

The evidence established that Pickens' storage of combustible materials within 30 feet of the building under construction was a violation of the International Fire Code and National Fire Prevention Association codes and standards—codes that the parties stipulated placed duties on Pickens as a contractor in South Carolina because it carries the weight of law in South Carolina. As the trial court instructed the jury, without objection from Pickens:

> Madame forelady and members of the jury panel, I charge you with regard to the National Fire Protection Association code section 241, with regard to its scope and purpose. Nation Fire Protection Association 241 is the standard for safeguarding construction, alteration and demolition operations. Subsection 1.1 regarding the scope, this standard shall apply on structures and in the course of construction, alteration or demolition including those in underground locations. Section 1.2 with regard to purpose. This standard is intended to prescribe *minimum safeguards* for construction, alteration, demolition operations in order *to provide reasonable safety to life and property from fire* during such operations. Section on subsection 3.1 – excuse me. Let me get this right – subsection 1.3.1 provides that this standard provides measures *for preventing or minimizing fire damages* during construction, alteration and demolition operations.
>
> Demolition subsection 1-3-1 defines yard storage as storage of commodities in outdoor areas. The International Fire Codes chapter three provides general precautions against fire. Subsection 301.1 as to scope provides as follows; the provisions of this chapter shall govern the occupancy and maintenance and of all structures and premises or *precautions against fire and spread of fire.*
>
> Madame forelady and members of the jury panel, I charge you in the National Fire Protection Association 241, subsection 8.3 – well, no. Chapter 8 provides for safeguarding construction and alteration operations. Subsection 8.3 regards constructional materials and equipment storage. Subsection 8.3.3 provides for yard storage of equipment to be installed or *combustible construction material shall not be stored closer than thirty feet from the structure under construction or alteration.*

(T. 771:5-T. 772:-16.) (emphasis added).[6]

The fire codes with which Pickens was bound to comply stated the reason combustible construction materials cannot be stored near buildings (let alone *on a flat roof adjoining buildings*, as here) was to prevent fire damage to buildings. The test for foreseeability that applied to the facts of this case is whether it was foreseeable to Pickens—charged with knowledge and compliance with these fire codes as a contractor bound by the laws of South Carolina—that storing combustible materials *on top* of a building could result in fire damage. The test was easily satisfied by the evidence of Pickens' violation of the fire codes.[7]

B. Pickens sets up its straw man "spread theory" argument only to knock it down—this is not, and never has been, a "spread theory" case.

There is no requirement that Winthrop prove the source of ignition of the fire. To the contrary, Winthrop needed only to prove that Pickens' breach of contract—or alternatively, Pickens' negligence—caused the damage to Winthrop's buildings. The issue at trial was whether a fire, ignited on the flat part of the roof, could have sustained

---

[6] The trial court also instructed the jury, again without objection, "violation of regulation as adopted by state law constitute [sic] negligence per se." (T. 774.)

[7] Winthrop attempted to introduce other testimony that would have further established proximate cause. The trial court excluded testimony from Chief Driggers and Mr. Arnold that Pickens' storage of combustible materials on the flat roof was a violation of the fire and safety codes, and that the fire could not have started but for the storage of combustible materials. (T. 74:5-124:14; T. 205:9-14; T. 604:13-22, T. 612:22-T. 613:21; T. 670:13-19; T. 672:15-T. 673:25.) Winthrop proffered testimony from Mr. Arnold to this effect. (T. 592:8-15, 599:20-22.) This testimony should have been permitted. *See Knoke v. South Carolina Dept. of Parks, Recreation & Tourism*, 234 S.C. 136, 478 S.E.2d 256 (1996) (holding that a fire safety expert was entitled to testify that defendant's actions were contrary to State and national standards of care, and that "Expert testimony is not rendered inadmissible simply because it embraces an ultimate issue to be decided by the trier of fact"). However, even without this testimony, the evidence was more than sufficient to support the jury's determination that Pickens' actions were the proximate cause of the damage Winthrop suffered.

itself, grown, and "spread" into the eaves of the adjoining pitched roofs but for Pickens storing combustible construction materials on the flat roof. (Appellant's Brief, p. 18.)

Pickens attempts to confuse the issue by claiming Winthrop relied on a "spread theory" of liability, and then claiming "spread theory" does not apply. Winthrop never relied on "spread theory," and Pickens fails to identify anything in the record to the contrary.

This is because "spread theory" does not apply to a case where a landowner is seeking damages from a contractor who caused a fire on the landowner's property. "Spread theory" applies to *hold a landowner responsible to another* where a landowner negligently creates a fire hazard on or emanating from his own land, and it is foreseeable that a fire could start and spread to an adjacent property. Every opinion and authority Pickens cites from other jurisdictions (not South Carolina) discussing "spread theory" follows that scenario.[8] (Appellant's Brief, p. 18-22.) The scenario in this case is completely different. This case involves a landowner seeking damages against a contractor due to the contractor's acts on the landowner's land. There is no "spread" of fire from one landowner's property to another's. For this reason, Winthrop has never advocated a "spread theory," and Winthrop agrees with Pickens that it does not apply. For Picken to claims that Winthrop did propose this theory—just so Pickens can knock it down—is disingenuous.

Assuming, *arguendo*, "spread theory" could apply to a landowner's claim for damages caused directly to the landowner's property by a contractor working on the same property, the evidence still supports the verdict. Under Pickens' out-of-jurisdiction cases,

---

[8] South Carolina has not addressed the issue of "spread theory" of liability.

"the precise origin of the fire is immaterial." *Chicago, M., St. P. & P. R. Co. v. Poarch*, 292 F. 2d 449, 451 (9th Cir. 1961). The question is whether "the property causing the fire has gotten into such a condition that it creates a fire hazard and that, if fire should occur in it, it is reasonably probable that it would spread to the adjacent property." *Id.* at 451. Here, it was Pickens' actions that left the flat roof in "such a condition that it created a fire hazard." *Id.* The only evidence offered at trial was the storage of combustible construction materials on the flat roof made it reasonably probable that this fire that started on the flat roof, without any other combustibles being present, would not have spread to other roofs and likely self-extinguished.

C. Pickens' argument based on *res ipsa loquitur* is a red herring; Winthrop never relied on the doctrine.

Pickens raises *res ipsa loquitur* in its brief, arguing that South Carolina's refusal to adopt the doctrine required Winthrop to prove the source of ignition in order to obtain an award of damages. (Appellant's Brief, p. 22.) Pickens did not raise this doctrine as grounds for its directed verdict below. As this Court has held, "Generally, an issue must be both raised and ruled upon by the trial court in order to be preserved for appellate review. Arguments raised for the first time on appeal are not preserved for our review." *In re Jamal G,* 396 S.C. 158, 163, 720 S.E.2d 62, 64 (Ct. App. 2011). Because the trial court never had the opportunity to rule on whether the doctrine of *res ipsa loquitur* entitled Pickens to a directed verdict, this issue is waived.

Even were the issue preserved, it lacks merit. Winthrop never relied on *res ipsa loquitur* to establish Pickens' liability in this case, nor did it need to as the doctrine applies only to negligence actions, not to breach of contract. Second, it operates only in the absence of any probative evidence, circumstantial or otherwise, to show negligence.

Eickhoff v. Beard-Laney, Inc., 199 S.C. 500, 20 S.E.2d 153, 155 (1942). While South Carolina courts have rejected the *res ipsa loquitur* doctrine, they have hastened to add, "that obviously this does not mean that negligence may not be established by circumstantial as well as direct evidence." *Id.*

Here, there was direct and circumstantial evidence Pickens was negligent. The evidence showed Pickens violated numerous fire safety codes and regulations, which is negligence per se. The self-stated purpose of those fire safety codes was to prevent fire damage to buildings. And Winthrop's evidence established that, but for Pickens' violation of those codes, the fire likely would have self-extinguished and no damage would have occurred. Winthrop had to provide evidence that Pickens' actions caused the damage, not that Pickens' actions were the source of ignition. Pickens provides no case law to the contrary.

At the risk of repetition, *res ipsa loquitur*, if it could apply, only applies to negligence. It does not apply to breach of contract, which Winthrop established by the same evidence as above. The trial court correctly denied the motion for directed verdict on negligence where Winthrop presented evidence from which the jury could have reasonably inferred that Pickens was negligent and that Pickens' negligence caused some or all of Winthrop's damages. *See The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005).

III. THE TRIAL COURT PROPERLY AND SUFFICIENTLY RESPONDED TO THE JURY'S REQUEST TO BE RECHARGED ON THE "DEFINITION OF PROXIMATE CAUSE"

Pickens argues that when the jury requested to be recharged on the "definition of proximate cause," the trial court erred by charging only the "definition of proximate

cause" and not also on foreseeability. This issue lacks merit.

First, "foreseeability" was not part of the charge on breach of contract. Nor should it have been. "Foreseeability" is measured differently for contracts and torts. In a breach of contract, the issue is whether damages were foreseeable at the time of contracting, not at the time of the breach of contract. *See Charles v. Texas Co.*, 199 S.C. 156, 18 S.E.2d 719 (1942) (noting the fact of damage in a contract action is proved by showing (1) that the plaintiff realized an actual loss it would not have incurred but for the defendant's breach of contract; and (2) the loss was a natural consequence of the breach which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made). In this case, as in any case dealing with a construction project, there is a risk of fire associated with the work. The contract expressly addressed that issue by mandating, *inter alia*, that Pickens store its combustible construction materials on the ground. (Pl. Ex. 1, p. 1500-2.)

In negligence, the issue is whether damages were foreseeable at the time of the negligent act. *Young v. Tide Craft*, 270 S.C. 453, 462, 242 S.E.2d 671, 675 (1978). Thus, there is no basis to reverse the final judgment for breach of contract on these grounds.

Second, and as Pickens acknowledges, during the court's initial charge, the court charged the jury on the definition of "proximate cause," and also the definition of "foreseeability." (Appellant's Brief, p. 26.) Pickens did not object to the charges. After deliberating for a time, the jury sent a note to the judge requesting to be recharged "on the 'definition of proximate cause.'" (Appellant's Brief p. 26, quoting T. 790:15-22; Court Ex. 1.) The trial court recharged the jury as follows:

> THE COURT: Now, as to proximate cause, I charged you previously that even if you find that the plaintiff has proved the defendant to have been negligent they would not be entitled to a verdict unless you further found that the defendant's negligence was the proximate cause of the plaintiff's injuries. Proximate cause does not mean the so[le] cause. The defendant's conduct can be a proximate cause if it was at least one of the direct concurring causes of the injury. The law defines proximate cause to be something that produces a natural chain of events which in the end brings about the injury. In other words—or damage. In other words proximate cause is a direct cause without which the damage would not have occurred. Okay. Anything else that you need while we are out?
>
> THE FOREPERSON: No, that answers it.
>
> THE COURT: If you need anything else you will let me know.
>
> THE FOREPERSON: Thank you.

(T. 792:14-T. 793:8.)

"It is well established in South Carolina that '[w]hen a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury's request.'" *State v. Anderson*, 322 S.C. 89, 94, 470 S.E.2d 103, 106 (1996). Thus, where the recharge is limited to answering the jury's question and the initial charge was adequate, there is no error. *Barksdale*, 311 S.C. 210 at 216, 428 S.E.2d at 502.

On appeal, Pickens admits that "Proximate cause is defined as 'the efficient or direct cause of an injury.'" (Appellant's Brief, p. 17) (quoting *McNair v. Rainsford*, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998)). Black's Law Dictionary defines proximate cause as follows:

> ***Proximate cause.*** **1.** A cause that is legally sufficient to result in liability. **2.** A cause that directly produces an event and without which the event would not have occurred.

Black's Law Dictionary 213 (7th ed. 1999). Neither definition includes "foreseeability." The trial court's recharge on the "definition of proximate cause" mimics both the Black's

Law Dictionary definition and Pickens' own definition at page 17 of its brief. The trial court answered the jury's question completely and sufficiently. *Anderson*, 322 S.C. at 94. And the jury confirmed that the trial court's instruction was sufficient to answer its question. (T. 793:5.)

On appeal, Pickens argues the court erred in failing to recharge other concepts of "legal cause" and "foreseeability." First, Pickens never asked the trial court to recharge "legal cause," nor did it object to the court's recharge on the basis that it lacked a definition for "legal cause."[9] As this Court has held, "Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review. Arguments raised for the first time on appeal are not preserved for our review." *In re Jamal G,* 396 S.C. at 163. Pickens' argument on "legal cause" is not preserved and merits no relief.

Pickens' argument on foreseeability is likewise meritless. As is plain from the Black's Law Dictionary definition and Pickens' own definition above, the "definition of proximate cause" does not include any reference to "foreseeability." Pickens effectively argues that when a jury asks a specific question, the trial court must also recharge the jury with other, related concepts. South Carolina law does not require a court to recharge the jury on all related issues when the jury asks a specific question. *See Anderson*, 322 S.C. at 94 (trial court properly excluded a *King*[10] recharge when the jury only requested a

---

[9] "Legal cause" is not a synonym of "foreseeability" or "proximate cause." *See Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996) (recognizing that "proximate cause requires proof of both causation in fact and legal cause"); *see also* Blacks Law Dictionary 213 (7th ed. 1999) (on the definition of "legal cause," stating only, "See *proximate cause.*").

[10] "*See State v. King*, 158 S.C. 251, 155 S.E. 409 (1930) (holding that trial court should instruct the jury that if they had any reasonable doubt as to whether unlawful killing was

recharge on the definitions of murder, malice, and involuntary manslaughter, and the original instructions included the *King* charge); *Barksdale*, 311 S.C. 210 at 216 (rejecting appellant's argument that the trial court should have recharged the definition of "mob," even where the appellant claimed "it was essential to understanding the definition of lynching," where the trial court recharged the definition of lynching per the jury's request).

"A charge is sufficient if, as a whole, it covers the law applicable to the case." *Id.* A court's "failure to charge in greater detail is not error if the details were fully covered in the original charge." *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) (citing *Corbin v. Prioleau,* 260 S.C. 171, 194 S.E.2d 875 (1973)).[11] Thus, the "whole charge" in this case includes the original charge, which discussed foreseeability. The jury's request for recharge on the "definition of proximate cause" "was very specific and indicated [the jury's] areas of confusion." *See Rauch*, 284 S.C. at 597. "The court's additional charge was limited to answering the jury's request." *Id.* Thus, there is no error. *See id.*

Further, Pickens' cited case of *State v. Lee-Grigg*, 387 S.C. 310, 692 S.E.2d 895 (2010), is not "instructive." The case does not address the question Pickens raises in this appeal – whether the trial court, upon receiving a request for a specific recharge of an

---

murder or manslaughter, it was jury's duty to convict defendant of the lesser offense, manslaughter)." *State v. Anderson*, 322 S.C. 89, 91, 470 S.E.2d 103, 104 (1996).

[11] The Georgia law Pickens cites directly conflicts with South Carolina law on this point. *Miller v. State*, 236 Ga.App. 825, 13 S.E.2d 27 (Ga. Ct. App. 1999). In *Miller*, the court held that a jury must be recharged on issues far exceeding its specific requests, even if the instruction was already given in the original charge. This holding conflicts with South Carolina cases of *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985) and *Corbin v. Prioleau,* 260 S.C. 171, 194 S.E.2d 875 (1973), and thus carries no precedential value whatsoever in this state.

instruction previously given, must also recharge other instructions previously given. In *Lee-Grigg*, the question raised on appeal was whether the trial court erred in refusing to include *in the original charge* an instruction supported by the evidence. *Id.* at 316. In that forgery case, the defendant put in evidence of her good character, and requested an instruction to the jury on good character. *Id.* at 315. The trial court refused. *Id.* The Supreme Court held the trial court's ruling was error because, in South Carolina, it is well settled that a defendant in a criminal case may put on evidence of good character, and is entitled to an instruction that the character should be considered by the jury in determining innocence or guilt. *Id.* at 317. The court noted that the jury later asked for a recharge on "intent," which was "evidence that they were struggling with this question," but without an instruction on character they were not aware they could consider such evidence. *Id.*

Here, Pickens acknowledges that the trial court properly and completely instructed the jury on proximate cause in its initial charge, and Pickens raised no objection. (Appellant's Brief, p. 26.) The jury heard all it needed to hear in the original charge, whereas the jury in *Lee-Grigg* was *never* instructed on a critical issue. Thus, *Lee-Grigg* does not apply.

Finally, Pickens speculates that the jury's request for a recharge on proximate cause "evidences its struggle with the issue." And that "...the jury was misguided on the question whether Pickens should be found liable for breaching the parties' contract or in negligence." (Appellant's Brief, p. 30.) (Again, Pickens did not object to the charge for breach of contract.) It is more likely, if the jury was "struggling," it was as to Winthrop's comparative negligence given the simultaneous request for a recharge on the

International Fire Code provision applicable to Winthrop. (T. 790:25-T. 791:14.) Whatever the basis for the jury's "struggle," it is improper to speculate when there is no error warranting reversal of the final judgment for breach of contract.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN BIFURCATING THE TRIAL

A. The trial court acted properly and within its broad discretion to decide to bifurcate the trial.

Rule 42(b), SCRCP, states that "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any . . . separate issue or . . . issues." Here, the trial court granted the motion to bifurcate after having "a conversation in chambers" with counsel for both parties. (T. 60:7-16.) It then placed its reasons for its ruling on the record:

> And the basis for it was, I questioned plaintiff's counsel very closely about that because I was not inclined to bifurcate if I was going to have the same witnesses testify in the second trial with regard to damages, but since apparently the only witnesses who will be testifying about the damages their testimony would be a lot shorter in the liability phase and most of the [sic] these witnesses on damages will not be called during the liability phase. It makes sense to me to bifurcate because if the jury were to return a verdict for the defendant we wouldn't have to spend all that time with all those witnesses on damages.
>
> On the other hand, if they return a verdict against the defendant then with regard to damages the witnesses pretty much are different witnesses. Not the same witnesses. So we won't lose any time or have to put witnesses up to testify basically to the same things twice. That will be my only concern because that would be a waste of time. But in light of the fact that witnesses are going to be different most of them on the damages than the liability, it makes sense to get the liability determined.
>
> Again, if they find for the defendant on that that will be the end of it. If they find for the plaintiff on that then we can get into the damage, but we won't have a repeat of the testimony which is what I was concerned about. This is an appropriate case. I do not do that very often, but I think this is an appropriate case for bifurcation.

(T. 61:1-T. 62:5.) The trial court's reasons speak to convenience, expedition, and economy—all valid bases under rule 42(b) that support his discretionary ruling to bifurcate.

B. Pickens failed to put any contemporaneous specific objection to bifurcation on the record, failing to preserve this issue for appeal.

Again, it appears that the merits of Winthrop's motion to bifurcate were discussed in chambers. (T. 60:7-16.) There is no transcript in the record of that discussion. The court gave Pickens the opportunity to place the basis for his objection on the record: "Let defense counsel object to the ruling on the bifurcation." (T. 60:15-16.) Pickens only generally objected, without providing any legal or factual reason for the objection:

> Yes, we do oppose the plaintiff's request for bifurcation. I understand that we had a conversation in chambers with Your Honor. Your Honor, has reached a decision on that. I just wanted to state that we did oppose that for the record.

(T. 60:20-24.)

A general objection, "without reference to any basis on which the objection was made . . . does not preserve any argument for appeal because such a general statement does not bring the specific grounds for the objection to the attention of the trial court." *Busillo v. City of North Charleston*, 404 S.C. 604, 608, 745 S.E.2d 142, 145 (Ct. App. 2013). An objection "must be made with sufficient specificity 'to inform the trial court of the point being urged by the objector.'" *Allegro,* 400 S.C. at 44 (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). Further, "[a] motion or an objection made during an off-the-record conference that is not made a part of the record does not preserve the question for review." *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 213-14, 723 S.E.2d 597, 608 (Ct. App. 2012). Pickens did not preserve any

issue for appeal with respect to the trial court's decision to bifurcate.

At the end of the trial on damages, Pickens orally moved for a new trial absolute, partially based on the court's decision to bifurcate. (T. 888:17-T. 889:3.) Pickens argued that Winthrop's theory of the case rendered bifurcation inappropriate because proximate cause and damages should have been tried considered together. (T. 888:17-T. 889:3.) Winthrop responded that Pickens' argument was not made previously when bifurcation was discussed, that the bifurcation caused no prejudice, and the decision was well within the trial court's discretion. (T.891:21-T. 892:2.)

The trial court denied the motion for new trial, and provided further insight into what occurred during the in-chambers discussion preceding the beginning of trial:

> Let me say this on the bifurcation. *The only objection to the bifurcation stated by the defendant at the time was that the jury – you thought the jury ought to know the full amount of the damages and that you were afraid that they would not – the jury would not perceive the magnitude of the damages and the magnitude of any verdict in this case.* In the event they rendered a verdict in favor of the plaintiff they wouldn't understand the magnitude of it. And that they might not appreciate the magnitude of it just going on the liability issue.

(T. 897:17-898:2.) The court then explained how there was no prejudice because it allowed either side to tell the jury during opening argument about the amount of damages at issue, and the plaintiff did so. (T. 898:2-13.) And the court explained in depth how bifurcation had the potential to save substantial time and expense, so bifurcation made sense. (T. 898:13-900:8.) Pickens' brief does not appeal the denial of its motion for new trial on this basis. (Appellant's Brief, p 34-39.) Even if Pickens had raised this argument, an issue may not be raised for the first time in a [motion for new trial] if it could have been raised previously. *McCormick v. England*, 328 S.C. 627, 633, 494 S.E.2d 431, 434 n. 3 (Ct. App. 1997); *McGee v. Bruce Hosp. System*, 321 S.C. 340, 346,

468 S.E.2d 633, 637 (1996) (issue raised for first time in motion for new trial is "procedurally barred").

On appeal, Pickens argues that the issues of liability and damages were too interrelated to warrant bifurcation, and "[b]ifurcation was inappropriate because the jury was forced to separately consider proximate cause and damages, even though these two issues were inextricably linked." (Appellant's Brief pp. 34-39.) Pickens did not raise these arguments before trial, and the trial court did not have the opportunity to consider and rule upon them at that time. *See Creighton*, 334 S.C. at 108 (holding that an issue not raised or ruled on by the trial court is not preserved for appellate review). Pickens raised these arguments for the first time in a motion for new trial at the conclusion of the damages trial, which was too late to preserve the arguments. *See McGee*, 321 S.C. at 346. The issues are procedurally barred.

C. Liability and damages were not inextricably intertwined.

Even if preserved, Pickens' arguments fail. Pickens claims that there would have been damage even without the improper storage of combustibles. Thus, bifurcation was improper because the jury was precluded from separating out the damage that would have occurred if Pickens was not involved. Pickens' argument is without merit.

Liability and damages were not "inextricably intertwined." Under the actions for breach of contract and negligence, once Winthrop established proximate cause, Pickens would be liable for 100% of the damages. During the liability phase, Winthrop presented evidence that, but for Pickens' breach of contract in storing combustible construction materials on the flat roof, **this** fire would not have spread to adjoining roofs and likely self-extinguished. Thus, the jury had substantial competent evidence that, but for

Pickens' breach of contract in storing combustible construction materials on the flat roof, there would be no damage. Proximate cause was determined entirely in the liability phase. The damages were caused by Pickens' breach of contract and negligence as established during the liability phase. Liability and damages were not "inextricably intertwined" because **no** damage would have existed but for Pickens' breach of contract in storing combustible construction materials on the flat roof. Only the amount of damages was at issue during the damages phase of the trial. The damages phase established the amount of the cost of repairing or replacing, water and fire damage to the buildings.

Pickens confuses the issue of proximate cause for liability with the dollar amount of damage. It claims it was prejudiced because the jury heard evidence in the first phase that the storage of combustible materials on the flat roof "made the fire and resulting damages worse." Pickens claims bifurcation foreclosed the issue of causation before the jury was presented with Winthrop's damages. But Pickens chose not to address Winthrop's proof of causation in the liability phase. Winthrop claimed the damage was caused by Pickens and no damage would have occurred but for Pickens' breach of contract. There was no need to try liability and damages together for Pickens to challenge Winthrop's expert's testimony that the magnitude of the fire was caused solely by Pickens' storage of combustible construction materials on the flat roof allowing the fire to spread to other roofs.

V. THE TRIAL COURT DID NOT ERR IN DENYING PICKENS' MOTION FOR DIRECTED VERDICT WHERE DIRECT AND CIRCUMSTANTIAL EVIDENCE SUPPORTED LIABILITY AND DAMAGES WERE NOT SPECULATIVE

Pickens claims that it was entitled to a directed verdict because the jury was

allegedly not provided with "the cost of repairs to Winthrop's property in the absence of Pickens' breach of duty." (Appellant's Brief, p. 40-41.) Pickens argues that Winthrop "...should have been required to offer some evidence as to what damage would have resulted from the fire without Pickens' involvement." (Appellant's Brief, p. 41.)

A. The jury had evidence supporting the amount of damages it awarded.

Pickens ignores the testimony and evidence considered by the jury in the damages phase of the trial. Winthrop had admitted into evidence a binder of documents establishing the specific amount of damages by category. (T. 832:20-21; T. 884:7-10, Pl. Ex. 67.) The binder included an invoice itemizing the amount paid to repair the flat roof in the amount of $1,123.65. (Pl. Ex. 67, Tab 22A; Bates # 3918.) The jury had this evidence including all other evidence contained within the binder during their deliberations. (Pl. Ex. 67.) None of this evidence was challenged by Pickens. Pickens never asked the jury to "carve out" any damage it claimed was caused by something other than its conduct. Instead of confronting the overwhelming evidence supporting the amount of Winthrop's damage, Pickens erroneously advised the jury that they did not have any evidence to determine what damages would have been caused anyway. (T.880:1-12.) Now Pickens asks this Court to improperly speculate as to how the jury reached its verdict as to the scope of damage. The jury had all the evidence it needed to determine damages to a reasonable certainty. The jury could have awarded all, some or none of the damages claimed by Winthrop. After weighing the evidence, the jury chose to award $7,223,343.14. The final judgment for breach of contract and damages in the amount of $7,223,343.14 should be affirmed.

The authorities cited by Pickens do not help its cause. Pickens acknowledges

South Carolina's black letter law that a jury should be able to determine damages with reasonable certainly, but never ties the facts of the cases to the present situation. (Appellant's Brief, p. 41.) Instead, Pickens merely asserts Winthrop has not done so. In fact, the cases cited by Pickens assist Winthrop. In *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981), South Carolina's Supreme Court reversed a directed verdict for defendants at the conclusion of the evidence on the alleged failure of the plaintiffs to present enough evidence to permit the jury to determine damages with reasonable certainty. In that case, a fast-food type building had been destroyed. *Id.* at 12. The property owner, not an expert, testified to the purchase price of the building and cost of construction. *Id.* The defendants claimed an expert was needed to testify "as to the value of a building like that." *Id.* at 12-13. The Supreme Court disagreed and ruled that from the testimony of the owner the jury could determine a reasonable value for the building at the time of its destruction. *Id.* at 13. Here, there was testimony from the contractors who actually repaired the buildings at Winthrop as to what the charges were. And every invoice relating to the payments, including damage to the flat roof, was admitted into evidence and provided to the jury for review during their deliberations. (Pl. Ex. 67.)

Similarly, in *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005), this Court affirmed the trial court's denial of defendant's motion for directed verdict on a failure of damages proof where the president of a video-gaming business testified to his lost profits and salary as a result of a breach of contract, fraud and negligent misrepresentation. The president testified to a range of damages. *Id.* at 226. The appellate court noted that the jury's verdict was "well within the range of damages"

testified to. *Id.* at 227. Further, because the verdict was a general verdict, the Court would not speculate as to how the jury allocated damages. *Id.* Here, the agreed-upon verdict form contained one-line item requesting the jury to enter the total amount of Winthrop's damages. The jury did so. The final judgment for breach of contract in the amount of $7,223,343.14 should be affirmed.

B. Damages were not speculative.

Pickens' arguments depend on its misapprehension of Winthrop's case. Pickens claims that Winthrop's theory was that Pickens' actions "aggravated or exacerbated the damage resulting from this fire whose ignition could not be attributed to Pickens." (Appellant's Brief, p. 41.) But Winthrop's theory was that Pickens caused all the damage – there would be no damage but for Pickens' improper storage of combustible construction materials in breach of express contractual provisions and in violation of the code causing the fire to spread to adjoining roofs.

The parties agreed that the fire originated on the flat roof. (T. 712:25-T. 713:2.) Pickens' argument also ignores the evidence provided by Winthrop's expert, Mr. Arnold that, but for Pickens' storage of combustible construction materials on the flat roof, the fire would not have spread to adjoining roofs and likely self-extinguished. (T. 658:7-T.660:7; 651:7-13; T. 652:10:15; T. 657:6-17; T. 659:5-13; 661:5-10; T. 665:9-16; T. 666:2-4; T. 672:18-22.) Thus, there was evidence that, but for Pickens' breach of contract, there would have been no damage. Instead of self-extinguishing, the fire reached the eaves of the adjoining roof and continued to burn. (T. 672:18-22.) The trial court noted the direct and circumstantial evidence supporting Pickens' liability for damage "but for" Pickens' storage of combustible construction materials on the flat roof:

> There is also testimony from Mr. Arnold with regard to the height of the fire, flames and that he saw and that could not have gotten to that height or burn that hot unless there were materials left up on the roof, combustible materials on the roof at the time to serve as fuel for that fire.
>
> Otherwise his testimony was that any other small fire on that - I will say rubberized roof because I am not familiar with all the terms and things that they use for these covers on the roof – are rubberized or plastic rubber or whatever.
>
> Nevertheless, his testimony was any fire that you put just directly on there without any other source of fuel would die out on its own without doing any real damage, except a little spot on the roof. That was there testimony. And so – and there is testimony to indicate that the fire on the flat definitely occurred on the flat roof. There is the size of the flat roof that is all on the record and everything. And where this fire started was near the eaves of the roof. And so – and the testimony was from Chief Driggers that the problem they had with the fire, and most of the damages caused because the fire got hot enough, high enough, to get in to the – basically the vents I don't know if he said exactly like that but I certainly think the expert Mr. Arnold did, got in to the vents which was high enough to get into the vents and in the eaves underneath the roof and that once it got in there it got in to those layers where the fire fighters couldn't get in to.

(T. 858:1-T. 859:5.)

> Most of the damage occurred from water having been pumped in and it had to be pumped because of where the fire was located in the roof and they had to keep pumping the water in there to try and put it out. Otherwise they could have gotten to it and put most of the fire out. So, that's the testimony.

(T.860:6-12.)

Thus, the jury had substantial competent evidence to determine damages to Winthrop's property caused by Pickens' breach of the express contractual provision in storing combustible construction materials on the flat roof rather than on the ground, and violation of code. There is no "hole" in the evidentiary record. The only "hole" is the one Pickens dug itself into by failing to present a scintilla of evidence rebutting Winthrop's evidence that Pickens' breach caused the damages sought and banking its

entire defense on an unnecessary element of proof – that Winthrop prove the source of ignition.

Again, Pickens' argument is unsupported by South Carolina law or the evidence at trial. South Carolina allows a plaintiff to recover those damages proximately caused by the defendant's breach of contract or tort duty. *Maro*, 389 S.C. at 222. The trial court did not abuse its discretion in denying Pickens' motion for directed verdict as to damages in light of this overwhelming evidence that, but for, Pickens' breach of express contractual provisions and code, the fire would not have spread to adjoining roofs and likely self-extinguished causing no damage. Pickens presented no evidence to rebut the testimony of Mr. Arnold or Chief Driggers. Pickens' liability for the full amount of the damages under contract and tort was supported by competent evidence. And Pickens never rebutted or challenged Winthrop's evidence supporting the amount of the damages.

VI. THE TRIAL COURT DID NOT ERR IN FAILING TO APPLY COMPARATIVE FAULT REDUCTION TO CONTRACT ACTION

A. Pickens waived any challenge to the jury's verdict by agreeing to the form and substance of the general verdict form.

After the liability part of the trial, the jury found (1) "Pickens Roofing breached the terms of its contract with Winthrop and that this breach was a proximate cause of Winthrop's damages," and (2) "Pickens Roofing was negligent and that such negligence proximately caused the [sic] Winthrop's damages." (Verdict Form 1). Questions 3 and 4 asked the jury to attribute the negligence by each party that contributed to the damages caused by negligence. Pickens never objected to the use of this verdict form or the verdict once it was entered.

Thereafter, the damages portion of the trial continued. The court instructed the

jury to determine the total amount of damages. (T. 883:9-15.) Neither party had any exceptions. (T. 884:4-6.) The court provided the jury with a verdict form that asked the jury only to fill in a blank in a single question: "We the Jury find damages in the amount of $_____." (Verdict Form 2.) Neither party expressed any exceptions. (T. 884:4-6.) The jury filled in the blank as directed, finding that the damages were $7,223,343.14. (T. 886:8, Verdict Form 2.) When they returned and informed the court of their verdict, neither party had any questions of the jury. (T. 886:16-18.) The jury was excused. (T. 887:22-23.)

Winthrop was required to elect its remedy, to choose which cause of action it wished to recover on. *See Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 13, 397 S.E.2d 774, 776 (Ct. App. 1990); *Harper v. Etheridge*, 290 S.C. 112, 121-23, 348 S.E.2d 374, 379-80 (Ct. App. 1986). Winthrop chose breach of contract. This Court has explained that "under South Carolina law, the doctrine of comparative negligence is only applicable to cases alleging negligence as a cause of action." *Ritter & Assocs., Inc. v. Buchanan Volkswagen, Inc.*, 405 S.C. 643, 651, 748 S.E.2d 801, 805 (Ct. App. 2013). This Court held "comparative negligence is inapplicable," and cannot operate to reduce an award when the award is based on "a breach of contract cause of action." *Id.* Thus, as in *Ritter*, the trial court here "was correct in not reducing the award" based on breach of contract. *Id. Ritter*'s reasoning comports with South Carolina's comparative negligence statute, S.C. Code Ann. 15-38-15 (1976), which contains nothing that says it applies to actions for damages for breach of contract. Courts are not authorized to expand the scope of a statute's operation. *Peake v. S.C. Dept. of Motor Vehicles*, 375 S.C. 589, 597-99, 654 S.E.2d 284, 289-90 (Ct. App. 2007).

Pickens argues that *Ritter* does not apply, arguing that "the duty giving rise to Winthrop's breach of contract claim exists outside of the contract between the parties." (Appellant's Brief p. 45.) However, the contract expressly provided that all roofing materials would be stored in two places, neither of which was the flat roof. Further, the contract required Pickens to "[c]omply with all applicable laws, ordinances, rules, regulations and orders of any public body having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss." (Appellant's Brief, p. 45.) Thus, Pickens breached express provisions of the contract in storing materials on the flat roof. Pickens' violation of the International Fire Code, which Pickens stipulated had the force of law in South Carolina, was a breach of contract claim for a duty to follow the law that was stated within the contract itself. (Appellant's Brief p. 45.) The argument that the breach of contract claim was for a breach that "exists outside of the contract" is nonsense. Moreover, Winthrop was found 40% comparatively at fault based on the allegation it failed to appoint a Fire Prevention Program Superintendent. (T. 290:25-T.292:13.) However, the contract expressly provided that Winthrop was not responsible to supervise or inspect Pickens' work, or ensure that Pickens' complied with its contractual obligations. (Pl. Ex. 1, p. 1400-3.) Critically, Pickens never pled or asserted that Winthrop breached the contract. The jury was never instructed to make any finding whether Winthrop breached the contract. Thus, the 40% reduction could **only** apply to the negligence count.

Further, the "measure of damages for breach of contract is loss actually suffered by contractee as result of breach." *Bensch v. Davidson*, 354 S.C. 173, 177-78, 580 S.E.2d 128, 130 (2003). "The purpose of an award of damages for breach is 'to give

compensation, that is, to put the plaintiff in as good a position as he would have been in had the contract been performed.'" *Drews Co., Inc. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 109, 371 S.E.2d 532, 533-34 (1988). The evidence discussed above established that there would have been no damage had Pickens complied with the contract, which required compliance with the fire code and prohibited storage of materials on the roof. Thus, the total amount of damages were properly awarded for breach of contract.

Had Pickens desired to somehow limit the amount of damages the jury awarded for breach of contract specifically, it could have offered evidence to rebut Winthrop's evidence. Pickens could have also requested a particularized verdict form that required the jury to identify an amount of damages attributable to breach of contract or negligence. Pickens also could have objected to the use of a generalized verdict. Pickens offered no evidence. It made no such objections, thus waiving any error in the jury's verdict form or the jury instruction. *See Creach,* 331 S.C. at 464. Instead, Pickens waited until the jury was excused, then asked the court to apply comparative *negligence* principles to the judgment even though the verdict did not identify it was based on the contract. (T. 889:7-25.)

B. Comparative fault principles do not apply to contract damages.

The actions for breach of contract and negligence are different actions, and legal principles applicable to each are wholly independent. *See Smoak v. Carpenter Enters., Inc.*, 319 S.C. 222, 224, 460 S.E.2d 381, 383 (1995) (holding that a court should not charge a jury in a breach of contract action on contributory negligence, "a tort concept," because it is a legal principle inapplicable to the case).

In its answer to Winthrop's complaint, Pickens' answer only included affirmative defenses to Winthrop's negligence count. (Answer.) Those defenses can only apply to negligence. On the breach of contract count, Pickens did not raise *any* affirmative defense that would provide for any setoff against Winthrop. Affirmative defenses must be pled. Rule 8(c), SCRCP. No authority allows Pickens to bootstrap an affirmative defense to one cause of action to a different and independent second cause of action. Pickens' arguments to expand the scope of South Carolina's comparative negligence statute to include contracts damages are wholly without merit and would require an amendment to the existing statute. The trial court correctly applied South Carolina law. There is no error warranting reversal of the final judgment for breach of contract in favor of Winthrop.

VII. THIS COURT SHOULD AFFIRM FOR ANY GROUND APPEARING ON THE RECORD

Rule 208(b)(2), SCACR, states that a respondent may argue this Court should "affirm for any ground appearing in the record as provided by Rule 220(c)." *See also I'On, L.L.C. . Town of Mt. Pleasant*, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000). "Rule 220(c), in turn, provides that "'[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.'" *Id.* at 418. This means that a respondent may raise any additional reasons appearing in the record supporting an affirmance, whether or not they were raised or ruled upon in the trial court. *Id.* at 420. This Court can then review those reasons and "rely on them *or any other reason appearing in the record* to affirm the lower court's judgment." *Id.*

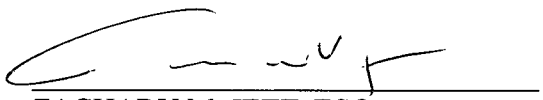
"An affirmance promotes judicial economy and finality in private and public affairs, which are important public policies." *Id.* at 421. Consequently, Winthrop

respectfully requests this Court "to affirm for any ground appearing on the record," as authorized by Rules 208(b)(2) and 220(c), SCACR.

CONCLUSION

Winthrop respectfully requests that this Court affirm the judgment on appeal for the reasons stated herein.

BUTLER PAPPAS WEIHMULLER
KATZ CRAIG, LLP



ZACHARY M. JETT, ESQ.
SC Bar No. 100484
zjett@butlerpappas.com
PETER M. VOGT, ESQ.
Admitted *Pro Hac Vice*
pvogt@butlerpappas.com
11620 N. Community House Road
Charlotte, NC 28277
(704) 543-2321/ (704) 543-2324
Attorneys for Respondent

December 9, 2014

BUTLER PAPPAS

TAMPA
CHICAGO
CHARLOTTE
PHILADELPHIA
TALLAHASSEE
MOBILE
MIAMI

December 9, 2014

VIA OVERNIGHT MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Court of Appeals of South Carolina
1015 Sumter Street
Columbia, SC 29201

Re: *THE WINTHROP UNIVERSITY TRUSTEES FOR THE STATE OF SOUTH CAROLINA, RESPONDENT, V. PICKENS ROOFING AND SHEET METALS, INC., APPELLANT.*
Circuit Case No.: 2012-CP-3151
Appellate Case No.: 2014-000821
Our File Number: 2868-1003218

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the original and one copy of the Initial Brief of Respondent and an original and one copy of the Respondent's Designation of Matter To Be Included in the Record on Appeal. Please file the originals and return the clocked-in copies to me via the enclosed self-addressed, stamped envelope. By copy of this letter, I am serving opposing counsel with the brief and designation of matter as set forth in the enclosed Proof of Service.

Thank you for your cooperation and assistance in this matter.

Very truly yours,

BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP

Peter W. Vogt

Enclosures

cc: Kirby D. Shealy III

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Appellate Case No. 2014-000821

The Winthrop University Trustees for the State of South Carolina, Respondent,

v.

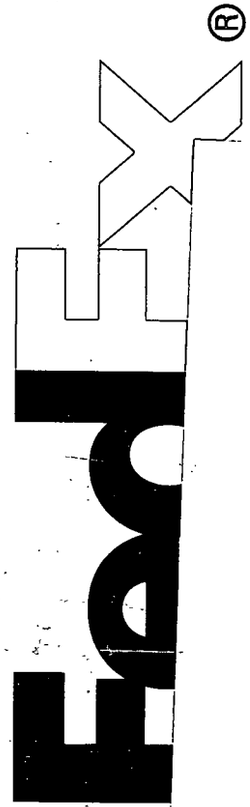
Pickens Roofing and Sheet Metals, Inc., Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and Respondent's Designation of Matter To Be Included In The Record on Appeal on the Pickens Roofing and Sheet Metals, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on December 9, 2014, addressed to its attorneys of record, Kirby D. Shealy III, Esquire and Lyndey Ritz Zwing, Esquire, at 1501 Main Street, 5th Floor, Columbia, South Carolina 29201.

December 9, 2014

Peter W. Vogt, Esquire



Extremely Urgent

From: (704) 543-2321
Maryfrances Cherry
Butler Pappas
11620 N. Community House Road
Charlotte, NC 28277

Origin ID: MEOA

FedEx Express

J14221402303uv

Ship Date: 09DEC14
ActWgt: 1.0 LB
CAD: 8461208/INET3550

Delivery Address Bar Code

Ref # 1003218
Invoice #
PO #
Dept #

SHIP TO: (803) 734-1890 BILL SENDER
The Honorable Jenny Abbott Kitching
Court of Appeals of South Carolina
1015 Sumter Street

COLUMBIA, SC 29201

TRK# 0201 **7721 4644 5606**

WED - 10 DEC 10:30A
PRIORITY OVERNIGHT

XH USCA

ASR
29201
SC-US
CAE

522G2/DC75/8AC9

RT 104 FZ 1 10:30 A 5606 12.10

Insert shipping document here.

After printing this label:
1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com.FedEx will not be responsible for any claim in excess of $100 per package, whether the result of loss, damage, delay, non-delivery,misdelivery,or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim.Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental,consequential, or special is limited to the greater of $100 or the authorized declared value. Recovery cannot exceed actual documented loss.Maximum for items of extraordinary value is $1,000, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.