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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

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SC Court of Appeals

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

v.

Pickens Roofing and Sheet Metals, Inc., ... Appellant.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN DENYING PICKENS' MOTION FOR NEW TRIAL ABSOLUTE BASED ON THE COURT'S REFUSAL TO STRIKE A JUROR FOR CAUSE WHERE THAT JUROR ADMITTED HAVING PREVIOUS KNOWLEDGE OF THE FACTS AND A CURRENT RELATIONSHIP WITH WINTHROP?

II. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT PICKENS' MOTION FOR DIRECTED VERDICT BASED ON WINTHROP'S FAILURE TO PRESENT ANY EVIDENCE THAT PICKENS CAUSED THE FIRE?

III. WHETHER THE TRIAL COURT ERRED IN FAILING TO GIVE A RECHARGE OF PROXIMATE CAUSATION THAT INCLUDED FORESEEABILITY?

IV. WHETHER THE TRIAL COURT ERRED IN BIFURCATING THE LIABILITY AND DAMAGES PHASES OF TRIAL WHERE CAUSATION AND DAMAGES WERE INEXTRICABLY INTERTWINED?

V. WHETHER THE TRIAL COURT ERRED IN DENYING PICKENS' MOTION FOR DIRECTED VERDICT AS TO DAMAGES WHERE WINTHROP FAILED TO PRESENT ANY TESTIMONY ESTABLISHING THE DEGREE TO WHICH PICKENS' CONDUCT WORSENED THE DAMAGES RESULTING FROM THE FIRE?

VI. ALTERNATIVELY, WHETHER THE TRIAL COURT ERRED IN FAILING TO ADJUST THE JUDGMENT TO REFLECT THE JURY'S DETERMINATION THAT WINTHROP WAS 40% AT FAULT?

STATEMENT OF THE CASE

This case was commenced by the filing of a summons and complaint in the York County Court of Common Pleas on September 5, 2012. (R. pp. 13-19.) Plaintiff Winthrop University Trustees for the State of South Carolina ("Winthrop") alleged causes of action for breach of contract and negligence against Defendant Pickens Roofing and Sheet Metals, Inc. ("Pickens") and sought damages arising from a fire that occurred upon Winthrop's campus on March 6, 2010. (*Id.*) Pickens answered on October 4, 2012 and denied all liability. (R. pp. 61-66.) Among its affirmative defenses, Pickens alleged that Winthrop was comparatively negligent. (*Id.*)

The case was called to trial before a jury during the week of March 17-21, 2014. Over Pickens' objection, the liability and damages phases of the trial were bifurcated. (*See* R. p. 149, line 7 – p. 151, line 5.) During jury selection, Pickens moved to strike Juror 25 for cause based upon that juror's status as a "student researcher" for Winthrop, who had been enrolled as a Winthrop student and was on campus when the fire occurred that formed the predicate for Winthrop's lawsuit. (*Id.* at p. 144, lines 9-23.) The trial court denied Pickens' motion and forced it to use one of its peremptory strikes to remove that juror. (*Id.* at p. 145, line 2 – p. 148, line 6.)

Following a four-day trial on liability, Pickens moved for a directed verdict on the grounds that Winthrop had offered no evidence that some act or omission by Pickens had caused the fire to ignite. (R. p. 788, line 3 – p. 789, line 21.) Although acknowledging that Winthrop had failed to adduce any evidence as to the ignition of the fire, the trial court nonetheless denied Pickens' motion on the grounds that Winthrop had introduced evidence to show that once the fire was ignited, Pickens' acts or omissions caused it to

spread. (R. p. 791, line 18 – p. 800, line 2.) Pickens put up no evidence during the liability phase of trial. (*Id.* at p. 801, lines 5-8; p. 803, lines 11-25.)

During the jury's deliberations on the issue of liability, it sent a note to the trial court asking, among other things, to be recharged concerning proximate cause. (R. p. 879, line 21 – p. 880, line 7.) The court provided an instruction as to cause-in-fact, but it left out any instruction as to foreseeability. (*Id.* at p. 881, line 14 – p. 882, line 4.) Pickens objected but was overruled. (*Id.* at p. 882, line 11 – p. 883, line 22.) The jury returned a verdict in Winthrop's favor as to its breach of contract and negligence causes of action, but it found that Winthrop bore 40% of the responsibility for the loss. (*Id.* at p. 884, line 3 – p. 885, line 5.) Pickens moved for judgment notwithstanding the verdict on the basis that the jury was never presented any evidence as to how the fire was caused to ignite. (*Id.* at p. 886, line 21 – p. 887, line 6) That motion was denied. (*Id.* at p. 887, lines 7-19.)

At the close of Winthrop's case as to damages, Pickens renewed its earlier directed verdict motion. (R. p. 945, lines 4-10.) It additionally moved for a directed verdict on the grounds that Winthrop had failed to introduce evidence as to how much worse the damages caused by the fire were than they would have been in the absence of Pickens' involvement. (*Id.* at p. 945, line 11 – p. 946, line 1.) These motions were likewise denied. (*Id.* at p. 946, line 13 – p. 965, line 10.)

The jury returned a verdict for Winthrop in the amount of $7,223,343.14. (R. p. 975, lines 4-13; *see also* R. p. 10.) Pickens moved for judgment notwithstanding the verdict on the same grounds it had previously raised at the directed verdict stage of the trial. (*Id.* at p. 977, lines 6-10.) It also moved for a new trial absolute on the grounds that

the trial court erred in bifurcating the trial and in failing to grant Pickens' motion to strike Juror 25 for cause. (*Id.* at p. 978, lines 4-6.) Alternatively, Pickens moved that the judgment be governed by the jury's comparative negligence determination on the grounds that the duty giving rise to Winthrop's contract claim was identical to the duty that gave rise to Winthrop's negligence claim. (*Id.* at p. 978, lines 7-22.) The trial court denied all of these motions. (*Id.* at p. 983, line 2 – p. 989, line 9.) Winthrop thereafter elected to recover under its contract cause of action. (*Id.* at p. 984, lines 8-21.)

Pickens received written notice on March 27, 2014 that judgment had been entered against it and timely filed its Notice of Appeal on April 21, 2014.

FACTS

Under the leadership of Winthrop's former President, Anthony DiGiorgio, Winthrop went through a transformative period, experiencing a multi-million dollar construction boom that led to the placement of several new buildings on its campus over the last twenty-five years. (R. p. 573, line 18 – p. 574, line 5; p. 514, line 12– p. 515, line 2.)

Among those new buildings is Owens Hall, constructed in 2007. (R. p. 576, lines 4-7.) Owens Hall is a state-of-the-art academic building with multiple classroom and office spaces in which technological teaching aids have been fully integrated into the structure. (Id. at p. 575, line 16 – p. 576, line 3.)

In 2009, President DiGiorgio sought to re-roof one of the older academic buildings on its campus known as Bancroft Hall. (R. p. 515, lines 13-15; p. 516, lines 2-6.) Bancroft Hall is a U-shaped building that contains primarily classrooms and professors' offices. (*Id.* at p. 522, lines 10-17; p. 609, lines 12-20.) The building was

originally constructed in 1909 and is connected to Owens Hall by way of the Bancroft Annex. (*Id.* at p. 522, lines 10-17.) Both Bancroft and Owens Halls have multiple roof surfaces, but most of their respective footprints are covered by sloped, asphalt-shingled roofing. (*Id.* at p. 576, lines 16-24; p. 605, lines 4-25.) However, the manner by which the shingle roofing systems are constructed on each building is different. Owens Hall's shingles are nailed to plywood nailboards that are adhered to both top and bottom sides of a layer of polyisocyanurate insulation, which is in turn mounted to a metal roof deck. (*Id.* at p. 279, lines 14-20.) All of these materials that are mounted to the metal roof deck are combustible. (*Id.* at p. 742, lines 6-18.) The older Bancroft Hall does not have the metal deck or the layer of insulation. Felt paper is nailed to plywood decking, and shingles are nailed over the felt paper in the same way that shingles are applied to residential structures. (*Id.* at p. 630, line 18 – p. 633, line 6.) While the materials that comprise it will burn, the roofing system that Pickens was hired to install on Bancroft carries the highest rating for resistance to fire known to the roofing industry. (*Id.* at p. 633, line 17 – p. 636, line 16.)

The roof over the Bancroft Annex is flat. It is comprised of metal decking that is covered by a layer of insulation and a thin, fully-adhered waterproof membrane. (R. p. 523, lines 14-25; p. 576, lines 16-24; p. 605, lines 3-25.) While this roofing system is combustible, it also carries the highest rating for resistance to fire known to the roofing industry. (*Id.* at p. 686, lines 6-19.) The flat roof is lower than the pitched roofs of the adjoining buildings and is accessible by means of a scuttle, or hatch, that opens onto the roof from Owens Hall and then climbing down a set of metal stairs approximately four feet. (*Id.* at p. 350, line 7- p. 351, line 2; p. 524, lines 18-24.) A ventilation fan for the

elevator shaft in Bancroft Hall projects through the brick sidewall along the flat roof next to the metal stairs. (R. p. 290, line 25 – p. 291, line 15; p. 588, lines 17-21.) That fan is the only mechanical device on the flat roof over the Bancroft Annex. (*See id.*) It is located immediately adjacent to the metal stairs described above. (*Id.*)

Immediately adjacent to the flat roof on the inside of Owens Hall is a mechanical room and the elevator shaft for Owens Hall. (R. p. 295, line 24 - p. 296, line 7.) The roof hatch is accessed by entering the mechanical room through a set of doors that are supposed to be kept locked. (*Id.* at p. 340, lines 13-19; p. 350, line 7 – p. 351, line 13; p. 408, lines 8-12; p. 524, line 18 – p. 525, line 12.)

The re-roofing of Bancroft Hall was primarily motivated by President DiGiorgio's aesthetic concerns, as the aging transite shingles on the building were covered with lichen, making the building look old and unmaintained. (R. p. 576, lines 10-15; p. 583, lines 6-14; p. 610, lines 11-17.)

Pickens won the bid for the re-roofing project, which began in 2009. (R. p. 615, line 23 – p. 616, line 11.) It had worked with Winthrop on several previous roofing jobs and was working with it on another roofing project on campus during the Bancroft Hall project, so the entities were generally familiar with how they each operated. (*Id.* at p. 395, lines 1-10; p. 398, line 21 – p. 399, line 6; p. 469, lines 14-17.)

The original specifications for the project called for the roofing contractor to have two staging or "lay down" areas at ground level, immediately adjacent to Bancroft Hall. (R. p. 401, line 23 - p. 402, line 3.) However, President DiGiorgio objected to the visibility of one of the lay down areas, indicating that it was unsightly to visitors and other pedestrians on campus. (*Id.* at p. 401, line 9 - p. 402, line 11.) One lay down area

was therefore removed during the final negotiations of the roofing contract with Pickens. (R. p. 401, line 9 - p. 402, line 13.) Pickens informed Wes Love, Winthrop's project manager for the Bancroft Hall re-roofing job, that not having the second lay down area would increase the labor costs for the project, as it would not be as efficient to move workers and supplies up to the roof level from only one area on the ground. (*Id.* at p. 515, lines 16-18; p. 516, line 22 – p. 517, line 23; p. 577, lines 17-24.) The parties therefore negotiated an addendum to the roofing contract to allow for the higher labor cost. (*Id.*)

Pickens subcontracted the demolition work and most of the shingling work to other companies. (R. p. 428, lines 13-15; p. 429, line 24 - p. 430, line 10.) However, it kept the metal fabrication aspects of the job in-house. (*See id.* at p. 319, lines 13-16.) Pickens employees were involved in the project in various capacities. (*Id.* at p. 319, lines 8-10; p. 335, line 22 – p. 336, line 7; p. 344, lines 6-16; p. 398, lines 15-20; p. 399, lines 7-8.) Clint Robinson was the project manager who had bid the job and was responsible for its overall progress and for addressing issues as they arose during the project. (*Id.* at p. 399, lines 7-8; p. 440, lines 11-13.)

During the week of March 1 to March 5, 2010, a metal crew from Pickens was installing copper panels on dormer roof projections along one particular pitch of Bancroft Hall's roof. (R. p. 319, lines 13-16; p. 329, lines 20-24; p. 347, lines 9-25.) The work did not involve the use of torches, soldering guns or any other tools that produced heat or flame. (*Id.* at p. 335, lines 10-19; p. 347, lines 11-25.) The crew stored metal pieces on the flat roof where Bancroft and Owens Halls adjoined to keep them from blowing or sliding off the pitched roof while they worked. (*Id.* at p. 350, lines 1-6.)

The members of Pickens' metal crew that worked on Bancroft during the week of March 1-5, 2010 were Brandon Lusk, Matthew Pruitt, and Randall "Randy" Pruitt. (*See* R. p. 319, lines 13-16.) Randy Pruitt served as foreman and the others were helpers. (*Id.* at p. 314, lines 15-18; p. 315, lines 3-10; p. 357, line 22 – p. 358, line 3; p. 379, lines 4-5; p. 405, lines 10-11; p. 418, lines 16-22.) None of the crew members smoked. (*Id.* at p. 328, lines 20-21; p. 346, lines 7-9; p. 368, lines 4-9; p. 389, lines 5-10.)

On March 5, 2010, the metal crew was the only Pickens crew working on Bancroft Hall.[1]. (R. p. 342, line 6 - p. 343, line 12.) They were joined by Bobby Pickens for about 45 minutes. (*Id.* at p. 334, lines 23-25; p. 471, line 18 – p. 472, line 8.) He took pictures of their work activity and then left the jobsite. (*Id.*)

The crew stopped working at approximately 4:00 p.m. (R. p. 371, lines 24-25; p. 289, lines 13-16.) They came down and spoke with Clint Robinson, who had come by the jobsite that afternoon to ask about their progress. (*Id.* at p. 419, lines 3-17.) Robinson did not go on the roof that day; in fact, it had been one or two weeks since he had last been on the roof. (*Id.* at p. 408, line 25- p. 409, line 2.)

Winthrop asserted that when the Pickens metal crew left the jobsite on March 5, 2010, they left shingles, roofing paper and other combustible materials on the flat roof. None of these materials is known to ignite spontaneously; in fact, they are designed to resist fire. (R. p. 304, line 22 - p. 305, line 16.) To establish its prima facie case, Winthrop relied primarily upon the testimony of Pickens employees, which was conflicting in many respects as to what materials were left on the flat roof when the crew

[1] There was evidence that a technician from Southern Elevator had performed routine maintenance on the elevators in both Bancroft and Owens Halls on either March 4 or 5, 2010. (*See* R. p. 586, line12 - p. 588, line 16; R. p. 1417.)

left for the day.[2] Nonetheless, there was testimony that packs of shingles and roofing paper had been stored on the flat roof and could have been left there when the crew stopped working on March 5, 2010.[3] (*See* R. p. 359, line 16 – p. 360, line 3; p. 385, lines 5-25; p. 386, lines 13, 20-22, p. 387, lines 14-16; p. 356, line 19 – p. 357, line 6; p. 387, lines 11-13, p. 387, line 24 – p. 388, line 5.) There was also testimony that the use of the flat roof as a storage or staging area was done with Winthrop's knowledge, and that Winthrop had not designated anyone to serve as its "fire prevention program superintendent" for the project. (*Id.* at p. 336, lines 8-10; p. 405, lines 20-25; p. 530, line 4 - p. 531, line 20; p. 584, line 22 - p. 586, line 11.)

Shortly before 3:00 p.m. on March 6, 2010, a Winthrop student noticed smoke emanating from Owens Hall and dialed 911. (R. p. 305, line 17 – p. 306, line 1; p. 478, line 25 – p. 480, line 11.) The fire department arrived within 15 minutes, but the fire was burning within the insulation layer of the roofing system on Owens Hall and was difficult to extinguish. (Id. p. 305, line 17 - p. 308, line 1; p. 278, line 23 - p. 280, line 3.) The fire burned from March 5, 2010 until approximately 6:45 p.m. on March 7, 2010. No source of ignition could ever be identified by any fire investigator. (Id. p. 290, line 15 - p. 293, line 14; p. 295, lines 21-23; p. 747, lines 22-24.)

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[2] Several witnesses testified that only metal was stored on the flat roof while others testified that shingles and roofing paper were also stored there. (*See* R. 350, lines 1-6 (regarding storage of copper on flat roof); p. 385, lines 5-20 (same), p. 387, lines 16-18 (same), p. 388, lines 19-22 (same). *See also* R. p. 359, line 16 – p. 360, line 3 (regarding storage of shingles); p. 385, lines 5-20 (same); p. 385, lines 21-25 (same); p. 386, lines 20-22 (same), p. 387, lines 14-16 (same); *see also* p. 386, lines 13 (regarding storage of tar paper on the flat roof); p. 387, lines 11-13, p. 387, line 24 – p. 388, line 5 (same); p. 472, line 17- p. 473, line 18 (Pickens reported to Winthrop that it only lost metal in the fire).)

[3] Unquestionably, packs of shingles were left along the ridgeline of the pitched roof on Bancroft Hall, as these were depicted in photographs taken before and after the fire, but these shingle packs did not burn in the fire. (*See* R..p. 348, lines 1-6; p. 352, lines 5-16.)

The jury was instructed that section 8.3.3 of chapter 241 of the codes and standards promulgated by the National Fire Protection Association ("NFPA") states that "Yard storage of equipment to be installed or combustible construction materials shall not be stored closer than 30 feet from the structure under construction or alteration" and that this provision had the force of law at the time of the fire. (*See* R. p. 861, line 7 – p. 862, line 22.) Likewise, the jury was instructed that in any construction project, the property owner is required to designate "a person who shall be responsible for the fire prevention program and who shall insure that it is carried out to completion." (*Id.* at p. 862, lines 15-19.) The jury was instructed that such person designated by the property owner was to be known as the "fire prevention program manager" who would have the "authority to enforce the provisions of [Section 7.2 of the IFC] and other applic[able] fire protection standards." (*Id.* at 862, lines 20-23; *see also* p. 862, line 24 – p. 863, line 5.)

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING PICKENS' MOTION FOR NEW TRIAL ABSOLUTE BASED ON THE COURT'S REFUSAL TO STRIKE JUROR 25 FOR CAUSE.

During the jury selection process, Juror 25, Vitta Clawson ("Juror 25"), responded affirmatively to several voir dire questions posed by the Court. Based on her answers, Juror 25 should have been stricken for cause because she was a current "student researcher" at Winthrop, had been a Winthrop student at the time of the fire, had previous knowledge of the facts of the case, and had discussed the subject fire with Winthrop professors and students at the time of the fire. (R. p. 116, line 6 - page 117, line 20.) The trial court erred in denying Pickens' motion to strike Juror 25 for cause and in denying Pickens' motion for new trial absolute.

Juror 25 responded affirmatively to several questions posed by the trial court to the jury venire. The first question was whether "any member of the jury panel or any member of your immediate family . . . [ever] worked for or ha[d] any business relationship with Winthrop University[?]" (*See* R. p. 112, line 23 – p. 113, line 1.) Juror 25 answered that she was a current "student researcher" at Winthrop and "d[id] know about this [incident]." (*Id.* at p. 116, lines 7-8.[4]) She also had personal knowledge of the subject fire, including its alleged cause. (*Id.* at p. 117, lines 8-12.)

Following the colloquy on this particular question, the court asked Juror 25 whether her "experiences in that regard and those relationships would interfere in any way with [her] ability to give both sides . . . a fair and impartial trial." (R. at p. 116, line 23 – p. 117, line 4.) Juror 25 responded: "I could do that. I could do that. That's not a problem. It's just I wanted to say that I knew things that occurred." (*Id.* at p. 117, lines 5-7.) The court continued to question her about her prior knowledge of the fire. (*See id.* at p. 117, lines 8-10.) She responded: "I was there during the fire, the incident, so I know people who were affected by it." (*See id.* at p. 116, lines 16-17.) She further responded that she knew about "[t]he fire, the incident, things that were said about how it occurred, and so forth." (*Id.* at p. 117, lines 11-12.)

Juror 25 also responded affirmatively to several other voir dire questions, including whether "any member of the jury panel or member of [their] immediate family obtained a degree or attended classes at Winthrop University" and whether "any member of the jury panel had any prior knowledge about this case from any source before"

[4] In addition to Juror 25, six other prospective jurors responded affirmatively to this question. Of these seven total jurors, five had only attenuated relationships with Winthrop and one was a current employee of the school who was later removed from the venire by the trial court based on her current employment status.

coming to court. (*See* R. p. 117, line 25 – p. 118, line 2; p. 121, lines 6-12; p. 132, lines 6-11; p. 136, line 6 - p. 137, line 4.) She answered that she was a "recent graduate" of Winthrop University and that she had previous knowledge about the case. (*Id.* at p. 121, line 6; p. 136, lines 6-15.) She explained her knowledge as follows:

> I watched it on the news. I am friends with students who were affected by the fire. They discussed some things that they knew [on] the school website and then some of the professors talked about it, but I don't live on campus so I don't know any specifics, but I have watched it.

(Id. at p. 136, lines 10-15.)

Article I, section 14 of the South Carolina Constitution and section 14-7-1050 of the South Carolina Code of Laws both mandate that litigants receive a fair trial by an impartial jury. S.C. Const. Art I, § 14; S.C. Code Ann. § 14-7-1050 (Supp. 2013). *See also Alston v. Black River Electric Co-Op.*, 345 S.C. 323, 326, 548 S.E.2d 858, 859 (2001) ("[u]nder South Carolina law, litigants are guaranteed the right to an impartial jury"). "If a potential juror has an interest in the lawsuit such that she is 'not indifferent in the case,' the juror shall be deemed incompetent to serve on the jury." *Id.* at 326-27, 548 S.E.2d at 859 (*quoting* S.C. Code Ann. § 14-7-1020 (Supp. 2000)).

"The trial court has a duty to assure that every juror is unbiased, fair, and impartial." *State v. Gaskins*, 284 S.C. 105, 114, 326 S.E.2d 132, 138 (1985),(citation omitted), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Although the decision to strike a juror is within the sound discretion of the trial court, appellate courts of this state have set parameters to guide trial courts in deciding whether to qualify a juror or not. *State v. Evins*, 373 S.C. 404, 645 S.E.2d 904 (2007); *Wilson v. Childs*, 315 S.C. 431, 434 S.E.2d 286 (Ct. App. 1993). The South Carolina Supreme Court has held: "A juror should be disqualified by the court if it appears to the

court that the juror is not indifferent in the case." *State v. Woods*, 345 S.C. 583, 590, 550 S.E.2d 282, 285 (2001); *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1986).

"When reviewing [a] trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire." *State v. Council*, 335 S.C. 1, 10, 515 S.E.2d 508, 512-13 (1999) (*citing State v. Green,* 301 S.C. 347, 392 S.E.2d 157 (1990)), *reh'g denied*, (May 14, 1999) and *cert denied*, 120 S.Ct. 558, 145 L.Ed.2d 489 (1999). Here, despite testifying that she could remain "fair and impartial" and give both sides a fair trial (*see* R. p. 117, lines 5-7, 20), Juror 25 provided several bases upon which the Court must find that the prospective juror could not be indifferent in this case. Not only was Juror 25 currently affiliated with Winthrop as a "student researcher,"[5] but she also "recently graduated" from the school, and had been a Winthrop student "during the fire, the incident" and "knew people who were affected by it." (R. p. 116, lines 7-8, 16-17, 20-22.) She also specifically stated that she "knew things that occurred," such as "[t]he fire, the incident, things that were said about how it occurred, and so forth." (*Id.* at 117, lines 11-12.) Juror 25's previous knowledge or belief about "how [the fire] occurred" (id.) gave her a perspective about the issues in the case that other potential jurors did not share.

Appellate courts have held that one disqualifying factor alone is insufficient to strike a juror for cause. *See Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961); *DeLee v. Knight*, 266 S.C. 103, 221 S.E.2d 844 (1975) (prospective jurors who may have heard details about the case were qualified where "they had not formed any

[5] It is unclear from Juror 25's responses as to whether she was compensated by Winthrop for performing such services. (*See* R. at p. 116, lines 7-8.)

concrete opinions" about the issues and stated that they could lay aside any impression or opinion and render a verdict based on the evidence presented in court); *Abofreka v. Alston Tobacco Co.*, 288 S.C. at 125, 341 S.E.2d at 624 ("A prior business relationship between a juror and a party does not as a matter of law disqualify a juror") (citation omitted). However, in a case such as this where the prospective juror had not only a *current* relationship with one of the parties, but also had knowledge of the facts of the case, the juror at issue could not have been wholly indifferent and should have been stricken for cause.

The trial court's failure to strike Juror 25 is especially egregious considering the court's decision to strike another prospective juror, Leslie Miller ("Juror 91"), for cause. During voir dire, Juror 91 stated that she was currently employed by Winthrop in the "office that coordinates help for struggling students." (*See* R. p. 114, lines 19-23.) Despite her statement that she had no personal knowledge about the case before coming to court (*id.* at p. 114, line 24 – p. 115, line 1) and testimony that she was not aware of any reason why her "work relationship . . . would interfere in any way with [her] ability to give both the plaintiff and the defendant a fair and impartial trial in this case" (*id.* at p. 115, lines 2-8), the trial court struck her for cause (*id.* at p. 147, lines 4-7). Later, in explaining its bases for striking Juror 91 for cause, the trial court stated that "even though that juror said [she] could be fair and impartial, [I] struck that jur[or] because [her employment with Winthrop] is too close of a connection." (*Id.* at 981, lines 6-14.)

The only difference between Juror 91 and Juror 25 is that Juror 25 had *closer proximity* to the issues in the case. Both were currently affiliated with Winthrop, one as an employee in the office assisting students (*id.* at p. 114, lines 19-23), and the other as a

student researcher (*id.* at p. 116, lines 7-8). *See* Am. Jur. 2d, *Jury* § 315 (the relation of employer and employee or master and servant between a party to a cause of action and a prospective juror is sufficient ground for a challenge for cause). In addition to being currently affiliated with Winthrop, Juror 25 was also a student at the time of the fire and had discussions with other students and professors about the cause of the fire. (R. p. 116, lines 16-17, 20-22; p. 121, line 6; p. 136, lines 10-15.) Juror Number 91, on the other hand, stated on the record that she had no previous knowledge of the incident. (*See id.* at p. 114, line 24 – p. 115, line 1.)

Failure to strike a juror who is biased as to the facts of the case is grounds for a new trial. *Long v. Norris & Associates, Ltd.*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000); *State v. Covington*, 343 S.C. 157, 539 S.E.2d 67 (Ct. App. 2000). Pickens' motion to strike Juror 25 for cause should have been granted based on her current affiliation with Winthrop as a "student researcher," her status as a "recent graduate" of the University, and her personal knowledge of the facts of the case, including the "cause" of the fire. (*See* R. p. 116, lines 16-17, 20-22; p. 121, line 6; p. 136, lines 10-15.)

At the close of trial, Pickens moved for a new trial absolute based on the trial court's denial of its motion to strike Juror 25 for cause. (*See* R. p. 978, lines 4-6.) The trial court denied Pickens' motion, finding that "there was no other close connection to Winthrop that would cause the Court to excuse her for cause" other than Juror 25's status as a "recent graduate" of the University. (*Id.* at p. 981, line 15 – p. 982, line 10.) By forcing Pickens to use one of its four peremptory strikes on a juror that was biased as to the facts of the case and was not indifferent, the trial court erred. (*Id.* at p. 139, line 14 –

p. 140, line 25; p. 982, line 11 – p. 983, line 8.) For these reasons, Pickens requests a new trial absolute.

II. THE TRIAL COURT ERRED IN FAILING TO GRANT PICKENS' MOTION FOR DIRECTED VERDICT AS TO LIABILITY BECAUSE WINTHROP FAILED TO PRESENT EVIDENCE OF CAUSATION.

When ruling on a motion for directed verdict, the court must view the evidence and the inferences that can reasonably be drawn therefrom in the light most favorable to the non-moving party. *Sabb v. South Carolina State Univ.,* 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002); *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied. *Adams v. G.J. Creel & Sons, Inc.,* 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995); *Bailey v. Segars,* 346 S.C. 359, 365-66, 550 S.E.2d 910, 913 (Ct. App. 2001). The appellate court should "reverse the trial court . . . when there is no evidence to support the ruling below." *Steinke v. S.C. Dept. of Labor, Licensing and Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999) (citation omitted).

Both of Winthrop's legal theories, breach of contract and negligence, required proof of proximate causation. *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 686 S.E.2d 200 (Ct. App. 2009); *Hanselmann v. McCardle*, 275 S.C. 46, 48-49, 267 S.E.2d 531, 533 (1980). "Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided." *Hanselmann*, 275 S.C. at 48-49, 267 S.E.2d, at 533 (quotation omitted).

Proximate cause is defined as "the efficient or direct cause of an injury." *McNair v. Rainsford*, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998) (citation omitted). It "requires proof of both causation in fact and legal cause." *Id.* (*citing Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996)). "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." *Id.* "Legal cause is proved by establishing foreseeability." *Id.* "A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence." *Id.*

Most negligence cases resulting in fire must be proven by circumstantial evidence because there is no direct evidence of the cause and/or origin of the fire, and oftentimes any potential direct evidence is destroyed by the fire. In *Thorburn v. Spartanburg Theatres, Inc.*, 263 S.C. 165, 168, 208 S.E.2d 919, 920 (1974), the South Carolina Supreme Court noted that "[t]he circumstances under which the fire originated and its destructive effect precluded direct proof of its cause . . . ." In such a case, although the "difficulty of proof does not relieve plaintiff of the burden of proof . . . the Court should take a very liberal view of the testimony." *Id.* (*quoting Brock v. Carolina Scenic Stages & Carolina Cas. Co.*, 219 S.C. 360, 366, 65 S.E.2d 468, 470 (1951)). Even under the most liberal view of the testimony in this case, there is unquestionably no proof that an act or omission by Pickens caused the fire to ignite. Rather, all of the testimony is consistent in that the cause of the fire, and even its precise origin, cannot be determined.

In *Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993), this Court affirmed summary judgment in a fire case where the jury was left to speculate

as to the most probable cause of the fire. As in *Harris*, the jury in this case was provided no evidence as to the cause of the event that forms the predicate for this lawsuit.

Because Winthrop could not prove, even with circumstantial evidence, that Pickens caused the fire to ignite, it relied upon a "spread theory" of liability. (*See* R. p. 781, lines 3-7; p. 819, lines 3-7; p. 821, lines 8-16, p. 823, lines 18-25.) To establish this theory it relied principally upon its expert witness, Dan Arnold, who testified that the source of the ignition for the fire is not relevant, because "we know the fire occurred" and "[f]or a fire of that magnitude and that substance to exist, to occur, you had to have fuel sufficient to do that." (*Id.* at 748, lines 3, 7-8.) Mr. Arnold testified that in his expert opinion, "[t]he 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." (*Id.* at p. 748, lines 9-13.) Winthrop's counsel used this testimony as the foundation for its contention that "the ultimate issue in this case" is "whether the fire could spread from the flat roof to the adjoining pitched roofs if there weren't combustibles there." (*Id.* at p. 824, lines 4-9.)

There is no South Carolina case to date that recognizes or adopts the "spread theory" of liability in a claim arising from a fire. The classic "spread theory" case involves a landowner or possessor who "affirmatively create[s] or maintain[s]" premises in an "unusually hazardous" manner, which "gives rise to an extraordinary and undue risk of combustibility." *See* 23 Am. Jur. Proof of Facts 2d 461 at § 8; *Scully v. Fitzgerald*, 843 A.2d 1110, 1116 (N.J. 2004) (*quoting B.W. King, Inc. v. Town of West New York*, 230 A.2d 133, 138-139 (N.J. 1967)). In such a situation, it becomes foreseeable that a

fire could easily ignite and thereafter fall, leap, or be thrown by the defendant's operations, and when in fact such event occurs, the defendant should be held responsible. There are no such facts in the case at hand.

Courts in other jurisdictions have found that a property owner and/or contractor performing work on a landowner's property can be liable to third parties for negligent storage of flammable materials and/or negligent maintenance of conditions likely to become highly combustible. As the Missouri Court of Appeals stated in S*herrell v. Brown*, 284 S.W.3d 164, 166 (Mo. Ct. App. E.D. 2009):

> The cause of a fire is frequently unknown and it is possible for a fire to occur under circumstances where appropriate care has been exercised. The mere occurrence of a fire does not raise a presumption of negligence or a presumption as to the cause of the fire. In establishing a submissible case on the issue of negligence, the plaintiffs must prove by substantial evidence that (1) there was negligence, and (2) **such negligence caused the fire.**

(internal citation omitted; emphasis added); *see also Mills v. Crawford*, 822 S.W.2d 548, 551 n. 1 (Mo. Ct. App. 1992) ("Generally a property owner is not responsible for damages resulting from a fire occasioned by others unless, due to conditions on his property, **he should have anticipated that the fire was likely to start**.") (emphasis added) (*citing Hesse v. Century Home Components, Inc.*, 514 P.2d 871 (Or. 1973); *Roy v. Domingue*, 493 So. 2d 880 (La. Ct. App. 1986); *Fridge v. Talbert*, 158 So. 209 (La. 1934)).

The condition of the premises where the fire occurs-- and whether that condition is conducive to the ignition of a fire-- is the primary factual focal point for many of the spread theory cases. *See Texas & N.O.R. Co. v. Bellar*, 51 Tex. Civ. App. 154 (1908) (Tex. Civ. App. 1908) (holding despite the lack of evidence as to the fire's cause and/or

origin, the railroad was negligent because it allowed vast amounts of oil to seep from its railcars and spread onto the ground). *See also Prince v. Chehalis Sav. & Loan Ass'n*, 58 P.2d 290, 291 (Wash. 1936) ("The theory of the respondents' action was that the appellant had permitted the garage to get into **such a state of disrepair that it created a fire hazard**") (emphasis added); *Menth v. Breeze Corp.* 73 A.2d 183 (N.J. 1950). Most of the cases focus on facts giving rise to a high likelihood that the conditions on the premises would cause a fire to ignite. *Scully v. Fitzgerald*, 843 A.2d 1110, 1116 (N.J. 2004) (referring to "an extraordinary and undue risk of combustibility"). In many of these cases, the likelihood of a fire starting is highly foreseeable given the type of work performed or the type of premises involved.

For example, in an early case discussing the spread theory, *Quaker Oats Co. v. Grice*, 195 F. 441 (2d Cir. 1912), the Second Circuit identified facts such as "large quantities of dust accumulat[ing]" in the air that was "known to be a combustible substance, which, when diffused and mixed with air, would upon the application of a flame or spark, ignite and explode" as providing the predicate circumstances giving rise to a foreseeable risk of fire. *Id.* at 443-44. Additionally, there was evidence that when the machinery in the building was running, it caused the building to vibrate so strongly that the dust would "rise or . . . sift off into the atmosphere, which became so dense that there 'was trouble in looking through it.'" *Id.* The Court held that the landowner had a duty to keep the premises clean, by preventing such dust from accumulating, when the landowner had clear notice and knowledge that such dust, when sifted in the air by the ordinary operation of the business's machinery, would foreseeably cause a fire to ignite. The Court held:

> If premises are allowed to become unsafe because they are filled with dust which would explode on the application of spark or flame, and the exercise of reasonable care would have prevented the premises from becoming thus unsafe, the person whose neglect brought about such a dangerous condition would not be excused because the actual spark which fired the train was produced by some [other cause].

Id. at 444. Even though the "spark or flame" may have been caused by some third party, the landowner was liable for enabling the premises to be kept in such condition that a fire was practically inevitable and could have been prevented by reasonable maintenance procedures. *Id.*

In *Menth v. Breeze Corp.* 73 A.2d 183 (N.J. 1950), the Supreme Court of New Jersey further stated:

> [I]f an owner or occupier by reason of his negligence has kept his premises in an unsafe and dangerous condition, as by the accumulation of inflammable material thereon so as to create a fire hazard to adjoining property in the event such material becomes ignited, such negligent owner or occupier may be held answerable for the damage caused by the spread of the fire even though such fire may have been started by the act of a third person or independent agency or any unauthorized act, if such act was **reasonably foreseeable** as the natural and probable consequence of the negligent manner in which the premises were kept.

Id. at 188 (emphasis added).

In *Chicago, M., St. P. & P. R. Co. v. Poarch*, 292 F.2d 449 (9th Cir. 1961), the court held "once it is established that the owner of a building **has negligently allowed it to become a fire hazard** and a fire does start, the actual cause . . . is immaterial." *Id.* at 451 (emphasis added).

As the above cases illustrate, the spread theory is only viable where there are facts tending to show that the landowner or possessor maintained the premises in a "tinderbox" condition, i.e., an extreme state of disrepair leading the landowner to know or have

reason to know that the chance that a fire may be ignited is high. For example, in *Scully v. Fitzgerald*, the Supreme Court of New Jersey noted:

> [A] landowner ordinarily is not liable for a fire started by a trespasser in the absence of the landowner's negligence. [citations omitted] We described the type of unsafe and dangerous condition that would give rise to a landowner's negligence as:
>
> > an ***unusually*** **hazardous situation** affirmatively created or maintained by the owner which gives rise to **an *extraordinary and undue risk* of combustibility**. . . . Generally, [such a condition] would arise from the type of use to which the building is put and either the resulting accumulation of flammable material therein or the increase of the flammability of the structure itself, from the use to which it was put.

843 A.2d at 1116 (*quoting B.W. King, Inc.*, supra, at 138-39) (emphasis added).

South Carolina continues to reject *res ipsa loquitur* as a theory of liability. *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010); *Fletcher v. Medical University of South* Carolina, 390 S.C. 458, 702 S.E.2d 372 (Ct. App. 2010); *Gilland v. Peter's Dry Cleaning Co.*, 195 S.C. 417, 11 S.E.2d 857, 858 (1940) ("where the burden rests upon a party to prove negligence we hold that he cannot meet this burden by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence"). Given this position, Winthrop should not have been absolved of its responsibility to prove that the fire was caused to ignite by some act or omission by Pickens. Winthrop's attempt to shift the focus in this case to the spread of the fire rather than to its ignition was a blatant attempt to do an end run around its *res ipsa loquitur* problem.

South Carolina's refusal to adopt *res ipsa loquitur* required Winthrop to prove that Pickens caused the fire to ignite, particularly where its alleged negligence was in furnishing some, but by no means all, of the potential fuel for the fire, none of which was

known to be highly combustible or especially conducive to the ignition of a fire.[6] (*See* R. p. 633, line 17 – p. 636, line 16.) However, the trial court merely allowed Winthrop to rely on evidence of the damage caused by the fire as the means of holding Pickens liable. This reliance was misplaced. As the New Jersey Supreme Court stated in *Menth*, supra:

> It is also essential to the application of the *res ipsa loquitur* doctrine that those seeking to obtain the benefit of its presumptive effect must show that in all probability the direct cause of the injury and so much of the surrounding circumstances essential to its occurrence were in the exclusive control of the defendant, or his agents or servants . . . . In case of fire the rule requires that the actual cause of it must have been under the exclusive control of the party charged with negligence.

73 A.2d at 187 (citations omitted). If making use of the presumption afforded by *res ipsa loquitur* requires proof of the cause of ignition then, in the absence of that presumption, such proof is of paramount importance. In the seminal case of *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (N.Y. 1920), the Court of Appeals of New York succinctly stated:

> We must be on our guard, however, against confusing the question of negligence with that of the causal connection between the negligence and the injury. A defendant who travels without lights is not to pay damages for his fault unless the absence of lights is the cause of the disaster. . . . "Proof of negligence in the air, so to speak, will not do."

Id. at 170 (citation omitted). *See also Holmes v. Davis*, 126 S.C. 231, 119 S.E. 249 (1923) (proof of injury alone does not raise the presumption of negligence).

Another logical impairment to Winthrop's theory is that the combustible materials that Winthrop alleged to have been stored in violation of the applicable section of the International Fire Code were the very materials that Pickens was contracted to install on

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[6] It was impossible for Winthrop to argue that Pickens' roofing materials were the only combustible materials on the flat roof, as it was acknowledged by Winthrop's own witnesses that the components of the flat roof are themselves combustible. (R. p. 686, lines 6-19.)

the roof of Bancroft Hall. (*See* R. p. 348, lines 1-15; p. 355, lines 13-24; p. 383, lines 12-24.) These materials carried the highest flame resistance rating available (*id.* at p. 633, line 17 – p. 636, line 16), yet it was their alleged presence on the flat roof that provided the fuel Winthrop contended was necessary to allow the fire that started on the flat roof to migrate into the surrounding pitched roofs. (*Id.* at p. 747, line 25 - p. 748, line 18.) This situation bears no resemblance to the kind of "tinderbox" conditions that have given rise to the recognition of the "spread theory" of liability in other states. Here, there is no evidence that the accumulation of such materials on the flat roof would increase the risk that a fire would start.

Although generally questions of proximate cause are for the jury, courts have found that certain consequences of an alleged act or omission were unforeseeable as a matter of law on several occasions. *See, e.g., Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978) (use of unaccepted repair practice by boat repairman deemed unforeseeable by boat manufacturer); *Crolly v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989) (suicide of intoxicated bar patron held unforeseeable by bartender); *Rife v. Hitachi Constr. Machinery Co., Ltd.*, 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005) (manufacturer could not foresee export of product manufactured for sale in Japan); *Eadie v. Krause*, 381 S.C. 55, 671 S.E.2d 389 (Ct. App. 2008) (application of Tennessee's election of remedies doctrine, precluding workers' compensation suit in Tennessee, was not foreseeable by attorney); *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 697 S.E.2d 644 (Ct. App. 2010) (client's lost profits not foreseeable in claim against law firm). In this case, Pickens contends that its storage of the very materials that

would shortly be installed on the roof of Bancroft Hall does not create a foreseeable risk of fire ignition that is any greater than that borne by the building generally.

Pickens' storage of roofing materials on the flat roof did not create a heightened risk that a fire would ignite. A fire on the flat roof was no more foreseeable because of the materials left there by Pickens' employees than it might have been in their absence. The absence of such foreseeable risk is fatal to Winthrop's cause of action, as it is this element that is crucial to other courts' allowance of fire claims where the precise cause of ignition is unknown. The trial court should therefore be reversed, and judgment should be entered in Pickens' favor.

III. THE TRIAL COURT ERRED IN FAILING TO GIVE A COMPLETE CHARGE ON PROXIMATE CAUSE TO THE JURY FOLLOWING THE JURY'S REQUEST FOR ADDITIONAL INSTRUCTION.

Throughout the duration of the four day trial on liability, the jury was asked by both parties to focus its attention on the narrow issue of causation.[7] Pickens' counsel argued to the jury:

> Even if [Pickens] stored roofing paper, shingles on the flat roof, even if they weren't suppose[d] to, it's not foreseeable that that is going to start a fire. Those very things are designed the way they are to resist fire. So -- so they fail on but for there being there the fire wouldn't have happened and they fail on the foreseeable. It has got to be foreseeable.

[7] (*See* R. p. 244, lines 17-24 (Winthrop's counsel stated during his opening statement that causation "is very important"); p. 248, lines 5-12 (further stating that "fuel for the fire" was "the linchpin of [Winthrop's] proof"). *See also* R. p. 253, lines 19-25 (Pickens' counsel stating during opening statement that Winthrop's case is "fatal[l]y flawed" because "[n]o one can . . . say [Pickens] was responsible for" any "source of ignition" for the fire, and "that's ultimately what this whole case comes down to.").) During closing arguments, Pickens' counsel suggested the jury "focus [their] attention on" Winthrop's inability to prove that the fire was "a foreseeable consequence of something [Pickens] did or that [it] [was not] suppose[d] to do." (Id. at p. 828, lines 14-21.)

(R. at p. 838, line 20 - p. 839, line 2.) Winthrop responded in its closing argument to the jury: "Fire is a foreseeable event when you store materials in such a manner that it violates the fire code." (Id. at p. 847, lines 17-21.)

After all of the evidence on the question of Pickens' liability for the fire was presented, the trial court instructed the jury on the applicable law. (R. p. 848, line 15 – p. 871, line 12.) As a part of its charge, the trial court instructed the jury on the definition of "proximate cause," including the requisite elements of cause-in-fact and legal causation. (*Id.* at p. 864, line 2 – p. 866, line 13.) The trial court appropriately defined cause-in-fact, as the cause but for which the accident would not have occurred, and legal cause as being "prove[n] by establishing foreseeability." (*Id.* at p. 864, line 6 – p. 866, line 13.) In addition to giving its general charges to the jury, the trial court instructed that "[o]nce you begin your deliberations if you still have some question or do not understand some part of the law or all of it for that matter, upon your request I will bring you back out . . . and re-instruct you on any part of it which you need to be instructed." (*Id.* at p. 848, lines 6-11.)

The jury deliberated for some time and then sent a note to the trial court requesting to be recharged, in part, on the "definition of proximate cause." (*See* R. at p. 879, lines 15-23.) The trial court's complete recharge on the definition of proximate cause was as follows:

> 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 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 proximate cause is a direct cause without which the damage would not have occurred.

(Id. at p. 881, lines 10-24.[8])

Pickens objected. (*See* R. p. 882, lines 13-25.) It argued that the trial court failed to include within its definition "the discussion of foreseeability" that it had previously included. (*See id.*) The trial court responded by stating simply that the jury "didn't ask for that. They asked for proximate cause and I don't want to complicate it." (*Id.* at p. 882, lines 16-17.) The trial court further stated, "I know foreseeability is something [the jury] can consider on proximate cause, but they only asked me about proximate cause. . . . Foreseeability may be a portion of that, but it is not in my proximate cause charge." (*Id.* at p. 883, lines 5-7, 14-16.)

The trial court erred in failing to include within its definition of proximate cause the requirement of legal causation. It is black letter law in South Carolina that "proximate cause requires proof of both causation in fact and legal cause." *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 146-47, 638 S.E.2d 650, 662 (2006) (emphasis added) (citing *Oliver v. S.C. Dep't of Highways & Public Transp.*, 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). The South Carolina Supreme Court has made it clear that "the **touchstone of proximate cause is foreseeability** which is determined by looking to the natural and probable consequences of the defendant's conduct." *Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) (citation omitted) (emphasis added). "[P]roximate cause requires proof beyond just the act or omission in question and concerns whether it is the 'but for' cause of the plaintiff's injuries and whether the

[8] The trial court also asked the jury whether it needed "[a]nything else"? (R. at p. 882, lines 3-4.) The foreperson responded, "[n]o, that answers it." (Id. at p. 882, line 5.)

harm was foreseeable." *Grier v. AMISUB of South Carolina*, 397 S.C. 532, 538, 725 S.E.2d 693, 697 (2012) (citation omitted).

"A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and which is supported by the evidence." *State v. Condrey*, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002) (citation omitted); *see* S.C. Const. Art. V, § 21. The South Carolina Supreme Court has stated that "[a] charge is sufficient if, as a whole, it covers the law applicable to the case." *State v. Burton*, 302 S.C. 494, 498, 397 S.E.2d 90, 92 (1990) (citation omitted). It has further held that "an alleged error in a portion of a charge must be considered in light of the whole charge, and must be prejudicial to the appellant to warrant a new trial." *Priest v.* Scott, 266 S.C. 321, 324, 223 S.E.2d 36, 38 (1976). Here, the trial court's recharge on the definition of proximate cause did not cover all of the applicable law. In fact it left out the "touchstone" of the definition: foreseeability. *Madison ex rel. Bryant*, 371 S.C. at 146, 638 S.E.2d at 662 (citing *Oliver*, 309 S.C. at 316, 422 S.E.2d at 130 (1992)). By failing to instruct the jury on legal causation when giving its recharge on the definition of proximate cause, the trial court prejudiced Pickens. Not only was causation the primary issue in the case, but both parties had focused the jury's attention on the narrow question of whether a fire was a foreseeable consequence of Pickens' alleged acts or omissions. (R. p. 253, lines 17-23; p. 828, lines 14-22; p 838, line 20 - p. 839, line 2.)

The case of *State v. Lee-Grigg*, 387 S.C. 310, 692 S.E.2d 895 (2010), is instructive. In *Lee-Grigg*, the defendant was charged with forgery when she submitted duplicative receipts to a state agency to recoup her costs for relocating a victim. The defendant argued that she lacked the requisite criminal intent to commit forgery because

she had a good-faith belief that she was authorized to seek reimbursement. The defendant's counsel submitted several requests to charge to the trial court, including one to the effect that there is a good faith defense to the crime of forgery and another that the jury could consider evidence of the defendant's good character in deciding whether she possessed the requisite criminal intent. The trial court refused to give the jury either of these two requested charges. The case was submitted to the jury, and after some deliberation the jurors asked the judge to reinstruct them on the definition of 'intent. The trial court recharged the jury and sent them back to deliberate. They subsequently returned with a guilty verdict.

The defendant in *Lee-Grigg* appealed, arguing that the trial court erred in failing to instruct the jury as requested. With regard to the second requested charge on character evidence, the Supreme Court noted that "the dispositive issue presented by the defense was whether [the defendant] believed in good faith that she was authorized to apply for reimbursement" and "[t]he jurors' request for a recharge on the definition of 'intent' is evidence that they were struggling with this question." *Id.* at 317, 692 S.E.2d at 898. Because "[c]haracter evidence of [the defendant's] reputation for honesty and trustworthiness was admitted, but without an instruction . . . that [the jury] could consider this evidence in determining her credibility and her culpability" the defendant was prejudiced. *Id.* The Supreme Court determined that such error was not harmless. *Id.*; *see also Ellison v. Parts Distributors, Inc.*, 302 S.C. 299, 302, 395 S.E.2d 740, 741 (Ct. App. 1990) (recognizing that "[f]ailure of the trial judge to give . . . requested charges [can be] prejudicial" where the requested charge relates to "the sole issue before the jury" and "the majority of evidence presented" during trial).

Similarly, in this case counsel repeatedly presented arguments to the jury that causation was the focal point of the trial. (*See* R. p. 244, lines 16-23; p. 248, lines 5-11.) Specifically, Pickens' counsel directed the jury's attention to its argument that there was no evidence Pickens' acts or omissions were the cause-in-fact of the fire. (*Id.* at p. 253, line 10 – p. 254, line 2.) He also argued with equal force that the ignition of a fire was not foreseeable to Pickens, given that fire-resistant materials were alleged to have been stored in a place where they were not subject to molestation by passersby or other parties. (*Id.* at p. 252, line 20 - p. 253, line 4; p. 834, line 21 - p. 836, line 1; p. 838, line 20 - p. 839, line 2.) The jury's request for clarification on the definition of proximate cause evidences its struggle with the issue. Without a jury instruction on causation that included foreseeability, the jury was misguided on the question whether Pickens should be found liable for breaching the parties' contract or in negligence.

In *State v. Anderson*, 322 S.C. 89, 470 S.E.2d 103 (1996), the South Carolina Supreme Court explained: "when a jury requests an additional charge, it is sufficient for the court to charge only those matters necessary to answer the jury's request." *Id.* at 94, 470 S.E.2d at 106 (internal quotation and citations omitted). Here, the trial court attempted to charge only those matters necessary to address the jury's question related to proximate cause (R. p. 882, lines 16-20), but in reality it failed to charge the jury on the full and complete definition of proximate cause, leading to potential juror confusion. The effect of the trial court's error was to downplay the importance of foreseeability as an element of proximate cause, which prejudiced Pickens.

In *Miller v. State*, 513 S.E.2d 27 (Ga. Ct. App. 1999), the Georgia Court of Appeals recognized that a "court's recharge [may] [leave] the jury with [a] 'mistaken

notion'" as to the applicable law where the court fails to provide adequate instructions during the recharge. *Id.* at 32. In *Miller*, the defendant was accused of committing first degree vehicular homicide after striking a bicyclist while allegedly driving drunk. Part of the State's required burden of proof was to show that the defendant's conduct was the proximate cause of the victim's death. Following a trial on the evidence, the jury was charged and sent to deliberate. During their deliberations, the jury asked the court the following question: "If we determine that the defendant was in fact DUI, then is he guilty of counts 1 or 2 by virtue of the fact that it is being determined that he was DUI. (Space) Need clear explanation of reasonable doubt." *Id.* at 31. In answering the jury's question, the Court proposed to re-read the charges on presumption of innocence, burden of proof and reasonable doubt. *Id.* The defendant also requested that the trial court recharge the jury on proximate causation, which the trial court refused. *Id.* After the jury was re-charged on the law, it deliberated further and returned a verdict of guilty.

On appeal, the Georgia Court of Appeals found that "[t]he significance of causation as the connecting link, causation in the sense of proximate cause, was not explained" to the jury, and such error was harmful to the defendant. *Id.* at 31-32. The Supreme Court noted that the defendant had two defenses: first that he did not violate the DUI statute, and second, his conduct was not, in any event, the proximate cause of the victim's death. *Id.* at 32. By failing to recharge the jury on proximate cause upon the defendant's request, the trial court's instructions "[a]t worst, . . . had the effect of depriving [the defendant] of a major defense" and "[a]t best, . . . was confusing." *Id.*

The court in *Miller* also ruled that the trial court's error was not saved by its "admonition to the jury to interpret the recharge and general charge as a whole . . .

because the recharge was merely a repetition of part of the original charge and the jury showed by its request for additional instructions that it did not comprehend the general charge on this pivotal particular." *Id.* at 32; *see also, State v. Davis*, 648 S.E.2d 354, 359 (W. Va. 2007) ("It was quite clear from the jury's question that they did not understand the trial court's initial charge...."); *State v. Brown*, 610 So. 2d 579, 581 (Fla. Dist. Ct. App. 1992) ("We may assume that the jurors could not adequately remember the definitions ..., since they requested reinstruction.").

A correlative principle to the requirement that a jury charge cover the law applicable to the case (*see State v. Burton*, 302 S.C. at 498, 397 S.E.2d at 92) is the requirement that additional charges to the jury state the law correctly and not be misleading. Courts in other jurisdictions agree. *See, Stewart v. Federated Department Stores, Inc.*, 662 A.2d 753, 757 (Conn. 1995) (court must "correctly adapt law to case in question" and "must provide jury with sufficient guidance in reaching correct verdict") (citation omitted); *see also Miller v. State*, 513 S.E.2d 27, 32 (Ga. Ct. App. 1999) ("[e]ven when the [re]charge relies on the exact language of the law, it must be calculated to enlighten rather than confuse the jury") (citation omitted); *Peake v. State*, 545 S.E.2d 309, 311 (Ga. Ct. App. 2000) ("It is not error to recharge only on the specific question so long as the recharge taken alone does not leave an erroneous impression in the minds of the jury.") (internal quotations and citations omitted). Supplemental instructions to the jury, if handled incorrectly, may result in prejudicial error requiring reversal. *See, e.g., Crim v. Shirer*, 278 S.C. 639, 300 S.E.2d 731 (1998); *see also Pearson v. Tippmann Pneumatics, Inc.*, 642 S.E.2d 691 (Ga. 2007) (recharge on proximate causation warranted reversal of case). Cases warranting reversal may include "situation[s] where the trial

court's selective re-reading of instructions . . . unfairly prejudice[s] the jury." *State v. Pannell*, 330 S.E.2d 844, 848 (W. Va. 1985).

In *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993), a jury was asked to determine whether a property owner had acquiesced to the public dedication of his land. The jury requested to be recharged on the law of dedication. The trial court erroneously substituted the word "acquisition" for the word "acquiescence" in its supplemental instruction and refused to correct the error. The South Carolina Supreme Court held that

> Acquiescence is a crucial element in determining a central issue of dedication. Considering that the uncorrected supplemental instructions were made at the request of the jury, the potential prejudicial effect of the erroneous instruction is heightened. We conclude that the inaccurate charge did not afford the jury a proper basis for determining the issues, and that the failure of the trial judge to give a corrective charge constitutes prejudicial error.

Id. at 369, 434 S.E.2d at 262.

Here, the trial court erred in concluding that even though "[f]oreseeability may be a portion of [proximate cause]" (*see* R. p. 883, lines 14-16), it did not need to be instructed merely because it was "not in [the court's] proximate cause charge" (*id.*). By failing to recharge the jury on the entire definition of proximate cause, including the pivotal element of foreseeability, the trial court misguided the jury, who was already struggling with this issue. The trial court's refusal to enlighten the jury on both requisite elements of proximate cause was prejudicial to Pickens and should be reversed.

IV. THE TRIAL COURT ERRED IN BIFURCATING THE LIABILITY AND DAMAGES PHASES OF TRIAL WHERE CAUSATION AND DAMAGES WERE INEXTRICABLY INTERTWINED.

In the case at bar, Winthrop's contract and negligence claims were both founded upon the contention that Pickens' conduct worsened the effects of the fire that occurred on March 6, 2010. (*See* R. p. 790, lines 6-8; p. 790, line 25 – p. 791, line 2; p. 791, lines 4-5.) Winthrop relied upon a fire "spread" or "aggravation" theory because it was unable to prove how the fire started or who caused it to ignite. (*Id.* at p. 290, lines 15-18; p. 295, lines 12-23; p. 747, lines 22-24.[9])

Prior to the start of trial, Winthrop's counsel moved to bifurcate the liability and damages phases of trial pursuant to Rule 42(b) of the *South Carolina Rules of Civil Procedure*. (*See* R. p. 149, lines 7-11.) The trial court granted that motion over Pickens' objection. (Id. at p. 149, line 20 – p. 151, line 6.) In granting Winthrop's motion, the trial court ruled that a bifurcated trial was in the interest of the parties, witnesses and judicial economy:

> 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 these witnesses on damages will not be called during the liability phase. It makes sense to me to bifurcate because if the jury [was] to return a verdict for [Pickens] we wouldn't have to spend all that time with all those witnesses on damages.

(Id. at p. 150, lines 2-13.) The decision to bifurcate was completely inappropriate in these circumstances, as any consideration of time savings was outweighed by the

[9] The trial court recognized that Winthrop had been unable to present evidence as to the cause or ignition source for the fire. (R. p. 488, line 25 – p.489, line 4; p. 679, lines 2-10. *Id.* at p. 964, lines 5-20 ("The jury found proximate result in damage to the plaintiff. And that's what this case is about. Not on the spread liability, fire spread liability theory. And I think that's where the defense missed the boat on this one, in arriving at their assessment and refusing absolutely to recognize any liability whatsoever on their part and refusing to try to work this case out somehow prior to a jury verdict. . . . I don't see [this case] [as] a spread liability case at all.").)

problem created by separating the jury's consideration of causation from the evidence of Winthop's alleged damages.

"Bifurcating a trial directly impacts how issues are presented at trial and the lens through which a judge or jury views a case." Note, Brian A. Comer, *Bifurcation of Civil Cases in South Carolina and the Fourth Circuit: What to Consider and How Parties Can Benefit*, 19 S.C. Law. 30 (Nov. 2007). The decision to grant or deny a motion to bifurcate is within the discretion of the trial court. *See Senter v. Piggly Wiggly Carolina Co., Inc.*, 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000) (*citing* Rule 42(b), SCRCP).

Although the trial court is given "broad discretion" in considering whether to grant a motion to bifurcate, such "discretion . . . is limited." *Cox v. E.I. DuPont de Nemours & Co.*, 39 F.R.D. 56, 57-58 (D.S.C. 1965). "This Court, mindful of the broad power of its 'discretion,' is ever cognizant of the limitation of its use to that which is right, is just, promotes the fairest and most impartial trial." *Id.* at 58. Although "consider[ations] of time and money [are] factors . . . , the real issue is prejudice or lack of prejudice with convenience as a close second." *Id.* at 58; *see also In re Benedictin Litigation*, 857 F.2d 290, 308 (6th Cir. 1988) ("A paramount consideration at all times in the administration of justice is a fair and impartial trial to all litigants. Considerations of economy of time, money and convenience of witnesses must yield thereto.") (quotation omitted).

Bifurcation of liability and damages is appropriate "only" if the issues do not overlap and are so distinct that a separate trial of each would not result in injustice. *See Creighton v. Coligny Plaza Ltd. Partnership*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998) (citation omitted); *see also Flagstar Corp. v. Royal Surplus Lines*, 341 S.C.

68, 73 n. 8, 533 S.E.2d 331, 333 n.8 (2000) ("In exercising their discretion, trial judges should take care to analyze whether or not the issues are overlapping or not distinct, in determining whether or not the 'separate issue' mandate of Rule 42(b) is met.").

Courts in other jurisdictions similarly recognize that "to justify a separate trial on the issue of liability, it must appear that it is separate and distinct from the issue as to damages, that such prior trial will not operate to the prejudice of a party to the action, and that it will expedite the litigation or lessen the cost thereof." *State ex rel. Perry v. Sawyer*, 500 P.2d 1052 (Or. 1972) (quotation omitted).

In cases where the nature of the plaintiff's injuries or damages have a direct bearing on the question of liability, as when there is a serious question whether the defendant's conduct was the proximate cause of a particular injury or category of damage, the jury should consider the two items simultaneously and bifurcation is improper. *Mason v. Moore*, 641 N.Y.S.2d 195 (N.Y. App. Div. 1996); *see also Rooss v. Mayberry*, 866 So. 2d 174, 176 (Fla. Dist. Ct. App. 2004) (bifurcation inappropriate where "issues of damages and causation ... are related and necessarily have an 'important bearing' on one another") (citation omitted); *Walker Drug Co., Inc. v. LaSal Oil Co.*, 972 P.2d 1238, 1245 (Utah 1998) (where issues of liability and damages are "not clearly separable" the trial court may err in granting a motion to bifurcate); *see also Ennix v. Clay*, 703 S.W.2d 137, 140 (Tenn. 1986) ("separation of issues in a trial is inappropriate where the nature of plaintiff's injuries could have an important bearing on the issue of liability") (citation omitted); *Verner v. Nevada Power Co.*, 706 P.2d 147, 150 (Nev. 1985) (where "issues of liability and damages [are] inextricably interrelated" bifurcation may be prejudicial to a party).

Other courts have held that where a defendant is alleged to have aggravated or worsened the plaintiff's pre-existing conditions, trial judges may commit reversible error in bifurcating trial into separate phases on liability and damages. *Agron v. Trustees of Columbia Univ. in City of New York*, 1997 WL 399667 (S.D.N.Y. July 15, 1997); *State ex rel. Perry v. Sawyer*, 500 P.2d 1052 (Or. 1972); *C.W. Regan, Inc. v. Parsons, Brinckerhoff, Quade and Douglas*, 411 F.2d 1379 (4th Cir. 1969). These cases stand for the proposition that separate trials on the issue of liability and damages could prejudice a party because the jury is unable to determine issues of proximate causation in light of the alleged pre-existing and later aggravated damages. *See id.* For example, in *State ex rel. Perry v. Sawyer*, 500 P.2d 1052, the Supreme Court of Oregon considered a personal injury case where the plaintiff sought damages for personal injury and "aggravation of a pre-existing emotional condition allegedly sustained in a motor vehicle accident." *Id.* at 1054. Because "plaintiff's emotional instability is important, not only regarding the extent of her injuries, but also concerning the question of liability," the Court held that bifurcation was inappropriate. *Id.*

Similarly, in *Agron v. Trustees of Columbia Univ. in City of New York*, 1997 WL 399667, the U.S. District Court for the Southern District of New York held that the evidence of liability and damages was inextricably intertwined where the plaintiff alleged that her "Post-Traumatic Stress Disorder and other physical disabilities worsened, or that Defendant's conduct caused new injuries different from those she suffered from previously." *Id.* at *2. "In either case, the evidence necessary to establish a handicap for the liability stage appears to be intertwined with the evidence of Plaintiff's damages." *Id.* "The Court thus finds that the liability and damages issues in this case are not so distinct

as to warrant bifurcation." *Id.*; *see also Shea v. 5008 Broadway Assoc.*, 739 N.Y.S.2d 155 (N.Y. App. Div. 2002) (where plaintiff allegedly sustained injuries from scalding hot water, "[t]he nature and extent of [the] burns were inextricably intertwined with the question of defendant's liability, thus requiring medical proof to show the causal connection between the subject incident and the injury in order to establish liability").

Winthrop's expert witness, Dan Arnold, testified at length as to his opinion that without Pickens' storage of combustible materials on the flat roof between Bancroft and Owens Halls, the subject fire would not have spread and caused the extensive damage that occurred on Winthrop's property. He opined:

> Q: And is it your opinion that this fire -- how can you have an opinion as to the fire spread without knowing how the fire -- what was the source of ignition for the fire?
>
> A: Well, we know the fire occurred.
>
> Q: Right.
>
> A: And we know the fire that did occur created the damage that we see and the observations that I already pointed out. For a fire of that magnitude and 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.

(R. p. 747, line 25 - p. 478, line 18.)

Bifurcation was inappropriate because the jury was forced to separately consider proximate cause and damages, even though these two issues were inextricably linked. In the first phase of trial, the jury heard evidence that but for Pickens' storage of combustible materials on the flat roof, the subject fire would not have spread to the adjoining roofline—making the fire and its resulting damages worse. (*See* R. p. 748, lines 1-19 (expert testimony of Dan Arnold).) However, the jury was precluded from making a determination as to what damages would have resulted from the fire irrespective of Pickens' conduct, versus what damages were caused by Pickens' improper storage of roofing materials on the flat roof. These issues were not separate and distinct and should not have been bifurcated. *Creighton v. Coligny Plaza*, 334 S.C. at 108, 512 S.E.2d at 516 (holding bifurcation of liability and damages is appropriate "only" if the issues do not overlap and are so distinct that a separate trial of each would not result in injustice). The bifurcation of these issues foreclosed the issue of causation before the jury was ever presented with Winthrop's damages. This decision was erroneous and prejudiced Pickens.

Although the trial court may have relied on grounds such as judicial economy and convenience, such issues do not trump a party's right to a fair trial. *Rossano v. Blue Plate Foods, Inc.*, 314 F.2d 174, 176 (5th Cir. 1963) ("While conservation of both time and money are the bedrock basis for the rule, it is also [true] that if trial on a limited issue is prejudicial to the objecting party there has been an abuse of discretion which should be reversed"). The trial court's decision to separate the issues of liability and damages did just that, and this case should be reversed and remanded for a new trial.

V. THE TRIAL COURT ERRED IN DENYING PICKENS' MOTION FOR DIRECTED VERDICT AS TO DAMAGES BECAUSE WINTHROP FAILED TO PRESENT ANY TESTIMONY ESTABLISHING THE DEGREE TO WHICH PICKENS' CONDUCT WORSENED THE DAMAGES RESULTING FROM THE FIRE.

"Neither the existence, causation, nor amount of damages can be left to conjecture, guess or speculation." *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008). "Generally, in order for damages to be recoverable, evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy." *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981); *Armstrong v. Collins*, 366 S.C. 204, 225, 621 S.E.2d 368, 379 (Ct. App. 2005). Winthrop failed to provide the jury in this case with the evidence it needed to make an appropriate determination as to what damages Pickens caused with reasonable certainty or accuracy.

South Carolina adheres to the general rule that a defendant can only be held liable for damages proximately caused by its acts or omissions. *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008); *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962). A defendant is not liable for pre-existing conditions, nor is it liable for damages that the plaintiff would have sustained in the absence of the defendant's acts or omissions. However, a defendant is liable for the exacerbation of pre-existing conditions. *Raino v. Goodyear Tire & Rubber Co.*, 309 S.C.255, 422 S.E.2d 98 (1992); *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 136 S.E.2d 286 (1964).

In cases of property damaged by fire, an owner may recover such damages as will restore him to the same property status that he occupied before his property was burned. *Nelson v. Coleman Co.*, 249 S.C. 652, 155 S.E.2d 917 (1967); *Hall v. Seaboard Air Line*

Ry. Co., 126 S.C. 330, 119 S.E. 910 (1923). The goal of an actual damages award is to compensate the plaintiff for losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position it would have been in if there had been no wrongful injury. *Mellen v. Lane*, 377 S.C. at 287, 659 S.E.2d at 250.

In the present case, the jury was told that a fire ignited by unknown means (*see* R. p. 295, lines 21-23; p. 747, lines 22-24) and that Pickens' behavior caused the fire to spread (*id.* at p. 754, line 6 – p. 755, line 4; p. 766, lines 12-19). However, the jury was not given the critical piece of evidence that it needed to know so that it could discharge its duty of only awarding damages to Winthrop that were proximately caused by Pickens: the cost of such repairs to Winthrop's property in the absence of Pickens' breach of duty. This hole in the evidentiary record renders the jury's verdict fatally flawed, as it unquestionably holds Pickens liable for *all* of Winthrop's losses occasioned by the fire. Pickens acknowledges that Winthrop was not required to prove its damages with mathematical certainty, but given Winthrop's theory that Pickens' actions aggravated or exacerbated the damage resulting from a fire whose ignition could not be attributed to Pickens, Winthrop should have been required to offer some evidence as to what damage would have resulted from the fire without Pickens' involvement. Because Winthrop's evidence failed to "enable the jury to determine the amount" of its losses that were attributable to Pickens "with reasonable certainty or accuracy," its negligence and contract actions must fail. *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981); *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005). The trial court's denial of Pickens' directed verdict motion should therefore be reversed.

VI. THE TRIAL COURT ERRED IN FAILING TO ADJUST THE JURY'S VERDICT AS TO DAMAGES ACCORDING TO ITS COMPARATIVE NEGLIGENCE DETERMINATION.

Winthrop asserted two causes of action against Pickens: breach of contract and negligence. (*See generally* R. pp. 13-19.) Winthrop based its contract claim on several contractual provisions, all of which incorporated, in one way or another, duties that already existed by way of law or regulation. Pickens' compliance with the following contractual terms was at issue:

> 1500-1.9(L) Initiate, maintain and supervise all safety precautions and programs in connection with the work. Take all necessary precautions for the safety of, and provide the necessary precaution to prevent damage, injury or loss ...
>
> 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.
>
> 1700-3.4 (A)(1) Comply with requirements in NFPA 241 for removal of combustible waste materials and debris.

(R. p. 991 at 1500(L)(4), 1700-3.4(A)(1).) Winthrop's negligence cause of action was purportedly based on Pickens' failure to act in a reasonable, "professional and workmanlike manner." (R. p. 17 at ¶ 23; *see also id.* at ¶ 24(a)-(h).) Pickens asserted the affirmative defense of comparative negligence. (*See* R. pp. 61-66.)

During trial, Winthrop focused on Pickens' alleged failure to follow applicable laws and regulations, including the 2006 edition of the International Fire Code, which incorporates by reference Chapter 241 of the codes and standards promulgated by the NFPA. (*See* R. p. 320, line 17 – p. 321, line 12; p. 400, line 11 – p. 401, line 10; p. 422, line 15 – p. 425, line 3; p. 441, line 16 – p. 442, line 22; p. 443, line 15 – p. 450, line 10; p. 578, line 19 – p. 579, line 15; p. 590, lines 11-23; p. 666, line 20 – p. 668, line 10; p.

667, line 21 – p. 668, line 1.) In its closing argument to the jury, Winthrop referenced Pickens' alleged breach of the contract. "There is no dispute that the contract required Pickens to follow code." (*Id.* at p. 819, lines 22-24; p. 820, lines 5-6 (stating the contract required Pickens to "comply with all applicable laws.").) Winthrop presented evidence of Pickens' employees' alleged lack of knowledge regarding NFPA 241, which was in effect at the time of the fire and which Pickens was required by both law and the parties' contract to follow. (*See* R. p. 991 at 1700-3.4(A)(1); *see also* R. p. 417, line 22 – p. 418, line 22; p. 456, line 21 – p. 458, line 12; p. 556, line 21 – p. 558, line 18.)

Pickens presented evidence of Winthrop's own contributory negligence in its failure to take measures required by statute to minimize the risk of fire. (*See* R. p. 531, lines 9-23; p. 579, lines 16-24; p. 584, line 15 – p. 586, line 5.) In its closing argument to the jury, Pickens argued that just as Pickens had legal obligations that were prescribed by the fire code, Winthrop had legal obligations of its own that it failed to adhere to by not designating a fire prevention program superintendent, as required by law. (*Id.* at p. 833, lines 6 – 834, line 10.) After hearing all of the evidence in the liability phase, the jury returned a verdict in Winthrop's favor as to its breach of contract and negligence causes of action, but it found that Winthrop bore 40% of the responsibility for the loss. (*Id.* at p. 884, line 3 – p. 885, line 5.)

Following the close of all evidence, Pickens moved that the judgment be governed by the jury's comparative negligence determination on the grounds that the duty giving rise to Winthrop's contract claim was identical to the duty that gave rise to Winthrop's negligence claim. (R. p. 978, lines 7-22.) The trial court denied Pickens' motion. (*See id.* at p. 981, line 2 – p. 989, line 10.) Winthrop elected to recover under its

contract claim, which the trial court held to be unaffected by the jury's comparative negligence determination. (R. p. 984, line 8 - p. 986, line 4.)

Ordinarily, comparative negligence does not operate as a defense to a breach of contract action. *See Ritter & Assoc., Inc. v. Volkswagen, Inc.*, 405 S.C. 643, 748 S.E.2d 801 (Ct. App. 2013). However, South Carolina does recognize that a breach of duty that arises independently of any contract duties between the parties may support a tort action. *Cullum Mech. Const., Inc. v. South Carolina Baptist Hosp.*, 344 S.C. 426, 544 S.E.2d 838 (2001). As Circuit Judge L.D. Lide explained in an opinion adopted by the South Carolina Supreme Court in *Meddin v. Southern Railway-Carolina Division*, 218 S.C. 155, 165, 62 S.E.2d 109, 112 (1950):

> [I]f the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie. On the other hand, where the contract creates a certain relationship between the parties, and certain duties arise by operation of law, irrespective of the contract, because of this relationship, then the breach of such duties warrants an action in tort.

See generally W. Page Keeton et al. *Prosser and Keeton on the Law of Torts* § 92 (5th ed. 1984) ("Tort obligations are in general obligations that are imposed by law on policy considerations to avoid some kind of loss to others. They are obligations imposed apart from and independent of promises made and therefore apart from any manifested intention of parties to a contract or other bargaining transaction"); *Jacques v. First Nat'l Bank of Maryland,* 307 Md. 527, 534, 515 A.2d 756 (1986) ("Where a contractual relationship exists between persons and at the same time a duty is imposed by or arises out of circumstances surrounding or attending the transaction, the breach of such duty is a tort"); *Interwest Const. v. Palmer*, 886 P.2d 92, 101 (Utah Ct. App. 1994), *aff'd* 923 P.2d 1350 (Utah 1996) ("In some cases an act or omission resulting in a breach of contract

may also constitute a breach of duty that is not subsumed by the contract and may thereby give rise to a cause of action sounding in tort").

In the present case, the duty giving rise to Winthrop's breach of contract claim exists outside of the contract between the parties. Winthrop based its contract claim on language in the parties' agreement that 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." (R. p. 991, at 1500-3, § 1.9(L)(4); p. 1700, § 3.4(A)(1); R. p. 819, line 16 - p. 820, line 6.) Winthrop alleged that Pickens breached this duty by failing to adhere to the requirements of the 2006 edition of the International Fire Code, which incorporates by reference NFPA 241, all of which were stipulated by the parties to have the force of law in South Carolina at the time of the fire. (*See* R. p. 153, lines 9-12; p. 153, lines 17-25.)

The parties' contract therefore merely acknowledged the duties imposed upon Pickens by statute, rather than imposing obligations upon Pickens that did not otherwise exist. Winthrop may argue that its breach of contract action was predicated upon other language in the contract that limited Pickens' storage of construction materials to locations approved by Winthrop. Section 1500-2, 1.9(D) of the Specifications provides: "Prior to starting work, [Contractor must] obtain approval from Owner for locations of work operations at ground level, such as material storage, hoisting, dumping, etc. Restrict work to approved locations." (R. p. 991 at 1500-2, § 1.9 (D).) However, under even the broadest reading of that provision, it cannot be said to have any bearing upon whether, and to what extent, Pickens could store materials *on the roof*, where the

combustible materials that served as the alleged fuel for the fire in this case were allegedly stored.

Winthrop's breach of contract action is therefore coextensive with its negligence claim, as both arise from the same duty of care. Ultimately, the claim that Winthrop denominated as "breach of contract" lies in tort, and the jury's comparative negligence determination should therefore govern the court's judgment in this case. It would violate public policy for a contracting party to essentially incorporate by reference the duties to which the opposing party is otherwise bound by law into a contract and thereby escape an apportionment of liability for his own contributions to a particular loss. *See Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991) (referencing opinion of Chief Judge Sanders in *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984) ("One person being at fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.").

Like courts in many other states, South Carolina has struggled to determine whether certain causes of action lie in tort or contract. *See generally* James J. White, *Reverberations from the Collision of Tort and Warranty*, 53 S.C. L. Rev. 1067 (2002). In most situations, the plaintiff seeks to convert what is otherwise a contract action into a tort claim in hopes of recovering tort damages. Here, on the other hand, Winthrop seeks to distinguish its contract claim from its negligence cause of action to avoid the jury's finding that it bears forty percent (40%) of the fault for its loss.

In other settings, the determination of whether a given claim sounds in contract or tort might not be clear, but there is unquestionable clarity here. Winthrop has clothed a

pure tort claim in the mantle of contract, but it cannot point to any contractual obligation that Pickens promised to undertake that it was not otherwise obliged to perform under South Carolina law. Pickens is by no means seeking to have this Court recognize a new defense to breach of contract actions.[10] It merely seeks a resolution, perhaps limited to the facts of this case, that recognizes the type of duty allegedly breached here, to which tort defenses should be applicable.

If the Court is unwilling to grant Pickens judgment as a matter of law or a new trial for the reasons set forth elsewhere in this brief, then it would respectfully request that the trial court's judgment be governed by the jury's comparative negligence determination.

CONCLUSION

Based on the foregoing, Pickens respectfully submits that this Court should reverse the trial court's denial of Pickens' motion for directed verdict as to liability and/or motion for directed verdict as to damages. In the alternative, Pickens requests that this Court reverse and remand the case for a new trial based on the trial court's denial of Pickens' motion for new trial absolute based on the trial court's refusal to strike Juror 25 for cause. Alternatively, Pickens asks the Court to remand the case to the trial court with

[10] Many commentators have argued for the recognition of comparative fault as a defense to certain kinds of contract actions. Ariel Porat, *A Comparative Fault Defense in Contract* Law, 107 Mich. L. Rev. 1397 (2009); John Barclay Phillips, *Out with the Old: Abandoning the Traditional Measurement of Contract Damages for a System of Comparative* Fault, 50 Ala. L. Rev. 911 (1999). Some courts have resolved the issue by interpreting a jury's finding that a plaintiff bears a share of responsibility for its own loss as a determination that the plaintiff failed to mitigate its damages (a traditional contract defense) to that extent. *See, e.g., Lesmeister v.* Dilly, 330 N.W.2d 95 (Minn. 1983);*Gateway Western Ry. v. Morrison Metalweld Process*, 46 F.3d 860 (8th Cir. 1995). Pickens does not believe the present facts warrant such judicial creativity.

an instruction that the judgment be adjusted according to the jury's comparative negligence determination.

Respectfully submitted,

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February 2, 2015.

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SC Court of Appeals

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 **Brief of Appellant** and **Reply Brief of Appellant** on Respondent The Winthrop University Trustees for the State of South Carolina by depositing a copy of said documents in the United States Mail, postage prepaid, on February 5, 2015, addressed to Respondent's attorneys of record, Peter W. Vogt, Esquire, and Zachary M. Jett, Esquire, at 11620 N. Community House Road, Charlotte, North Carolina 28277.

Victoria Moody – Paralegal

February 5, 2015.