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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

SC Court of Appeals

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.

REPLY BRIEF OF APPELLANT

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ARGUMENTS

This case presents a dangerous opportunity for the creation of new law that would result in the wholesale abandonment of traditional notions of proximate causation in South Carolina. Until now, this state has adhered to the black letter formulation of proximate cause, which requires a plaintiff to prove both cause-in-fact and foreseeability. If the trial court's ruling below is allowed to stand, both of these elements will be replaced by a legal construct in which fortuitous proximity and happenstance may give rise to monumental liability. While the attendant procedural errors committed by the trial court provide a solid foundation for reversal, it is its adoption of a novel theory of liability that carries the greatest risk of opening new, unintended avenues of recovery and upsetting well-settled principles regarding the apportionment of risk between contracting parties.

I. WINTHROP'S THEORY OF LIABILITY, WHATEVER ITS NAME, FAILS AS A MATTER OF LAW.

Winthrop vehemently argues that it did not rely on a "spread theory" in this case and that Pickens uses this theory as a "straw man." *See* Initial Brief of Respondent at pp. 27-28. Whether it is labeled as a "spread theory" or not, it is undisputed that Winthrop sought to hold Pickens liable for making the fire worse, as it had no evidence that Pickens caused the fire to ignite. In the unique circumstances presented here, Winthrop cannot survive the "but for" test of causation and a directed verdict should have been granted.

The "spread theory" utilized by plaintiffs in other jurisdictions (and described in the cases cited by Pickens) was the only theory available to them, because unexplained fires caused their damages. The cited cases do not rise and fall on the fact that many of those cases involved adjoining landowners, and therefore cannot be distinguished from

the facts in this case on that basis. Rather, in those cases courts allowed the injured plaintiffs to recover from the defendants because the conditions that the defendants created gave “rise to an extraordinary and undue risk of combustibility.” *See* 23 Am. Jur. *Proof of Facts* 2d 461 at § 8. By creating and/or maintaining such dangerous and unsafe conditions, courts have reasoned that it was foreseeable that *a fire may start*, even if the precise mechanism of its ignition was undetermined. *See id.*

Winthrop’s theory of recovery, whatever its name, is fatally flawed because Pickens’ alleged misconduct was not the “but for” cause of the fire’s ignition, nor was it reasonably foreseeable that such a fire would begin as a consequence of such misconduct. Winthrop therefore failed to establish proximate causation, a requisite element of both its breach of contract and negligence causes of action.

There is no dispute that Winthrop failed to trace the cause of the fire’s ignition to Pickens. Moreover, Winthrop failed to establish that it was reasonably foreseeable to Pickens that a fire was more likely to ignite because of the construction materials stored on the flat roof. The construction materials were intended to be installed on the adjacent pitched roof and were not known to spontaneously combust. The mere storage of these materials did not create an extraordinary and undue risk of combustibility such that liability based on a “spread theory,” or some other negligence theory, could be established.

Furthermore, it was unforeseeable that a fire was likely to start *on the flat roof*, as opposed to any other location in, on or near Owens or Bancroft Halls. Given that it was, according to the uncontradicted evidence in the record, not a location where people would be expected to be during the almost 24-hour period between the time that Pickens’

employees left the worksite and when the fire occurred,¹ or where any mechanical activity was taking place,² a fire breaking out on the flat roof was no more likely than a fire igniting in a classroom, professor's office, or an HVAC system. It was therefore unforeseeable to Pickens that its alleged storage of felt paper or shingles would cause a fire to spread or be made worse, even if the manner of its storage violated NFPA 241. Winthrop's theory therefore fails, rendering the trial court's denial of Pickens' directed verdict motion erroneous.

II. THE PREJUDICE ANALYSIS URGED BY WINTHROP FOR ERRONEOUSLY QUALIFIED JURORS ONLY APPLIES IN CRIMINAL CASES.

The separate and distinct processes for examining prospective jurors and impaneling juries in civil and criminal proceedings are set forth in S.C. Code Ann. §§ 14-7-1010 – 1140 (Supp. 2014). In both types of cases, jurors are required to be impartial and the trial court must undertake the appropriate examination to prevent unqualified persons from jury service:

The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.

¹ Winthrop Police Officer Jamie Howe testified that he had to unlock the doors from the attic to the flat roof in order to let firefighters onto the flat roof to fight the fire. (*See* R. p. 484, lines 12-15. *See also* R. at p. 589, lines 2-9 (testimony that to access the flat roof, a person would have to go through an attic from the third floor and the doors to the attic are typically locked).)

² (*See* R. p. 589, lines 10-15 (Hardin affirming that “[n]o part of the mechanical system for the elevator is on the [flat] roof.”).)

S.C. Code Ann. § 14-7-1020 (Supp. 2014). “It is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair, and impartial.” *State v. Holland*, 261 S.C. 488, 495, 201 S.E.2d 118, 122 (1973); *see also Alston v. Black River Electric Co-op.*, 345 S.C. 323, 326-27, 548 S.E.2d 858, 859 (2001) (“If a potential juror has an interest in the lawsuit such that she is ‘not indifferent in the cause,’ the juror shall be deemed incompetent to serve on the jury.”) (quotation omitted).

The specific process for impaneling a jury in a civil action is set forth in Sections 14-7-1050 – 1070 (Supp. 2014). Section 14-7-1050 provides, in relevant part,

[T]he clerk ... shall furnish the parties or their attorneys with a list of twenty jurors from the whole number of jurors who are in attendance, the names on the list to be numbered from one to twenty, and be stricken off by numbers in the same manner as the regular panels of jurors in those courts have been formed. From this list the parties or their attorneys shall alternatively strike, until there are but twelve left, which shall constitute the jury to try the case or issue. In all cases the plaintiff shall have the first strike and in all civil cases any party shall have the right to demand a panel of twenty competent and impartial jurors from which to strike a jury.

S.C. Code Ann. § 14-7-1050 (Supp. 2014). “[O]bjection[s] for cause must be made before striking” S.C. Code Ann. § 14-7-1070 (Supp. 2014).

The Supreme Court has stated that the legislative intent of § 14-7-1050 was to give litigants a fair and impartial jury which is guaranteed by the State Constitution. *See Brown v. S.H. Kress & Co.*, 170 S.C. 178, 170 S.E. 142, 143 (1933) (citation omitted); *see S.C. Const. Art. I, § 14.*

In sharp contrast to the specific rules for the striking of a civil jury (*see S.C. Code Ann. §§ 14-7-1050, 14-7-1070*), in criminal cases the law simply requires that it be done “according to the established practice.” S.C. Code Ann. § 14-7-1100 (Supp. 2014). Commentators have explained the “established practice” as follows:

[J]urors are required to come forward and stand before the parties and their attorneys, who then express their approval or disapproval, the state going first. The customary procedure is that the solicitor will say either “Excuse the juror,” in which case the juror resumes his or her seat, or “Present the juror,” in which case the defense must then decide whether to accept or reject the juror. The defense must then either exercise a strike, stating “Excuse the juror,” or “Seat the juror,” in which case the juror is seated in the jury box.

23 S.C. Jur. *Jury* § 28.

In light of the differences between the procedures used to impanel juries in civil and criminal cases, the Supreme Court’s analysis in *Green v. Maynard*, 349 S.C. 535, 564 S.E.2d 83 (2002), cited by Winthrop as barring Pickens’ arguments with respect to Juror 25 (*see* Initial Brief of Respondent at p. 20), is inapposite here. *Maynard*’s three-part test, requiring that the objecting party (i) “exhaust[] all . . . peremptory challenges”; (ii) demonstrate “the juror was erroneously qualified”; and (iii) “demonstrate he was deprived of a fair trial” (*id.* at 538, 564 S.E.2d at 84) does not apply in a civil case.

With regard to the first element, it is worth noting that in a criminal trial, a defendant may not need or want to utilize all of his peremptory strikes. *See* 23 S.C. Jur. *Jury* § 28. However, he must do so if he wishes to preserve any error as to the qualification of a particular juror. *See Maynard*, 349 S.C. at 538, 564 S.E.2d at 84. On the other hand, a party to a civil suit always uses the four strikes allotted for each side. *See* S.C. Code Ann. § 14-7-1050 (Supp. 2014) (“From this list [of 20 prospective jurors] the parties or their attorneys shall alternatively strike, until there are but twelve left, which shall constitute the jury to try the case or issue.”).

The third *Maynard* element is likewise inapplicable in a civil trial setting. In describing the requirement that the objecting party “demonstrate he was deprived of a fair trial,” the Supreme Court concluded that the forced use of a peremptory strike upon an

otherwise unqualified juror alone is not evidence of prejudice. *See Maynard*, 349 S.C. at 541-42, 564 S.E.2d at 86 (citing *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000)). The Court explained that an objecting party must demonstrate “he was deprived of a subsequent strike he would have exercised, and to which he would have been entitled, but for the forced strike. Such a claim may be preserved by stating for the record an articulable objection to a subsequently presented juror.” *Id.* at 86 n. 6, 564 S.E.2d at 542.

An objecting party in a civil action has no opportunity to “object[] to a subsequently presented juror” after all of its strikes have been utilized. Thus, the requirements established by *Maynard*, including that the objecting party show prejudice by “demonstrating he was deprived of a fair trial,” cannot logically be imposed upon litigants in a civil action.

Here, Pickens was deprived of its statutory right to “a panel of twenty *competent* and *impartial* jurors from which to strike a jury” pursuant to Section 14-7-1050 (emphasis added) because the trial court erroneously qualified Juror 25.³ By failing to excuse Juror 25 for cause prior to establishing the pool of twenty jurors from which the parties would strike, the trial court required Pickens to use one of its peremptory strikes on an impartial and unqualified juror. This error mandates a new trial.

³ The trial court had adequate evidence before it to find that Juror 25 was potentially biased. She was currently affiliated with Winthrop as a “student researcher,” she was a recent graduate of the University, and she had personal knowledge of the facts of the case, including the cause of the fire. (*See R.* p. 116, lines 7-8, 16-17, 20-22; p. 121, line 6; p. 136, lines 10-15.) The court’s failure to acknowledge all of these issues in denying Pickens’ motion to disqualify evidences its miscomprehension of Juror 25’s potential for partiality. (*Id.* at p. 145, lines 11-23.)

III. PICKENS PRESERVED ITS OBJECTION TO BIFURCATION.

Winthrop argues that Pickens has not preserved its objection to bifurcation on the ground that causation and damages were inextricably intertwined. *See* Initial Brief of Respondent at pp. 38-39. Winthrop asserts that Pickens should be limited to its pre-trial objection to bifurcation. *See id.* The law of error preservation yields no support for this proposition. Prior to the trial court’s evidentiary rulings limiting Winthrop’s expert’s testimony, Pickens could have not known that causation and damages would become so integrally related. At the appropriate time, in its motion for new trial, Pickens timely raised the very argument it now posits to this Court. (*See* R. p. 977, line 17 – p. 978, line 3.)

At the outset of trial, Winthrop intended to prove that Pickens’ conduct not only caused the fire to spread, but also that it led to the fire’s *ignition*.⁴ Pickens objected during the pre-trial conference to Winthrop’s motion to bifurcate based on its concern that “the jury ought to know the full amount of the damages and that . . . [if the issues were bifurcated] the jury would not perceive the magnitude of the damages and the magnitude of any verdict in this case.” (R. p. 986, line 17 – p. 987, line 2.) Pickens’ objection was founded upon its concern that the jury’s determination of the central question in the case (at least at that point)—whether Pickens started the fire—might not be given appropriate consideration in the absence of evidence as to the size of Winthrop’s alleged damages.

⁴ (*See* R. p. 211, lines 21-22 (stating to the trial court that “[t]his fire would not have occurred and spread if there weren’t combustibles there.”); p. 244, lines 16-23 (stating to the jury during its opening statement that “this fire would not have occurred or spread to Owens and Bancroft but for combustibles being stored on the flat roof”).)

The trial court bifurcated the trial into liability and damages phases based on its conclusion that separate trials on these issues would promote convenience and save judicial resources. *See* Rule 42(b), SCRCP. (R. p. 149, line 25 – p. 151, line 13.) However, case law requires that such considerations yield to concerns of potential prejudice to a party. *See Cox v. E.I. DuPont de Nemours & Co.*, 39 F.R.D. 56, 58 (D.S.C. 1965) (“consider[ations] of time and money [are] factors . . . , [but] the real issue is prejudice or lack of prejudice with convenience as a close second.”). The trial court’s emphasis on convenience, expedition, and economy over Pickens’ objection based on potential prejudice was error.

Subsequently, during the liability phase of trial, the court narrowed the scope of Winthrop’s evidence by prohibiting its expert witness from testifying “concerning the causation, proximate cause and that sort of thing” because “we don’t have . . . any factual evidence to show what started the fire.” (R. p. 261, lines 18-24.) The trial court explained:

He can’t testify concerning . . . what was on the roof because he doesn’t know. He wasn’t up there. And when the fire got through there was nothing up there basically. Everything burned up. . . .

Now, however, once the fire started the combustible materials would have made the fire worse. And I think he can testify to that, if that’s his testimony And if he’s properly qualified with expertise in that area I think he can testify to that.

However, the Court is not going to allow him to testify on proximate cause. He can testify that if there are combustible materials up there which were prohibited that these combustible materials would have made the fire worse in allowing it to spread, to get as high as they did to get on the adjoining roofs. As I understand it that’s the plaintiff’s position and on a flat roof not allowed to have the materials and once there are combustible materials that is [sic] what caused the fire to be as bad as it was. I think he can testify concerning that, but he can’t testify concerning proximate cause because he doesn’t know what was on the roof and so,

that's the problem I see in the plaintiff's case. I don't think he can testify as to proximate cause in this case. He can't testify but for this materials [sic] up there this fire would not have occurred. That's basically the position of the defense. I don't think he can testify to that. . . .

I don't believe he can testify that this fire would not have occurred unless these materials were up there. I don't think there is enough factual evidence to support that conclusion.

(R. p. 262, line 1 - p. 265, line 5.) The court excluded the only evidence which would have established a causal connection between Pickens' storage of construction materials on the flat roof and the fire's *ignition*. (*See id.*) As a result, Winthrop's expert could only opine that but for Pickens' wrongdoing the fire would not have *spread*. (*Id.*)

Following Winthrop's proffer of its expert witness the trial court reiterated that it would not allow Winthrop to present opinion testimony that but for Pickens' conduct the fire would not have started. The court stated:

I don't see how you are going to get to ignition, when I can think of at least 30 things that could have started this fire and all of them would be pure speculation. You can't go there. That's what I am telling you. You will not be able to speculate about the cause of the fire and how it started.

(R. p. 679, lines 2-8.) Winthrop was therefore left with the theory that Pickens' actions *worsened the effects* of the fire that occurred. (*See id.* at p. 790, lines 6-8; p. 790, line 25 - p. 791, line 2; p. 791, lines 4-5.) In other words, Winthrop was forced to rely on a "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.)

The court's limitation of Winthrop's evidence as to proximate cause necessarily made the issues of causation and damages inextricably intertwined. Nonetheless, because the trial was already bifurcated, the jury was forced to consider damages in a vacuum.

Evidence of Winthrop's damages was presented after causation had already been established, leaving the jury without any ability to determine which damages would have occurred in the absence of Pickens' alleged misconduct and which damages resulted from it.⁵ The bifurcation of liability and damages prejudiced Pickens—for reasons that did not exist at the time the trial court made its decision to separate the trial into two phases. After the trial had concluded, the court erred in refusing to acknowledge that separating these issues was inappropriate where Winthrop's theory of liability had become solely focused on whether Pickens' conduct *worsened* the effects of the fire.

Creighton v. Coligny Plaza Ltd. Partnership, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998), does not support Winthrop's contention that Pickens failed to preserve its objection to bifurcation on the ground that causation and damages were inextricably intertwined, because Pickens made an objection on that very basis to the trial court. In *Creighton*, the defendant moved for bifurcation of the liability and damages phases of trial and the plaintiffs objected. *Id.* at 107-08, 512 S.E.2d at 516. At the pre-trial conference, the plaintiffs' attorney argued that bifurcation was improper on the ground that the jury should not hear "sterile testimony" alone. *Id.* at 108, 512 S.E.2d at 516. On appeal, however, the plaintiffs asserted as an additional ground that the trial court

⁵ Parenthetically, it is worth noting that Winthrop claims throughout its brief that the "evidence ... established that there would have been *no damage* had Pickens complied with the contract" Initial Brief of Respondent at p. 48 (emphasis added); *see also id.* at pp. 40, 43. This assertion has no foundation in the record. Winthrop's expert, Dan Arnold, a registered fire protection engineer, admitted that in the absence of other combustibles, a fire commencing on the flat roof "would spread, melt through the rubber roof and then eventually self-extinguish." (R. p. 750, lines 8-10.) Mr. Arnold's testimony that the fire would have "self-extinguished" is incompatible with the assertion that "no damage" would have occurred without Pickens' involvement.

Thus, even if Winthrop's theory of liability had merit, Pickens cannot be held liable for the *full amount* of Winthrop's damages where Winthrop claimed that Pickens caused those damages to be *worse* than they otherwise would have been.

“ignored judicial economy by bifurcating the trial.” *Id.* This second ground was *never* presented to the trial court. *See id.* On appeal, this Court held that “[b]ecause the argument presented by the [plaintiffs] to the trial court was based on grounds other than those raised on appeal, the issue is not properly preserved.” *Id.*

Here, Pickens is not asserting that causation and damages are intertwined for the first time on appeal. That argument was raised before the trial court at the appropriate time, in Pickens’ motion for new trial absolute. (*See* R. p. 977, line 17 – p. 978, line 3.) *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.”) (quotation omitted). Pickens gave the trial court an opportunity to rule on the issue now before this Court. In relying upon concerns for judicial convenience, expedition and economy in denying Pickens’ motion for new trial without considering the prejudice to Pickens, the trial court erred. (*See id.*)

Creighton is also distinguishable on the basis that the “judicial economy” ground submitted by the plaintiffs on appeal was available to the plaintiffs and could have been raised prior to the start of trial. In the present case, Pickens’ contention that the issues of liability and damages were intertwined and not separate and distinct was not available to it at the pre-trial conference when the court granted Winthrop’s motion to bifurcate. At that time, based on Winthrop’s expressed theory that Pickens caused the fire to ignite—thereby causing *all* of the resulting damage—the issues of causation and damages were separate and distinct. However, after Winthrop’s theory of liability changed, those issues became necessarily interrelated. Pickens’ objection to bifurcation is therefore preserved.

IV. FOR PUBLIC POLICY REASONS, THE COURT'S JUDGMENT SHOULD BE CONTROLLED BY THE JURY'S COMPARATIVE FAULT DETERMINATION.

Pickens maintains that the appropriate remedy in this case is either to reverse the trial court's denial of Pickens' directed verdict motion or, alternatively, to grant it a new trial. However, in the event that the Court reaches the question as to the bearing that the jury's comparative negligence determination should have on the judgment, then it must reject Winthrop's arguments out of hand.

Winthrop attempts to rewrite the language of the parties' contract in an effort to manufacture a separate and independent contractual duty on which to hold Pickens liable under a breach of contract theory beyond the duties to which it was bound by applicable law. Its mischaracterization of the contract provisions undermines its argument that Pickens breached any duties arising solely under the parties' agreement and supports Pickens' theory that the jury's verdict should be governed by its comparative negligence determination.

As expected, Winthrop argues in its brief that "the contract expressly provided that all roofing materials would be stored in two places, neither of which was the flat roof." *See* Initial Brief of Respondent at p. 47. It relies upon section 1.9(D) of the Specifications. (R. p. 991 at § 1500-2.) Section 1.9(D) provides:

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

(*Id.*) Winthrop submits that this provision "only authorizes storage of materials in specific locations on the ground." Initial Brief of Respondent at p. 3.

Nothing in the clear and unambiguous language of Section 1.9(D) limits storage of construction materials to the ground as Winthrop suggests. The only reasonable interpretation of that section is that it requires Pickens to: (1) obtain Winthrop's approval before commencing any work *on the ground*, and (2) keep its *ground level operations* confined to those approved locations. (R. p. 991 at § 1500-2 (emphasis added).) This interpretation is entirely consistent with the other evidence in the record regarding Winthrop's concerns with the appearance and aesthetics of its campus. (See R. p. 401, line 9 - p. 402, line 9.)

The only requirements in the parties' contract that limit the locations of material storage are Sections 1500(L)(4) and 1700-3.4(A)(1), which incorporate existing laws, ordinances, rules, and regulations, including specifically NFPA 241. (R. p. 991 at 1500(L)(4), 1700-3.4.(A)(1).) Because the duties imposed by these authorities exist outside of the parties' contract, Pickens' breach of those duties amounts to mere negligence, not a failure to fulfill obligations arising solely under the parties' private agreement.

Ritter & Assocs., Inc. v. Buchanan Volkswagen, Inc., 405 S.C. 643, 748 S.E.2d 801 (Ct. App. 2013), cited by Winthrop (*see* Initial Brief of Respondent at p. 46), is distinguishable because in this case both a tort claim and a contract claim exist. In that case, Ritter operated as a licensed used car wholesaler in the State of Florida. *Id.* at 646, 748 S.E.2d at 803. Ritter was authorized to purchase used vehicles from the Florida Auto Auction of Orlando ("FAAO") and frequently transacted with Todd Taylor, a broker in South Carolina, to resell automobiles purchased from the FAAO to dealerships in other states. *Id.* at 647, 748 S.E.2d at 803. Taylor would direct that Ritter purchase vehicles

from the FAAO and resell them to him for distribution to his dealership-clients in South Carolina. *Id.* At some point during the relationship between Ritter and Taylor, and based on the frequency of the parties' transactions, Ritter gave Taylor the authority to directly deposit checks for the purchase of the vehicles from the South Carolina dealerships into Ritter's account. *Id.* at 647-48, 748 S.E.2d at 803. Taylor used this authority to establish an elaborate check kiting scheme. *Id.* at 648, 748 S.E.2d at 803.

Upon discovering the fraud perpetrated by Taylor, Ritter brought an action against Buchanan Volkswagen, Inc., one of the South Carolina dealerships that Taylor represented, in order to recover payment for unpaid vehicles sold to Buchanan by Ritter through Taylor. *Id.* Ritter asserted multiple causes of action, including breach of contract, negligence, and negligent supervision. *Id.* at 648, 748 S.E.2d at 804. The case was tried before a special referee. *Id.* The special referee held that Ritter's allegations of negligence and negligent supervision were mere "examples of the nonperformance of the contractual obligations between the parties" and that those causes of action did not exist outside of the parties' agreement. *Id.* The court entered judgment in Ritter's favor on its breach of contract action. *Id.*

On appeal, Buchanan Volkswagen argued that the special referee failed to apportion liability between it and Ritter based on Ritter's negligent business practices in dealing with Taylor. *Id.* at 651, 748 S.E.2d at 805. In making its argument, Buchanan agreed that "[e]ven though the basis for the award sounds in contract, the negligence on Ritter's part can serve to mitigate or even entirely subsume the amount of the award." *Id.* This Court held that "the doctrine of comparative negligence is only applicable to cases alleging negligence as a cause of action." *Id.* (citation omitted). Because Buchanan's

liability to Ritter for payment for the vehicles it purchased through Taylor arose only because of the parties' contractual arrangement, no separate tort liability existed to hold Buchanan liable for Taylor's conduct. *Id.* Since no separate tort liability existed, tort defenses, such as comparative negligence were inapplicable. *Id.*

In this case, Pickens' duties arose pursuant to applicable law, including NFPA 241, and are only the basis of a breach of contract action because "all applicable laws" were specifically integrated into the parties' agreement. (R. p. 991 at 1500(L)(4), 1700-3.4(A)(1).) Winthrop admits that "[t]here is no dispute that the contract required Pickens to follow code." (R. p. 819, lines 22-24; p. 820, lines 5-6.) Even if those duties had not been incorporated into the contract, Pickens would have been bound by law to comply with these requirements. In effect, the contract merely acknowledged the duties imposed upon Pickens by law. Insofar as this case is concerned, the contract did not impose obligations upon Pickens that did not otherwise exist under the law.

Winthrop argues that Pickens should have brought a counterclaim for breach of contract and that by doing so it could have had its potential contract liability reduced. *See* Initial Brief of Respondent at p. 47. It fails to acknowledge that a breach of contract action was not available to Pickens because the contract only expressed the requirement that Pickens, as the contractor, comply with applicable laws, ordinances, rules, and regulations. No countervailing expression of Winthrop's obligations to comply with extant legal authorities can be found in the contract. (R. p. 991 at 1500(L)(4), 1700-3.4(A)(1).) A breach of contract action against Winthrop is not viable in this case, and it is disingenuous of Winthrop to suggest that Pickens could have protected its rights by bringing a counterclaim.

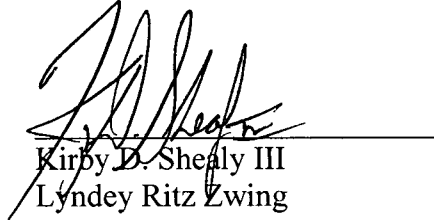
Winthrop also argues that its comparative negligence should not be held against it pursuant to the terms of the contract because the agreement “expressly provided that Winthrop was not responsible to supervise or inspect Pickens’ work, or ensure that Pickens’ [sic] complied with its contractual obligations.” See Initial Brief of Respondent at p. 47 (citing R. p. 991 at 1400-3). This provision does not contract away Winthrop’s duty to maintain the safety of its own property. See *Wilson v. Marshall*, 260 S.C. 271, 276, 195 S.E.2d 610, 613 (1973) (recognizing a “duty to exercise due care for one’s own safety”). “One person being at fault will not dispense with another’s using ordinary care for himself.” *Langley v. Boyter*, 284 S.C. 162, 166, 325 S.E.2d 550, 553 (Ct. App. 1984).

If Pickens is liable to Winthrop, its liability arises as a matter of law irrespective of its contractual promise to abide by the duties that give rise to that liability. Such liability sounds in tort, despite being enshrined in the parties’ contract, and applicable affirmative defenses, such as contributory negligence, should apply. Winthrop’s own contributory negligence, in failing to take measures required by applicable law 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), should be considered and applied to the jury’s determination in this case. Allowing a party to shield itself from the consequences of its own negligence in bringing about a loss by wrapping another party’s legal duties in a contract is not sound public policy, and it produces an unjust result here.

CONCLUSION

Based on the foregoing arguments, Pickens respectfully requests that this Court grant the relief requested in its primary brief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kirby D. Shealy III", is written over a horizontal line.

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February 2, 2015.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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,

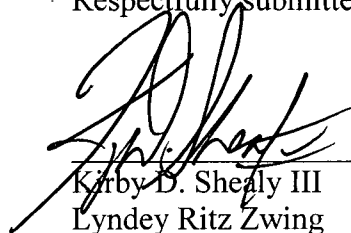
v.

Pickens Roofing and Sheet Metals, Inc.,Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that both the Brief and Reply Brief of Appellant
comply with Rule 211(b), SCACR.

Respectfully submitted,



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