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.

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

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Pursuant to South Carolina Rules of Appellate Procedure 221(a) and 240(e), Respondent, The Winthrop University Trustees for the State of South Carolina ("Winthrop"), hereby respond to the Petition for Rehearing filed by the Appellant, Pickens Roofing and Sheet Metals, Inc. ("Pickens"). Pickens' repetition of *entire* issues already briefed, argued, considered, and rejected by this Court does not satisfy its burden on rehearing to "state with *particularity* the *points* supposed to have been overlooked or misapprehended by the court." Rule 242, SCACR (emphasis added.) Alternatively, Pickens inappropriately raises new argument for the first time on rehearing, and uses the rehearing as a second attempt to litigate issues before this Court. Due to this Court's thorough and well-reasoned twenty-page opinion, Pickens cannot identify any point this Court could reasonably have "overlooked or misapprehended." The petition should be denied.

ARGUMENT

As the South Carolina Supreme Court acknowledged in 1933, in a case that Pickens cites in its petition, "The purpose of a petition for rehearing is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing is not just to have the case tried in this court a second time." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933); *see also Kennedy v. S. Carolina Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001); *Checker Yellow Cab Co., Inc. v. Checker Cab & Parcel Serv., Inc.*, 340 S.E.2d 549, 552 (S.C. Ct. App. 1986). This basic principle is codified in Rule 221(a), SCACR: "Petitions for rehearing . . . shall state with particularity the points supposed to have been overlooked or misapprehended by the court."

Moreover, as recognized by the South Carolina Supreme Court nearly 80 years ago, arguments previously raised in the briefs and necessarily considered in preparation of an opinion do not establish a basis for rehearing:

> In the consideration of the issues involved in the cause this Court took into account and gave heed to the matters now presented by the petition for rehearing. These propositions have already been presented to this Court in the printed briefs and in the oral argument. These propositions have been considered by this Court in the preparation of the filed opinion. These points have not been overlooked and have not been misapprehended, and do not therefore fall within the terms of Rule 17 of this Court.
>
> Inasmuch, therefore, as this Court has already considered the propositions presented in the petition for rehearing, it is the judgment of the Court that the petition for rehearing be, and the same is hereby, denied.

Hicks v. Hicklin, 187 S.C. 355, 197 S.E. 390, 393 (1938); *see also* 5 C.J.S. Appeal and Error § 796 ("A rehearing should never be granted when it would amount to nothing more than a second appeal on a question determined in the first.")

These are age-old tenets of South Carolina law that Pickens' petition repeatedly defies. Pickens' petition does little more than repeat arguments and citations already presented to, and considered by, this Court, so the petition documents do not provide a basis for granting rehearing. Further, because the petition for rehearing is largely a recitation of arguments already raised in the briefs, Winthrop incorporates its Respondent's brief into this return by reference, rather than unnecessarily respond to the underlying merits of every issue for a second time.

I. PICKENS FAILS TO ESTABLISH THIS COURT MISAPPREHENDED LAW OR FACT IN AFFIRMING THE TRIAL COURT'S RULINGS REGARDING JUROR 25.

A. This Court did not overlook or misapprehend any fact or law in correctly determining that the argument regarding Juror 25 being a "student researcher" was not preserved.

In its Appellant's brief, Pickens argued:

> 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.

(Appellant's Br. p. 10.) Thus, Pickens claimed there were several grounds for Juror 25 to be stricken, the first of which was that Juror 25 was a "current 'student researcher.'"

This Court held on the first ground: "Pickens' argument that the trial court erred in refusing to strike Juror 25 for cause because she was a 'student researcher' is unpreserved because it was not specifically raised below." (Op. p. 12). This holding is supported by the transcript (R. p. 144, lines 9-23); Winthrop's argument from the Respondent's brief (Resp't. Br. 21-22); and this Court's recognition of black-letter law on preservation. *See Wilder Corp. v. Wilke*, 330 S.C 71, 76, 497 S.E.2d 731, 733 (1998). ["[C]onstitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal."] *See also Herron v. Century BMW*, 395 S.C. 461, 465–66, 719 S.E.2d 640, 642 (2011).

Pickens argues on rehearing that its "student researcher" issue was preserved because there is no meaningful distinction between "student" and "student researcher." This is a new argument, and cannot be raised for the first time in a petition for rehearing. *See Arnold*, 168 S.C. 163, 167 S.E. at 234. Moreover, this is not a proper assertion for rehearing that the Court "overlooked or misapprehended" anything.

Further, this argument is belied by Pickens' own argument from its Appellant's Brief. There, Pickens expressly distinguished between "student" and "student researcher," arguing "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 . . . ." (Appellant's Br. p. 10.) If the two are the same, as Pickens argues now, there was no reason for Pickens to have

distinguished between them previously. Pickens cannot raise any new argument—let alone argument in direct contravention of prior argument—for the first time on rehearing.

Pickens' argument is also nonsensical as considered under the standard for rehearing. This Court considered the objections other than the "student researcher" issue on the merits—including the fact that she was a "student" at the time of the fire. (Op. p. 12.) If "student researcher" and "student" are indistinct, as Pickens claims, then this Court has already considered the facts Pickens asserts, and nothing has been overlooked or misapprehended.

B. This Court did not overlook or misapprehend any fact or law in determining the trial court did not abuse its discretion in refusing to strike Juror 25 for cause based on the preserved objections.

Pickens argues in its petition that "It is clear from Pickens' objection that it believed Juror 25 was not impartial based on her *current affiliation with Winthrop as a 'student.'*" (Pet. Reh. p. 3) (emphasis added). But, in the next paragraph, Pickens contradicts itself by stating that, at the time of voir dire, "Juror 25 *'recently graduated'* from Winthrop, [and] *had been* a Winthrop student 'during the fire, the incident.'" (Pet. Reh. p. 3) (emphasis added).

Pickens argues that "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." (Pet. Reh. p. 4.) Notably, Pickens cited to *Abofreka* as authoritative in its Brief, and did not dispute that it applies to past business relationships—which is substantially similar to Juror 25's past relationship with Winthrop as a "student." *See* (Appellant's Br., p. 14.) Regardless, here Pickens merely tries to distinguish the two cases, which is nothing more than taking issue with this Court's decision and not sufficient to establish grounds for rehearing. This Court obviously read both cases before explaining their facts and holdings in its opinion. (Op. p. 12.) It would be unreasonable to assume this Court overlooked

or misapprehended the facts of the cases. Moreover, the *Abofreka* case was already extensively argued in both the Appellant's and Appellee's briefs before it was discussed by this Court. Pickens has not established this Court overlooked or misapprehended anything about the cases, and provides no reason for this Court to hear the case a second time. *See Arnold*, 168 S.C. 163, 167 S.E. at 234; *Hicks*, 187 S.C. 355, 197 S.E. at 393.

Pickens next claims "this Court misapprehended applicable law in concluding Pickens did not suffer any prejudice because 'Juror 25 was not empaneled.'" Assuming there was error—which there was not—Pickens' argument is that it suffered prejudice merely by virtue of Juror 25 being one of the 20-juror panel from which the jury was chosen. According to Pickens, it was prejudiced because it was "preclude[ed] from using a peremptory strike on any other candidate within the jury pool." (Pet. Reh. 5.) This is another rehash of the identical argument already presented and rejected by this Court once.

Pickens cites no authority that establishes the empaneling itself is the "prejudice" required to obtain a reversal. To the contrary, the only case Pickens cites for the merits of this argument—an Indiana case—affirmatively establishes Pickens' claim is *insufficient* to establish prejudice. Indiana law is not "applicable law"—it has no binding effect upon this Court. This Court did not misapprehend any applicable law.

But, assuming Indiana law is "applicable law," it supports this Court's conclusion. In *Merritt v. Evansville-Vanderbugh School Corp.*, 765 N.E. 2d 1232 (Ind. 2002), the court ruled: "In Indiana, it is enough to show that an objectionable juror served because a party was forced to use a peremptory strike to cure an erroneous denial of a challenge for cause." *Id.* at 1235 (emphasis added). Simply being forced to use a peremptory on a juror that should have been excused for cause does not establish prejudice in Indiana. *Id.* at 1237, n. 8 (citing *Woolston v.*

State, 453 N.E.2d 965 (Ind. 1983), stating "prejudice not shown where defendant did not desire to challenge only juror sworn after last peremptory challenge was used to strike another juror for whom challenge for cause was denied").

Under this Indiana test, Pickens has not "show[n] that an objectionable juror served because [it] was forced to use a peremptory strike to cure an erroneous denial of a challenge for cause." Juror 25 did not serve. Pickens identifies no other juror it considered "objectionable." Pickens does not even argue that there were any other "objectionable" jurors. And it never made any of these arguments in the trial court or in the briefing on appeal.

Finally, Pickens' unsupported argument that "The prejudice analysis cannot turn upon whether the juror in question was empaneled or not" conflicts with the binding opinions upon which this Court relied, all of which at least imply that an error in empaneling, in and of itself, is not the prejudice required for reversal. *See Wilson v. Childs*, 315 S.C. 431, 439, 434 S.E.2d 286, 291 (Ct. App. 1993) ("There is no reversible error in the empaneling 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 rest of Pickens' argument is further repetition and restatement of the identical arguments it raised in its Appellant's Final Brief. (Appellant's Br. pp. 13-16). It does not identify with specificity any point of law or fact overlooked or misapprehended, nor is it likely this Court overlooked or misapprehended large chunks of the Appellant's argument. Pickens

does not provide a basis for rehearing on these issues. *See Arnold*, 168 S.C. 163, 167 S.E. at 234; *Hicks*, 187 S.C. 355, 197 S.E. at 393.

II. PICKENS FAILS TO ESTABLISH THIS COURT MISAPPREHENDED ANY LAW OR FACT IN AFFIRMING THE TRIAL COURT'S DENIAL OF PICKENS' MOTION FOR DIRECTED VERDICT.

Pickens again argues that directed verdict should have been granted because Winthrop did not prove "that Pickens caused the fire to ignite." Pickens does no more than rephrase the identical argument previously raised in its briefs, even copying them verbatim in some places. Copying or paraphrasing general arguments from a brief that has already been considered and rejected by this Court does not establish with specificity that this Court overlooked or misapprehended anything, and thus does not provide a basis for this Court to grant rehearing. *See Arnold*, 168 S.C. 163, 167 S.E. at 234; *Hicks*, 187 S.C. 355, 197 S.E. at 393.

This Court expressly considered Pickens' argument "that Winthrop's claims failed as a matter of law because Winthrop could not identify the specific ignition source for the roof fire." (Op. p. 15.) This Court provided substantive analysis on the arguments raised in this issue, over three pages' worth. (Op. p. 13-15.) It cited to evidence in the record from Mr. Arnold—acknowledged by Pickens on page 7 of its petition. Then this Court ultimately held "we do not view the question of the specific ignition source fatal to Winthrop's claims; we find Winthrop provided the necessary direct and circumstantial evidence to establish causation of the fire damages and support the submission of this issue to the jury." (Op. p. 16.) In other words, this Court read, considered, analyzed, and rejected Pickens' arguments. It is highly unlikely this Court "overlooked or misapprehended" Pickens' issues—it simply disagreed with Pickens' position. Thus, this argument does not provide a basis for this Court to grant rehearing. *See Arnold*, 168 S.C. 163, 167 S.E. at 234; *Hicks*, 187 S.C. 355, 197 S.E. at 393.

Pickens attempts to distinguish *McQuillen v. Dobbs*, 262 S.C. 386, 392, 204 S.E.2d 732, 735 (1974), a case cited by this Court in its opinion. But this Court recited the facts and holdings of *McQuillen* in its opinion. (Op. p. 14.) It is unlikely this Court overlooked or misapprehended how those facts might apply to this case when it relied upon those facts in drafting the opinion in this case. Further, *McQuillen* establishes that even where it is not clear what ignited a fire, that party can be held liable for that damage. As this Court stated in analyzing *McQuillen*:

> The supreme court affirmed the denial of the directed verdict motion, holding that although no direct evidence showed what caused the fire, the plaintiff provided evidence of facts and circumstances from which a jury could reasonably infer the fire would not have occurred but for the defendant's negligence.

(Op. p. 14.) *McQuillen* is on point.

Pickens also argues that there was no evidence that the fire was foreseeable to Pickens. Again, this was already argued in the briefs, and addressed by this Court on page 15 of its opinion. This Court expressly held "we find unpersuasive Pickens' argument that the damages were unforeseeable because the work crew left the exact materials that would eventually compose the Bancroft Hall roof on the flat roof." (Op. p. 15.) Despite this, Pickens repeats its argument regarding flame resistance of construction materials. (Appellant's Br., pp. 23-24) These facts, having been considered and rejected, were not overlooked or misapprehended.

III. PICKENS FAILS TO ESTABLISH THIS COURT OVERLOOKED OR MISAPPREHENDED ANY LAW OR FACT IN HOLDING NO REVERSIBLE ERROR OCCURRED WITH THE RECHARGE OF THE JURY ON PROXIMATE CAUSATION.

Again, Pickens reargues the same points it raised in its briefing. Pickens concludes that "This Court's opinion wholly fails to acknowledge, apply, or distinguish the case citations and arguments made by Pickens in this appeal." Unfortunately, Pickens does not specify to which "case citations" it is referring. Thus, in addition to being a merely repetitive argument, the

argument does "not state with particularity the points supposed to have been overlooked or misapprehended by the court," and so it fails the standard for rehearing. *See* Rule 221, SCACR. It is also conclusory and is insufficient on that basis as well. *See, generally, Glasscock, Inc. v. U.S. Fidelity and Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.")

This Court is not required to "address a point which is manifestly without merit in a written opinion." Rule 220(b)(2), SCACR. And there is no rule requiring this Court to expressly address every single citation and sub-argument in its written opinion. Pickens has no support for its conclusion that this Court "necessarily overlooked or misapprehended the issues on appeal." (Pet. Reh. p. 12.)

Further, this Court did provide a basis for its affirmance. It held that the trial court gave a lengthy substantive definition of proximate cause, then gave a more succinct charge that was "responsive to the jury's recharge request." (Op. p. 15-16.) It noted the deferential standard of review, and found no abuse of discretion. (Op. p. 16). Even had Pickens identified with particularity any of the citations from its prior brief, none of them undermine this Court's reasoning or conclusion.

IV. PICKENS FAILS TO ESTABLISH THIS COURT OVERLOOKED OR MISAPPREHENDED ANY LAW OR FACT IN HOLDING NO REVERSIBLE ERROR OCCURRED REGARDING BIFURCATION.

Pickens states that "This Court failed to acknowledge or address Pickens' argument that causation and damages were inextricably intertwined in this case." (Pet. Reh. p. 13.) This is false. The very first sentence of this Court's analysis of this argument was "Pickens contends the

circuit court erred in bifurcating the trial because causation and damages were inextricably intertwined." (Op. p. 17.) And later, this Court held:

> Moreover, we do not find bifurcation resulted in injustice to Pickens because the liability and damages evidence did not overlap. Indeed, the evidence presented during the damages phase was limited to topics such as the documentation of Winthrop's damages; cleanup, reconstruction, and electronics restoration; and the invoices from and payments to those performing such work after the fire. Thus, bifurcation was appropriate.

(Op. p. 18.) This Court indisputably addressed Pickens' argument that the issues were intertwined. Certainly, this Court did not "overlook or misapprehend" Pickens' argument. *See Arnold*, 168 S.C. 163, 167 S.E. at 238.

Pickens also asserts that "the Court's sole focus was on judicial economy and convenience, as decided by the trial court." (Pet. Reh. p. 13.) This, too, is false. This Court expressly recognized the requirement of Rule 42(b), SCRCP, that a court must "always preserv[e] inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State." (Op. p. 17.) This Court expressly acknowledged that, pursuant to *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998), "A trial should be bifurcated only if the issues are so distinct that trial of each along would not result in injustice," and "Where evidence relevant to the issues of both liability and damages overlap, bifurcation is inappropriate." (Op. p. 17.) Further, as quoted above, this Court considered whether the issues were intertwined, and whether injustice had been caused. This Court responded to all of Pickens' arguments.

The rest of Pickens' argument in its petition is largely copied, (often word-for-word) from its prior brief: same case law, same contentions. It does not establish any point with specificity that this Court overlooked or misapprehended, and does not provide any argument different from what was raised in the briefs and already considered. Thus, it does not establish a

basis for this Court to grant rehearing. *See Arnold*, 168 S.C. 163, 167 S.E. at 238; *Hicks*, 187 S.C. 355, 197 S.E. at 393.

V. PICKENS FAILS TO ESTABLISH THIS COURT OVERLOOKED OR MISAPPREHENDED ANY LAW OR FACT IN HOLDING NO REVERSIBLE ERROR OCCURRED IN THE COURT'S DENIAL OF THE MOTION FOR DIRECTED VERDICT AS TO DAMAGES.

Save the introductory paragraph, Pickens' entire argument for this issue is copied word-for-word from Pickens' brief with no added information. Certainly, copying and pasting an entire issue from a prior brief does not satisfy the particularity requirement of Rule 242. The fact that this Court addressed the issue in its opinion precludes the possibility that this Court overlooked or misapprehended the entire appellate issue. And Pickens is not entitled to a second appeal of the issue. *See Arnold*, 168 S.C. 163, 167 S.E. at 238; *Hicks*, 187 S.C. 355, 197 S.E. at 393.

In the new, single introductory paragraph, Pickens asserts 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." (Pet. Reh. p. 15.) Pickens repeats its argument that "a fire would have occurred, regardless" of Pickens' negligence, and that the jury did not have information to distinguish between damage caused by Pickens' negligence and damage that would have occurred otherwise.

This argument was thoroughly addressed in the briefs. And this Court did not overlook or misapprehend the arguments, correctly ruling:

> Although Pickens suggests it could have caused only a portion of the damages due to its role in the spread or exacerbation of the fire, Winthrop's expert testified that the fire would not have spread and would have completely extinguished, except on the flat roof area, but for the presence of the improperly placed combustibles. This testimony alone provides sufficient evidence to support the

> circuit court's submission of the damages question to the jury. Winthrop produced the testimony of six witnesses as well as a binder of invoices encompassing the repair and reconstruction costs, from which the jury was able to determine damages with reasonable certainty. Accordingly, we find the circuit court properly denied Pickens's directed verdict motion as to damages.

(Op. p. 19). Pickens provides no reason or legal basis for this Court to reconsider this holding.

VI. PICKENS FAILS TO ESTABLISH THIS COURT OVERLOOKED OR MISAPPREHENDED ANY LAW OR FACT IN HOLDING THAT THE BREACH-OF-CONTRACT DAMAGES SHOULD NOT BE REDUCED BY COMPARATIVE NEGLIGENCE.

Pickens raises the identical argument raised in its prior briefs, simply claiming this Court's disagreement with its argument demonstrates it "misapprehended applicable law." Pickens cites two cases previously argued in its Brief—in a sentence mostly copied directly from that brief—that this Court has already considered. (Appellant's Br. p. 46.) The argument and authorities already having been considered and rejected, this Court should not grant rehearing. *See Arnold*, 168 S.C. 163, 167 S.E. at 238; *Hicks*, 187 S.C. 355, 197 S.E. at 393.

The merits of the underlying argument are equally weak, for the reasons set forth in the Respondent's Brief, in this Court's opinion. Further, the cases Pickens cite are inapposite. In *Nelson v. Concrete Supply Company*, 303 S.C. 243, 399 S.E.2d 783 (1991), the supreme court considered a "negligence action" and adopted "comparative negligence." The *Nelson* court cited to *Langley v. Boyter*, 284 S.C. 162, 235 S.E 2d 550 (Ct. App. 1984), "[f]or an exhaustive analytical discussion of the history and merits of comparative negligence." *Nelson*, 303 S.C. at 244, 399 S.E.2d at 784. In *Langley*, while discussing contributory negligence, the court made the statement that Pickens cites in its petition at p. 18: "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." 284 S.C. at 166, 325 S.E. 2d at 553.

The question in this cause was whether comparative negligence can apply to a breach of contract claim. The question *is not* whether comparative negligence applies to negligence claims. *Nelson* is inapplicable to the question here. Pickens' quote from *Langley* is inapplicable to any South Carolina action, since contributory negligence was abandoned in 1991. Consequently, this Court did not overlook or misapprehend any applicable law.

CONCLUSION

Because Pickens has failed to establish any basis for rehearing on any issues presented, Winthrop respectfully requests the petition for rehearing be denied.

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PROOF OF SERVICE

I certify that I have served Respondent's Return to Appellant's Petition for Rehearing on Pickens Roofing and Sheet Metals, Inc., by depositing a copy of them in the United States Mail, postage prepaid, on August 26, 2016, addressed to its attorneys of record, Kirby D. Shealy III, Esquire and Lyndey Ritz Zwing, Esquire, at 1501 Main Street, 5th Floor, Columbia, South Carolina 29201.

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This 26 day of August, 2016.

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