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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

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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.

APPELLANT'S PETITION FOR REHEARING

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Pursuant to Rules 221(a) and 240 of the *South Carolina Rules of Appellate Procedure*, Appellant Pickens Roofing and Sheet Metals, Inc. ("Pickens") respectfully Petitions for Rehearing regarding the Court's decision filed August 3, 2016 (Op. No. 5433). In its opinion, this Court affirmed the jury's award of $7,223,343.14 in favor of The Winthrop University Trustees for the State of South Carolina ("Winthrop") and concluded the trial court did not err in (1) denying Pickens' motion for new trial absolute based on the court's refusal to strike a juror for cause; (2) denying Pickens' motion for directed verdict as to liability; (3) bifurcating the liability and damages phases of trial over Pickens' objection; (5) denying Pickens' directed verdict motion as to damages; and (6) failing to adjust the jury's damages verdict to reflect Winthrop's comparative negligence.

Rule 221(a), SCACR, authorizes a party who believes the Court overlooked or misapprehended points of law and/or fact to petition for rehearing. *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933). For the following reasons, Pickens submits the Court misapprehended applicable law and/or fact in affirming the trial court's judgment and should grant Pickens' petition for rehearing.

ARGUMENTS

I. THE COURT MISAPPREHENDED LAW AND/OR FACT IN AFFIRMING THE CIRCUIT COURT'S REFUSAL TO GRANT PICKENS' MOTION FOR NEW TRIAL ABSOLUTE BASED ON ITS REFUSAL TO STRIKE JUROR 25 FOR CAUSE.

This Court held the trial court did not err in denying Pickens' motion for a new trial based on the court's refusal to strike Juror 25 for cause. The Court concluded Pickens failed to preserve its objection that Juror 25 should have been stricken for cause

on the ground she was a "student researcher"; the juror indicated, despite her knowledge about the facts of the case, she could remain impartial; and Pickens failed to show it suffered prejudice as Juror 25 was not empaneled. *See* Opinion at ¶ I.

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. 2015). *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"). "To safeguard this right, prospective jurors must be excused for cause when . . . the [circuit] court determines that the juror cannot be fair and impartial." *Burke v. AnMed Health*, 393 S.C. 48, 53, 710 S.E.2d 84, 86 (Ct. App. 2011). Here, by refusing to strike Juror 25 for cause, Pickens was denied its constitutional and statutory "right to have a panel of twenty competent and impartial jurors from which to strike a jury." S.C. Code Ann. § 14-7-1050 (Supp. 2015).

This Court held Pickens failed to preserve its objection to Juror 25 on the basis she was a "student researcher" because "it was not specifically raised to and ruled on by the trial court." Opinion at ¶ I (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n objection must be sufficiently specific to inform the [circuit] court of the point being urged by the objector.")). During pre-trial motions, counsel for Pickens objected to Juror 25 on the following grounds:

> [Juror 25] is a student at Winthrop University. In the conference up front in front of the court reporter earlier or in several conferences she indicated that she was there at the time -- or within the Winthrop Community at the time the fire occurred. She had watched it on the news and particularly that she had talked about the fire with fellow students and professors. Your Honor, I felt that that gave her a perspective on this case that the

> other jurors would not have and respectfully moved to have her stricken from the jury list for cause.

(R. p. 144, lines 9-23.)

It is clear from Pickens' objection that it believed Juror 25 was not impartial based on her current affiliation with Winthrop as a "student." (*Id.*) The distinction the Court draws between Pickens' objection on the record to Juror 25 as a "student" and its argument that Juror 25 should have been stricken for cause because she was a "student researcher" lacks any meaningful distinction. Pickens made a timely and sufficiently specific objection to Juror 25 based on her current connection with Winthrop, her discussions with other students and professors, and her knowledge of the fire through information gathered from news reporting. (*See id.*) Pickens' objection was sufficiently specific to inform the trial court as to Pickens' belief that Juror 25 was not impartial and should have been stricken for cause. Pickens' objection to Juror 25 as a current "student researcher" is preserved and this Court's conclusion otherwise is in error.

Even if Pickens had not preserved its objection to Juror 25 on the ground that Juror 25 was a "student researcher," it is clear from an examination "of the entire voir dire," *State v. Council*, 335 S.C. 1, 10, 515 S.E.2d 508, 512-13 (1999) (citation omitted), that Juror 25 could not be indifferent in this case. Juror 25 "recently graduated" from Winthrop, 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 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.) Pickens preserved these objections in the record. (R. p. 144, lines 9-23.) Juror 25's previous knowledge or belief about "how [the fire] occurred" (*id.*) and discussions with other students and

professors of Winthrop University gave her a perspective about the issues in the case that other potential jurors did not share. For this combination of reasons, Juror 25 should have been stricken by the trial court for cause and this Court's affirmance of the trial court's refusal to grant Pickens a new trial on this basis was error.

The Court's reliance on *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1986), and *Hollins v. Wal-Mart Stores, Inc.*, 381 S.C. 245, 672 S.E.2d 805 (Ct. App. 2008), was misplaced. In *Abofreka*, the Supreme Court held a prior business relationship between a juror and a party does not, on its own, disqualify the juror as a matter of law. In *Hollins*, the Court of Appeals affirmed a circuit court's refusal to strike a juror where the juror stated she had no knowledge of the matter and had not discussed it with her brother who worked at the defendant's store. In this case, Juror 25 had not only a current relationship with Winthrop, but also had knowledge of the facts of the case to be tried. Juror 25 testified she watched stories about the fire on the news, discussed the fire with friends who were students affected by the fire (R. p. 136, lines 10-15), and stated that while she was a student "some of the professors talked about it." (*Id.*)

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.) The trial court's

order denying Pickens' motion for new trial was error and this Court should have reversed its ruling.

Moreover, this Court misapprehended applicable law in concluding Pickens did not suffer any prejudice because "Juror 25 was not empaneled." *See* Opinion (citing *Wilson v. Childs*, 315 S.C. 431, 439, 434 S.E.2d 286, 291 (Ct. App. 1993) ("There is no reversible error in the impaneling of a jury unless it appears that the objecting party was prejudiced."); *Moore v. Jenkins*, 304 S.C. 544, 547, 405 S.E.2d 833, 835 (1991) ("[W]ith regard to errors in the empaneling of juries, this Court has previously stated in reviewing such errors that 'irregularities in the empaneling of the jury will not constitute reversible error unless it affirmatively appears that the objecting party was prejudiced thereby.'" (quoting *S. Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 162, 332 S.E.2d 102, 105 (Ct. App. 1985)).

The trial court erroneously qualified Juror 25 and therefore Pickens was deprived of its statutory right to "a panel of twenty *competent* and *impartial* jurors from which to strike a jury." S.C. Code Ann. § 14-7-1050 (Supp. 2015) (emphasis added). Pickens was prejudiced by the trial court's decision before Pickens used any peremptory challenges. 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 strikes on an impartial and unqualified juror, which necessarily prejudiced Pickens, precluding it from using a peremptory strike on any other candidate within the jury pool.

The prejudice analysis cannot turn upon whether the juror in question was empaneled or not, as this Court held. If the prejudice analysis is as this Court suggests, a civil litigant would never have the ability to appeal a trial court's refusal to strike a juror

for cause, because either: (i) the challenging party used a peremptory strike to remove the juror from the empaneled jury and therefore "did not suffer any prejudice," or (ii) the challenging party used its four strikes on other jurors, allowing the biased juror to be empaneled, amounting to a waiver of the challenge. In *Merritt v. Evansville-Vanderburgh School Corp.*, 765 N.E.2d 1232 (Ind. 2002), the Supreme Court of Indiana recognized: "It is sound public policy to require litigants to help themselves by using their peremptory challenges to ensure an impartial jury. Permitting them to seek a new trial when they had a remedial tool available and chose not to use it could lead to harsh results." *Id.* at 1236.

The Court's conclusion that Pickens was not "prejudiced" because Juror 25 was not empaneled creates an unjust result for parties in civil litigation. The effect is to deny civil litigants their right to a fair and impartial jury where such litigants actually use remedial tools, such as peremptory challenges, in an attempt to address a trial court's error. By doing so, however, under this Court's analysis, the litigant is giving up its ability to seek appellate review of the trial court's error. In concluding Pickens was not prejudiced, the Court misapprehended applicable law and should grant Pickens' petition for rehearing.

II. THE COURT MISAPPREHENDED LAW AND/OR FACT BY AFFIRMING THE COURT'S DENIAL OF PICKENS' MOTION FOR DIRECTED VERDICT ON THE GROUND WINTHROP FAILED TO PRESENT ANY EVIDENCE OF CAUSATION.

Although both of Winthrop's legal theories, breach of contract and negligence, required proof of proximate causation, Winthrop could not prove, even with circumstantial evidence, Pickens caused the fire to ignite. (*See* R. p. 781, lines 3-7; p.

819, lines 3-7; p. 821, lines 8-16, p. 823, lines 18-25.) Instead, Winthrop relied on a "spread theory" to hold Pickens responsible. (*Id.*) This Court adopted Winthrop's theory of liability, unsupported by any South Carolina case precedent, by holding:

> "Viewing the evidence[1] in the light most favorable to Winthrop, [the evidence] warrant[ed] a reasonable inference that the presence of improperly placed combustible materials was a direct cause of the fire damages, *as the fire would not have* ***spread*** *to either of the pitched roofs nor caused significant damages but for Pickens' acts.*"

Opinion (emphasis added). The Court's decision to affirm the trial court's denial of Pickens' motion for directed verdict on the basis Winthrop failed to adduce any evidence of causation was error.

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.*

Regardless of the label assigned to its theory, Winthrop sought to hold Pickens liable for making the fire *worse*, as it undisputedly had no evidence that Pickens caused the fire to ignite in the first place. There is not a shred of evidence in the record to

[1] The Court cites testimony of Dan Arnold, Winthrop's expert witness 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.)

demonstrate Winthrop's ability to trace the source of the fire's ignition to Pickens. 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.

The facts underlying the Supreme Court's decision in *McQuillen v. Dobbs*, 262 S.C. 386, 204 S.E.2d 732 (1974), which this Court used to support its Opinion, are distinguishable. In *McQuillen*, a fire destroyed the personal belongings of the plaintiff-tenants of a mobile home in Beaufort County. *Id.* at 387-88, 204 S.E.2d at 733. As in this case, there was no direct evidence or expert opinion of causation. *Id.* at 391, 204 S.E.2d at 735. However, evidence presented by the plaintiffs regarding the defendant's "superficial inspection" of a fuel oil furnace on the property only days before the fire occurred, when combined with circumstantial evidence of the fire's height within the furnace on the day of the accident, created a sufficient inference of causation—*of the fire's escape from the furnace*—to submit to the jury. *Id.* at 389, 204 S.E.2d at 734.

The plaintiff testified "that, when the fire was first discovered, it was burning in the ceiling of the home, with no flames seen under the house or at the floor level." *Id.* at 390, 204 S.E.2d at 734. The defendant testified that "when he opened the door of the furnace, the fire was roaring, with flames going up from the stovepipe, 'from the bottom all the way up.'" *Id.* at 392, 204 S.E.2d at 735. Based on this evidence, the Court determined sufficient circumstantial evidence was established to enable the jury to infer that the fire could have only escaped from the furnace based upon the defendant's lighting of the furnace, together with an excessive amount of fuel in the fire pot which

should have been discovered by a more thorough inspection by the defendant. *Id.* at 392, 204 S.E.2d at 735.[2] Based on the Supreme Court's analysis, the cause of the fire's *ignition* in *McQuillen* was not at issue. The evidence was uncontradicted that the defendant lit the furnace on October 11, 1972, and the mobile home burned the next day, October 12. *Id.* at 389, 204 S.E.2d at 734. Therefore, the only issues in the case were whether the negligence of the defendant allowed the fire to escape from the furnace and engulf the home and whether the defendant negligently failed to provide extinguishing equipment which effectively prevented the plaintiffs from mitigating their damages. *Id.* at p. 388, 204 S.E.2d at 733. The Court held circumstantial evidence in the record was sufficient to raise a reasonable inference as to causation.

No evidence regarding the source of the fire's ignition existed in the case at bar, whether circumstantial or otherwise. Indeed, the record upon which the jury was to decide the central issue in the case was devoid of *any* evidence from which it could determine *how or why the fire began*. Instead, the jury was presented only with evidence of "fuel" left on the flat roof, purportedly by Pickens' employees, and informed that a fire was discovered by a student a day after Pickens' employees left the property, which resulted in extensive damage to the roofs of Bancroft and Owens Halls. Unlike in *McQuillen*, in which it was undisputed the original fire—contained within the furnace itself—was ignited by the defendant, there was no evidence presented in this case regarding how the fire on the flat roof ignited. The only evidence presented to the jury is

[2] "The intense fire found in the furnace by [the defendant] could have resulted only from an excessive amount of fuel in the fire pot of the furnace, which could only have entered from the outside tank through the pipeline and control devices on the furnace. There was no excessive amount of fuel turned into the furnace. ... The record sustains the conclusion that the fire resulted from a malfunction in the control mechanism of the furnace, which was inspected and serviced in a superficial manner."

that Pickens' alleged conduct—leaving flammable materials on the flat roof—somehow made a fire worse than it would have otherwise been in the absence of any negligence. Not a single witness was able to testify that a fire would not have occurred in the absence of Pickens' negligence.

Based on the unique circumstances presented here, and the absence of any evidence regarding the fire's ignition source, Winthrop could not survive the "but for" test of causation, and a directed verdict should have been granted.

Furthermore, there was no evidence that a fire commencing on the flat roof was a foreseeable consequence of Pickens' employees' alleged negligent act of leaving combustible materials on the flat roof, which was likewise constructed of combustible materials. (*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.)

Such foreseeability is the very reason why other states have allowed the "spread theory" of liability to attach in the narrow circumstances where a fire of unknown origin breaks out and causes damage to an innocent property owner. *Sherrell v. Brown*, 284 S.W.3d 164, 166 (Mo. Ct. App. E.D. 2009); *Scully v. Fitzgerald*, 843 A.2d 1110, 1116 (N.J. 2004) (referring to "an extraordinary and undue risk of combustibility"); *Quaker Oats Co. v. Grice*, 195 F. 441 (2d Cir. 1912) (finding "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" sufficient evidence of foreseeability that a fire would ignite.) This aspect of the theory was not addressed by the Court, even as it apparently embraced the theory's validity in its Opinion.

III. THE COURT MISAPPLIED APPLICABLE LAW IN AFFIRMING THE TRIAL COURT'S RECHARGE TO THE JURY ON PROXIMATE CAUSATION.

For the reasons outlined above, causation, or lack thereof, was essential to the jury's decision in this case.[3] It is for this overarching reason that the trial court's failure to give the jury a complete charge on proximate causation following the jury's request for a recharge was so prejudicial to Pickens and should have resulted in a new trial.

Although case law in South Carolina permits a trial court to "charge only the parts of the initial charge which are necessary to answer the jury's request," *Rauch v. Zayas*, 284 S.C. 594, 597, 327 S.E.2d 377, 378 (Ct. App. 1985), the recharge must sufficiently cover the requested information and not be misleading. *State v. Condrey*, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002) (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."); *see* S.C. Const. Art. V, § 21.

In this case, the jury requested a recharge from the trial court regarding proximate cause, the heart of the legal dispute between the parties. In recharging the jury, the trial

[3] (*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; 838, line 20 – p. 839, line 2; *see also* p. 838, line 20 – p. 839, line 2.)

court failed to include within its definition of proximate cause the requirement of legal causation, or foreseeability, which the Supreme Court has made clear is "the touchstone" of a proximate cause analysis. *Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) (citation omitted).

The trial court's failure to include within its recharge a definition of legal cause, or foreseeability, rendered the recharge misleading to the jury and prejudicial to 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. (*See* R. p. 253, lines 17-23; p. 828, lines 14-22; p 838, line 20 - p. 839, line 2.) The prejudice to Pickens was heightened by the jury's focus on causation throughout the four-day trial on liability.

This Court's opinion wholly fails to acknowledge, apply, or distinguish the case citations and arguments made by Pickens in this appeal. By failing to provide a substantive basis for its decision affirming the trial court's recharge to the jury, this Court has necessarily overlooked or misapprehended the issues on appeal

IV. THE COURT MISAPPREHENDED APPLICABLE LAW IN AFFIRMING THE TRIAL COURT'S DECISION TO BIFURCATE THE LIABILITY AND DAMAGES PHASES OF THE TRIAL.

Based on Winthrop's theory that Pickens' conduct worsened the effects of the fire that occurred on March 6, 2010, the trial court should never have bifurcated the liability and damages phases of trial. (*See* R. p. 790, lines 6-8; p. 790, line 25 – p. 791, line 2; p. 791, lines 4-5.) Because it relied on a fire "spread" or "aggravation" theory, Winthrop should have been required to present evidence of causation to connect Pickens' alleged liability to Winthrop's purported "worsened" damages. (*Id.* at p. 290, lines 15-18; p. 295,

lines 12-23; p. 747, lines 22-24.[4]) The trial court's separation of these two issues, through bifurcation, prejudiced Pickens and should have resulted in a new trial.

This Court failed to acknowledge or address Pickens' argument that causation and damages issues were inextricably intertwined in this case. Instead, the Court's sole focus was on judicial economy and convenience, as decided by the trial court. *See* Opinion at ¶ IV. 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. *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). Other courts have held 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

[4] 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.").)

phases. *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).

Although the trial court may have relied on grounds of judicial economy and convenience, such issues do not supersede a party's right to a fair trial. *See 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"). Bifurcation was inappropriate because the jury was forced to separately consider proximate cause and damages, even though these 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. 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.

By focusing solely on judicial economy and convenience, and failing to acknowledge or address Pickens' argument that issues regarding liability and damages

overlapped, this Court has necessarily overlooked or misapprehended the issues on appeal and rehearing should be granted.

V. THE COURT MISAPPREHENDED APPLICABLE LAW IN AFFIRMING THE TRIAL COURT'S DENIAL OF PICKENS' MOTION FOR DIRECTED VERDICT AS TO WINTHROP'S INABILITY TO PROVE DAMAGES.

This Court misapprehended law and/or facts by affirming the trial court's decision to deny Pickens' directed verdict motion in the damages phase of trial on the ground Winthrop failed to provide evidence to the jury regarding the extent to which its damages were made worse by Pickens' conduct. As stated above, Winthrop's theory of the case is that Pickens' negligence caused a fire to become greater than it otherwise would have been in the absence of Pickens' negligence. As a result, there is a sharp distinction between the damages Winthrop would have necessarily incurred in the absence of Pickens' negligence (because a fire would have occurred, regardless) and the damages which resulted from Pickens' conduct. 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, and Pickens was therefore entitled to a directed verdict.

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 the plaintiff would have sustained in the absence of the defendant's acts or omissions. However, a defendant may be held 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 the present case, the jury was told a fire ignited by unknown means (*see* R. p. 295, lines 21-23; p. 747, lines 22-24) and 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 it needed to know so 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 held Pickens liable for *all* of Winthrop's losses occasioned by the fire.

Pickens acknowledges 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' alleged negligence. 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 have been reversed.

VI. THIS COURT MISAPPREHENDED APPLICABLE LAW IN FAILING TO ADJUST THE JURY'S DAMAGES VERDICT TO REFLECT WINTHROP'S COMPARATIVE NEGLIGENCE.

Winthrop asserted two causes of action against Pickens, including breach of contract and negligence. Both of these causes of action arose out of the same alleged wrongful conduct: leaving flammable materials on the flat roof. Winthrop based its contract claim on several provisions in the parties' agreement, all of which incorporated, in one way or another, duties that already existed by way of law or regulation. Winthrop acknowledged as much during its closing argument, stating: "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.").)

Pickens asserted the affirmative defense of comparative negligence. (*See* R. pp. 61-66.) It could not have asserted a counterclaim for breach of contract because the parties' agreement, drafted by Winthrop's consultant, Stafford Consulting Engineers, did not reciprocally incorporate Winthrop's legal duties into the parties' agreement. At the conclusion of trial, the jury found Pickens was both negligent and in breach of the parties' contract. The jury also concluded Winthrop's own negligence proximately contributed to its damages. However, because the contract merely incorporated Pickens' legal duties, and not Winthrop's, Winthrop was able to escape its own comparative fault by choosing relief under its contract theory.

Because the parties' contract merely acknowledged the duties imposed upon Pickens by statute, rather than imposing obligations upon Pickens that did not otherwise exist, Winthrop's breach of contract action is coextensive with its negligence claim. Ultimately, the claim Winthrop denominated as "breach of contract" lies in tort, and the

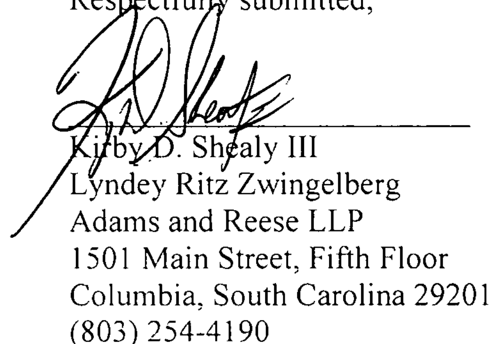
jury's comparative negligence determination should govern the court's judgment in this case. It violates public policy for a party to incorporate by reference the duties to which the opposing party is otherwise bound by law into a contract and thereby escape an apportionment of liability for his own 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.").

The Court misapprehended applicable law by affirming the trial court's decision not to enforce the jury's comparative negligence determination, and a rehearing should be granted.

CONCLUSION

For the reasons stated above, this Court should grant Pickens' Petition for Rehearing in this case.

Respectfully submitted,



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Attorneys for Appellant Pickens Roofing and Sheet Metals, Inc.

August 18, 2016.

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

RECEIVED
AUG 18 2016
SC Court of Appeals

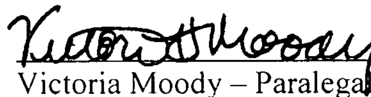
The Winthrop University Trustees for the
State of South Carolina, ... Respondent,

v.

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

PROOF OF SERVICE

I certify that I have served **Appellant's Petition for Rehearing** 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 August 18, 2016, addressed to Respondent's attorneys of record, Peter W. Vogt, Esquire, and Zachary M. Jett, Esquire, at Butler Weihmuller Katz Craig LLP, 11605 North Community House Road, Suite 150, Charlotte, North Carolina 28277.



Victoria Moody – Paralegal

August 18, 2016.

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August 18, 2016

RECEIVED
AUG 18 2016
SC Court of Appeals

VIA HAND-DELIVERY:
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

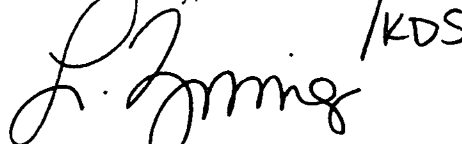
RE: *The Winthrop University Trustees for the State of South Carolina v. Pickens Roofing and Sheet Metals, Inc.*
Appellate Case No. 2014-000821
A&R File No. 050434-000018

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the original and seven (7) copies of Appellant's Petition for Rehearing together with our firm's check in the amount of $25.00 to cover the filing fee. Please file the original and six (6) copies pursuant to Rule 240, SCACR, and return the extra copy to me via our courier.

By copy of this letter, I am serving all counsel of record with the Petition as set forth in the enclosed Proof of Service. Thank you for your attention to this matter.

Sincerely,



Kirby D. Shealy III

KDSIII/vhm
Enclosures

cc: Peter W. Vogt, Esquire
Zachary M. Jett, Esquire