THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Appellate Case No. 2014-000821

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S.C. SUPREME COURT

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

v.

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the court of appeals on October 21, 2016.

QUESTIONS PRESENTED

I. WAS JUROR 25 A PROPER MEMBER OF THE VENIRE?

II. SHOULD THE TRIAL COURT HAVE DIRECTED VERDICT FOR PICKENS?

III. WAS IT ERROR NOT TO RECHARGE ALL ELEMENTS OF PROXIMATE CAUSATION?

IV. WAS IT APPROPRIATE TO BIFURCATE LIABILITY AND DAMAGES?

V. DID WINTHROP PROVE WHICH DAMAGES PICKENS CAUSED?

VI. SHOULD THE JUDGMENT REFLECT THE JURY'S DETERMINATION THAT WINTHROP WAS 40% AT FAULT?

STATEMENT OF THE CASE

This case was commenced by the filing of a summons and complaint in the York County court of common pleas on September 5, 2012. (Appx. pp. 69-75). Plaintiff Winthrop University Trustees for the State of South Carolina ("Winthrop") alleged causes of action for breach of contract and negligence against Defendant Pickens Roofing and Sheet Metals, Inc. ("Pickens") and sought damages arising from a fire that occurred on Winthrop's campus on March 6, 2010.[1] (*Id.*). Pickens answered on October 4, 2012, denying all liability. (Appx. pp. 117-122). Among its affirmative defenses, Pickens alleged that Winthrop was comparatively negligent. (*Id.*).

The case was tried before a jury from March 17-21, 2014. Over Pickens' objection, the trial court bifurcated the liability and damages phases of the trial. (*See* Appx. p. 203, line 7 – p.

[1] The court of appeals' opinion mistakenly indicates that the fire occurred in 2009.

205, line 5). During jury selection, Pickens moved to strike Juror 25 for cause based upon that juror's status as a current student at Winthrop who had been enrolled as a Winthrop student and was on campus when the fire occurred. (Appx. p. 198, lines 9-23). The trial court denied Pickens' motion, forcing Pickens to use one of its peremptory strikes to remove that juror from the venire. (Appx. p. 199, line 2 – p. 203, line 6).

Following a four-day trial on liability, Pickens moved for a directed verdict on the ground that Winthrop had offered no evidence that some act or omission by Pickens had caused the fire to ignite. (Appx. p. 848, line 3 – p. 849, line 21). Although acknowledging Winthrop had failed to adduce any evidence as to the ignition of the fire, the trial court nonetheless denied Pickens' motion because Winthrop had introduced evidence to show that once the fire was ignited, Pickens' acts or omissions caused it to spread. (Appx. p. 851, line 18 – p. 860, line 2). Pickens put up no evidence during the liability phase of trial. (Appx. p. 861, lines 5-8; p. 863, lines 11-25).

During the jury's deliberations, it sent a note to the trial court asking, among other things, to be recharged concerning proximate cause. (Appx. p. 939, line 21 – p. 940, line 7). The court provided an instruction as to cause-in-fact, but it left out any instruction as to foreseeability. (Appx. p. 941, line 14 – p. 942, line 4). Pickens objected but was overruled. (Appx. p. 942, line 11 – p. 943, line 22). The jury returned a verdict in Winthrop's favor as to its breach of contract and negligence causes of action, but it found Winthrop bore 40% of the responsibility for the loss. (Appx. p. 944, line 3 – p. 945, line 5). Pickens moved for judgment notwithstanding the verdict on the basis the jury was never presented any evidence as to how the fire started. (Appx. p. 946, line 21 – p. 947, line 6). Pickens' motion was denied. (Appx. p. 947, lines 7-19).

At the close of Winthrop's case as to damages, Pickens renewed its earlier directed verdict motion, asserting Winthrop had offered no evidence that Pickens had caused the fire to ignite. (Appx. p. 1005, lines 4-10). It additionally moved for a directed verdict on the basis that Winthrop had failed to introduce evidence as to how much worse the fire damages were than they would have been without Pickens' involvement. (Appx. p. 1005, line 11 – p. 1006, line 1). These motions were likewise denied. (Appx. p. 1006, line 13 – p. 1025, line 10).

The jury returned a verdict for Winthrop in the amount of $7,223,343.14. (Appx. p. 1035, lines 4-13; *see also* Appx. p. 66). Pickens moved for judgment notwithstanding the verdict on the same grounds it had previously raised at the directed verdict stage of trial. (Appx. p. 1037, lines 6-10). It also moved for a new trial absolute, arguing that the trial court erred in bifurcating the trial and in failing to grant Pickens' motion to strike Juror 25 for cause. (Appx. p. 1038, lines 4-6). Alternatively, Pickens moved that the judgment be governed by the jury's comparative negligence determination, asserting that the duty giving rise to Winthrop's contract claim was identical to the duty on which Winthrop based its negligence claim. (Appx. p. 1038, lines 7-22). The trial court denied all of these motions. (Appx. p. 1043, line 2 – p. 1049, line 9). Winthrop thereafter elected to recover under its contract cause of action. (Appx. p. 1044, lines 8-21).

On March 27, 2014, Pickens received written notice that judgment had been entered and timely filed its Notice of Appeal on April 21, 2014. The court of appeals affirmed the judgment of the circuit court. *The Winthrop University Trustees for the State of South Carolina v. Pickens Roofing and Sheet Metals, Inc.*, Op. No. 5433 (S.C. Ct. App. filed August 3, 2016). Petitioner seeks a writ of certiorari to review that decision.

FACTS

In 2009, Winthrop hired Pickens to reroof one of the older academic buildings on its campus known as Bancroft Hall. Bancroft Hall is immediately adjacent to Owens Hall, which was constructed in 2007. Both buildings have pitched roofs, and they adjoin each other at a place that is covered by a flat roof which is several feet lower than the adjacent pitched roofs.

The contract for the re-roofing of Bancroft Hall contained two provisions that are germane to this lawsuit. First, the contract contained a specification requiring Pickens to "[c]omply with all applicable laws, ordinances, rules, regulations and orders of any public body having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss." (Appx. p. 1151 at Contract § 1500, ¶ 1.9(L)(4)). Second, the contract contained a specification pertaining to the storage of materials that were to be used during the project: "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." (Appx. p. 1129 at Contract § 1500, ¶ 1.9(D)). Consonant with this second provision, Winthrop approved two ground-level storage areas, one on the lawn immediately adjacent to Bancroft Hall and another in a nearby parking lot.

Two provisions of the International Fire Code, which incorporates standards promulgated by the National Fire Protection Association ("NFPA"), are likewise pertinent to the issues in this appeal. First, section 8.3.3 of NFPA standard 241 prohibits the "yard storage" of combustible materials within thirty feet of a structure that is under construction. (Appx. p. 921, lines 7-16). Second, section 7.2 of NFPA standard 241 provides that an owner of a building under construction "shall designate a person who shall be responsible for the fire prevention program and who shall insure that it is carried out to completion." Such person designated by the property

owner is known as the "fire prevention program manager" who has the authority to enforce fire protection standards. (Appx. p. 922, lines 15-23).

During the week of March 1-5, 2010, a Pickens work crew was installing copper panels on dormer roof projections along one particular pitch of Bancroft Hall's roof. (Appx. p. 373, lines 13-16; p. 383, lines 20-24; p. 401, lines 9-25). It was the only crew working on Bancroft Hall on Friday, March 5, 2010. (Appx. p. 396, line 6 - p. 397, line 12). The work did not involve the use of torches, soldering guns or any other tools that produced heat or flame. (Appx. at p. 389, lines 10-19; p. 401, lines 11-25). None of the crew members smoked. (Appx. at p. 382, lines 20-21; p. 400, lines 7-9; p. 422, lines 4-9; p. 443, lines 5-10). The crew stored metal pieces on the flat roof where Bancroft and Owens Halls adjoined to keep them from blowing or sliding off the pitched roof while they worked. (Appx. at p. 404, lines 1-6).

The crew stopped working at approximately 4:00 p.m. (Appx. p. 425, lines 24-25; p. 343, lines 13-16). Winthrop asserted that when the Pickens crew left the jobsite, they left shingles, roofing paper and other combustible materials on the flat roof. None of these materials is known to ignite spontaneously; in fact, they are designed to resist fire. (Appx. p. 358, line 22 - p. 359, line 16). To establish its prima facie case, Winthrop relied primarily upon the testimony of Pickens employees. These witnesses testified that packs of shingles and roofing paper had been stored on the flat roof and may have been there when the crew stopped working on March 5, 2010.[2] (*See* Appx. p. 413, line 16 – p. 414, line 3; p. 439, lines 5-25; p. 440, lines 13, 20-22, p. 441, lines 14-16; p. 410, line 19 – p. 411, line 6; p. 441, lines 11-13, p. 441, line 24 – p. 442, line 5). Testimony also indicated that Pickens used the flat roof as a storage or staging area with

[2] Unquestionably, packs of shingles were left along the ridgeline of the pitched roof on Bancroft Hall, as these were depicted in photographs taken before and after the fire, but these shingle packs did not burn in the fire. (*See* Appx. p. 402, lines 1-6; p. 406, lines 5-16).

Winthrop's knowledge. (Appx. p. 390, lines 8-10; p. 459, line 20 – p. 461, line 14). Evidence presented to the jury revealed that Winthrop had not designated anyone to serve as its "fire prevention program superintendent" for the project, as required by section 7.2 of NFPA standard 241. (Appx. p. 590, line 4 - p. 591, line 23; p. 644, line 22 - p. 646, line 11).

Shortly before 3:00 p.m. on March 6, 2010, almost twenty-four hours after the Pickens crew had left the jobsite, a Winthrop student noticed smoke emanating from Owens Hall and dialed 911. (Appx. p. 359, line 17 – p. 360, line 1; p. 532, line 25 – p. 534, line 11). The fire department arrived within 15 minutes, but the fire was burning within the insulation layer of the roofing system on Owens Hall and was difficult to extinguish. (Appx. p. 359, line 17 - p. 362, line 1; p. 332, line 23 - p. 334, line 3). The fire burned until approximately 6:45 p.m. on March 7, 2010. No one has ever identified a source of ignition. (Appx. p. 344, line 15 - p. 347, line 14; p. 349, lines 21-23; p. 807, lines 22-24).

ARGUMENTS

I. GRANTING CERTIORARI IN THIS CASE IS SUPPORTED BY SPECIAL AND IMPORTANT REASONS UNDER RULE 242(b), SCACR.

This case arises from a fire that occurred on Winthrop's campus in March 2010. This Court should grant certiorari pursuant to Rule 242(b)(1), SCACR, because this case involves novel questions of law, including whether Winthrop was capable of recovering despite its inability to prove the source of the fire's ignition. In addition, this case presents a novel issue of applying comparative negligence principles in a breach of contract action.

II. THE TRIAL COURT SHOULD HAVE STRICKEN JUROR 25 FROM THE VENIRE.

The court of appeals affirmed the denial of Pickens' motion for a new trial based on the trial 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) ("Under 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); S.C. Code Ann. § 14-7-1020 (Supp. 2015). 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).

A. The issue was preserved.

The court of appeals held Pickens failed to preserve its objection to Juror 25 on the basis she was a "student researcher" at the time of the trial 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, arguing:

> [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.

(Appx. p. 198, 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 of appeals drew 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 difference. Pickens made a timely and specific objection to the trial court regarding Juror 25 based on her current connection with Winthrop, her discussions with other students and professors about the cause of the fire, and her personal knowledge of the fire through information gathered from news reporting and conversations on campus. (*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 the court of appeals' contrary conclusion is in error.

B. Juror 25 could not be indifferent.

Even if Pickens had not preserved its objection to Juror 25 on the ground that she 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." (Appx. p. 170, 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." (Appx. at 171, lines 11-12). Pickens preserved these objections in the record. (Appx. p. 198, 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, the trial court should have stricken Juror 25 for cause.

This situation is akin to a juror having a familial relationship with one of the parties. Generally, jurors within the sixth degree of consanguinity are to be excused under the practice long followed in this state. *See Smith v. Quattlebaum*, 223 S.C. 384, 76 S.E.2d 154 (1953). Juror 25's numerous connections to Winthrop and to the facts of the case made her far more closely linked than second cousins or first cousins twice removed.[3]

C. This case is distinguishable from those upon which the court of appeals relied.

The court of appeals cited *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), to justify its conclusion that the trial court did not abuse its discretion in refusing to strike Juror 25 for cause. In *Abofreka*, this 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

[3] Juror 25's connections to Winthrop and to the facts are arguably closer than those of a stockholder of a publicly traded corporation or of a member of an electric cooperative that is party to a case, both of which have been deemed to be incompetent to serve on a jury as a matter of law. *See Southern Bell Tel. & Tel. Co. v. Shepard*, 262 S.C. 217, 204 S.E.2d 11 (1974) and *Alston v. Black River Electric Co-op.*, 345 S.C. 323, 548 S.E.2d 858 (2001).

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.

Juror 25's connection to the circumstances giving rise to this case is much closer than the relationships exhibited by jurors in *Abofreka* and *Hollins*. Juror 25 had not only a current relationship with Winthrop, but she also had knowledge of the facts of the case because of her former status as a Winthrop student. Juror 25 testified she watched stories about the fire on the news, discussed the fire with friends who were students affected by the fire, and overheard "some of the professors talk[] about" the fire and damages caused to Winthrop. (Appx. p. 190, lines 10-15).

A court's erroneous failure to strike a juror for cause is grounds for a new trial. *State v. Sanders*, 103 S.C. 216, 88 S.E. 10, 12 (1916). In *Cordes v. Associates of Internal Medicine*, 87 A.3d 829 (Pa. Super. Ct. 2014), the Pennsylvania Superior Court reversed a trial court for failing to strike two jurors for cause, holding, in part, "the trial court failed to pay due regard to the precept that the mere appearance of partiality on the part of a juror may suffice to undermine confidence in the outcome of the trial. *Id.* at 842 (citations omitted). In *Cordes*, two challenged jurors had family members who were treated by the defendant physician. *Id.* at 841. The trial court, like the one here, found these jurors' connections to the defendant-physician did not warrant striking either for cause, concluding there was no real or close familial or situational relationship and relied upon each juror's assurance that he or she could impartially assess the defendant's credibility and liability. *Id.* at 842. The lower court's justification in *Cordes* was deemed insufficient and the trial court's conclusion here should be viewed in the same light.

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, a critical issue in the case. (*See* Appx. p. 1170, lines 16-17, 20-22; p. 175, line 6; p. 190, lines 10-15). Because the trial court erroneously denied Pickens' motion, the court of appeals should have granted Pickens a new trial.

D. The court of appeals' prejudice analysis leaves Pickens without a remedy.

The court of appeals held Pickens did not suffer any prejudice because "Juror 25 was not empaneled." *See* Opinion at § I (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 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 *Southern Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 162, 332 S.E.2d 102, 105 (Ct. App. 1985))). By doing so, the court left Pickens without a remedy.

The trial court erroneously qualified Juror 25, which deprived Pickens 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 strikes. 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, which necessarily prejudiced Pickens by precluding it from using a strike on any other candidate in the jury venire.

The prejudice analysis cannot turn upon whether the juror in question was empaneled, as the court of appeals held. If the analysis is as the court suggested, 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.

The court of appeals' 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 the court of appeals' analysis, the litigant gives up its ability to seek appellate review of the trial court's error. In concluding Pickens was not prejudiced, the court of appeals left Pickens without a remedy. Certiorari should be granted to rectify this unjust result.

III. WINTHROP FAILED TO PRESENT ANY EVIDENCE OF CAUSATION.

Although both of Winthrop's legal theories require proof of proximate causation, it could not prove that Pickens caused the fire to ignite. (*See* Appx. p. 841, lines 3-7; p. 879, lines 3-7; p. 881, lines 8-16, p. 883, lines 18-25). Winthrop therefore necessarily relied on a "spread theory" of liability to hold Pickens responsible. (*Id.*). The court of appeals adopted Winthrop's theory without any support in South Carolina case precedent, holding:

> Viewing the evidence[4] in the light most favorable to Winthrop, [the evidence] warrant[ed] a reasonable inference that the presence of improperly placed

[4] The court of appeals cited testimony of Dan Arnold, Winthrop's expert witness, who testified 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." (Appx. at 808, lines 3, 7-8.) Mr. Arnold testified, "[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

> 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 § II (emphasis added). The court of appeals erred in denying Pickens' motion for directed verdict on the basis that Winthrop failed to adduce any evidence of causation.

The court of appeals was forced to engage in a logical finesse. In doing so, it absolved Winthrop of its burden to prove causation by assuming the ignition of the fire. It erroneously focused upon Pickens' negligence in increasing the fuel load for a fire that was already underway. This analysis ignores well-settled notions of proximate causation and its twin components of cause-in-fact and foreseeability.

A. Proximate cause as a requisite element of proof

Proof of proximate cause in any civil action is crucial to a plaintiff's ability to recover.

> An act or an omission is not regarded as a cause of an event if the particular event would have occurred without it. A failure to fence a hole in the ice plays no part in causing the death of runaway horses which could not have been halted if the fence had been there, though of course making the hole did play a part. A failure to have a lifeboat ready is not a cause of the death of a person who sinks without trace immediately upon falling into the ocean, though taking the person out to sea was a cause. The failure to install a proper fire escape on a hotel is no cause of the death of a man suffocated in bed by smoke. The omission of crossing signals by an approaching train is of no significance when an automobile driver runs into the sixty-eighth car. The presence of a railroad embankment may be no cause of the inundation of the plaintiff's land by a cloudburst which would have flooded it in any case.

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 265-66 (5th ed. 1984).

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.

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those combustibles the damage that I saw and the spread of the fire to the roof wouldn't have occurred." (Appx. at p. 808, lines 9-13).

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.*

Foreseeability is determined from the defendant's perspective at the time of the negligent act allegedly causing the plaintiff's damages, not after the damages have occurred. *Mellen v. Lane*, 377 S.C. 261, 280, 659 S.E.2d 236, 246 (Ct. App. 2008); *Shepard v. S.C. Dept. of Corr.*, 299 S.C. 370, 375, 385 S.E.2d 35, 38 (Ct. App. 1989). A defendant cannot be held liable for unpredictable or unexpected consequences. *Young v. Tide Craft, Inc.*, 270 S.C. 453, 463, 242 S.E.2d 671, 676 (1978); *Stone v. Bethea*, 251 S.C. 157, 161-162, 161 S.E.2d 171, 173 (1968). In determining whether a consequence is natural and probable, the defendant's conduct must be viewed in the light of the attendant circumstances. *Young*, 270 S.C. at 463, 242 S.E.2d at 676.

B. Causation in fire cases

Courts have struggled with the fundamental tenets of causation for decades, particularly in fire cases. In some states, where the evidence fails to yield an articulable causal link between a negligent act and resulting damages, courts have adopted *res ipsa loquitur*. South Carolina has not done so,[5] but the court of appeals' opinion here has made the "spread theory" of liability—a first cousin to *res ipsa loquitur*, in which a plaintiff is not required to prove that a fire's ignition was caused by the defendant—the de facto law of this state.

[5] *See, e.g., Crider v. Infinger Trans. Co.*, 248 S.C. 10, 148 S.E.2d 732 (1966); *Graham v. Town of Latta*, 417 S.C. 164, 769 S.E.2d 71 (Ct. App. 2016).

Proximate cause is a central issue in most fire cases because of the vagaries of fire's behavior. Courts have wrestled with the extent to which a particular defendant might be liable to another in cases of damage caused by fire for well over a hundred years. *See, e.g., Gregory v. Layton*, 36 S.C. 93, 15 S.E. 352 (1892) (defendant not liable for fire escaping from defendant's land onto plaintiff's land without proof of negligence); *Davis v. Charleston & W.C. Ry. Co.*, 72 S.C. 112, 51 S.E.552 (1905) (evidence that boiler was old, rusted and worn out sufficient to establish a prima facie case of negligence in action brought by neighboring owner whose property was damaged by debris from explosion); *Savannah Fire & Marine Ins. Co. v. Pelzer Mfg. Co.*, 60 F. 39 (D.S.C. 1894) (negligence of railroad for fire that began immediately after locomotive passed area of origin not presumed); *Hutto v. Seaboard Air Line Ry.*, 81 S.C. 567, 62 S.E. 835 (1908) (proof of causal connection between operation of railroad and cause of fire enough to raise rebuttable presumption of negligence by railroad)[6]; *Cf. Ryan v. New York Central Railroad Co.*, 35 N.Y. 210 (N.Y. Ct. App. 1866) (damages to neighboring house caused by negligent burning of building deemed too remote for liability to attach); *Hoad v. Lake Shore & M.S.R. Co.*, 85 Pa. 293 (1877) (destruction of property from burning oil carried by creek under railroad collision deemed unforeseeable).

C. Pickens did not cause this fire.

Pickens' alleged negligent act of leaving roofing materials on the flat roof on March 5, 2010 was neither the cause-in-fact nor the legal cause of Winthrop's damages as a matter of law. Because there is no evidence as to how or why the fire occurred, there is no evidence that the fire

[6] Apparently, the courts' struggle with the issue of causation in the cases of fires started by locomotives provoked the General Assembly to pass a statute holding railroads strictly liable for all fire damages they cause. *See* S.C. Code Ann. § 58-17-3920 (1976) ("Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines . . .". Notions of proximate cause are immaterial to claims under this statute. *Fraser-Patterson Lumber Co. v. Southern Ry. Co.*, 79 F. Supp. 424 (W.D.S.C. 1948).

would not have occurred in the absence of Pickens' conduct. Similarly, it was not foreseeable to Pickens that either (i) a fire would break out on the flat roof nearly 24 hours after it left the premises or (ii) if a fire were to ignite somewhere on Owens or Bancroft Halls, it was more likely to commence on the flat roof adjoining the two buildings. The foreseeability component of proximate cause is a particular infirmity in Winthrop's case, given the temporal attenuation between the Pickens' acts and the start of the fire.

Regardless of what label its theory bears, Winthrop undisputedly sought to hold Pickens liable for making the fire *worse*. There is not a shred of evidence connecting 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), the court of appeals 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 this Court's decision in *McQuillen v. Dobbs*, 262 S.C. 386, 204 S.E.2d 732 (1974), which the court of appeals used to support its Opinion, are distinguishable. In *McQuillen*, a fire that consumed a mobile home destroyed the plaintiffs' personal belongings. *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 that plaintiffs presented 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 "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 "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, this 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.

Based on this 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. This 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.* Rather, the evidence revealed that some materials that are capable of being burned may have been left on the flat roof (which was likewise capable of being burned), purportedly by Pickens' employees, and a fire was discovered by a student almost 24 hours after Pickens' employees left the property.

Unlike *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 is that Pickens' alleged conduct—leaving flammable materials on the flat roof—made the fire worse than it would have otherwise been in the absence of any negligence. Not a single witness was able to testify the fire would not have occurred without Pickens' involvement. 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 there. (*See* Appx. p. 402, lines 1-15; p. 409, lines 13-24; p. 437, lines 12-24). These materials carried the highest flame resistance rating available (Appx. p. 693, line 17 – p. 696, 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. (Appx. p. 807, line 25 - p. 808, 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. *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 accumulation of dust known to be highly flammable in airspace within building to be sufficient evidence of foreseeability); *Chicago, M., St. P. & P.R. Co. v. Poarch*, 292 F.2d 449, 451 (9th Cir. 1961) ("once it is established that the owner of a building has negligently allowed it to become a fire hazard and a fire does start, the actual cause

... is immaterial."). The foreseeability component of Winthrop's theory of recovery was not addressed by the court of appeals, even as it apparently embraced the theory's validity.

Because Winthrop failed to submit evidence as to the fire's ignition source, it necessarily failed to prove proximate causation and Pickens was entitled to a directed verdict.

IV. PROXIMATE CAUSE INCLUDES MORE THAN CAUSE-IN-FACT.

For the reasons outlined above, causation, or lack thereof, was essential to the jury's decision in this case.[7] 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 a trial court is allowed 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, (Appx. p. 939, line 21 – p. 940, line 7), the heart of the legal dispute between the parties. In

[7] (*See* Appx. p. 298, lines 17-24 (Winthrop's counsel stated during his opening statement that causation "is very important"); p. 302, lines 5-12 (further stating that "fuel for the fire" was "the linchpin of [Winthrop's] proof"). *See also* Appx. p. 307, 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." (Appx. p. 888, lines 14-21; 898, line 20 – p. 899, line 2; *see also* p. 898, line 20 – p. 899, line 2).

recharging the jury, the trial court failed to include within its definition of proximate cause the requirement of legal causation, or foreseeability, (Appx. p. 941, line 14 – p. 942, line 4), which this Court has made clear is "the touchstone" of the 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* Appx. p. 307, lines 17-23; p. 888, lines 14-22; p 898, line 20 - p. 899, line 2). The prejudice to Pickens was heightened by the jury's focus on causation throughout the four-day trial on liability.

V. BIFURCATION OF LIABILITY AND DAMAGES WAS NOT APPROPRIATE.

Based on Winthrop's theory that Pickens' conduct worsened the effects of the fire, the trial court should never have bifurcated the liability and damages phases of trial. (*See* Appx. p. 850, lines 6-8; p. 851, line 25 – p. 851, line 2; p. 791, lines 4-5). Because Winthrop relied on a fire "spread" or "aggravation" theory, it should have been required to present evidence of causation to connect Pickens' alleged liability to the purported "worsened" damages. (Appx. at p. 344, lines 15-18; p. 349, lines 12-23; p. 807, lines 22-24[8]). The trial court's separation of these two issues, through bifurcation, prejudiced Pickens and should have resulted in a new trial.

[8] The trial court recognized Winthrop had been unable to present evidence as to the cause or ignition source for the fire. (Appx. p. 542, line 25 – p.543, line 4; p. 739, lines 2-10. *Id.* at p. 1024, 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.")).

The court of appeals 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. *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. *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 focused upon judicial economy and convenience, such salutary aims do not override 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* Appx. p. 808, 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' allegedly improper storage of roofing materials on the flat roof. These issues were not separate and distinct and should have been tried together. Bifurcation foreclosed the issue of causation before the jury was ever presented with Winthrop's damages. This decision was erroneous and prejudiced Pickens.

VI. WITHOUT PROOF OF HOW THE FIRE BEGAN, WINTHROP HAD TO DIFFERENTIATE BETWEEN DAMAGES PICKENS CAUSED AND DAMAGES THAT WOULD HAVE OCCURRED ANYWAY. IT DID NOT.

Winthrop failed to provide evidence regarding the extent to which its damages were made worse by Pickens' conduct. As stated above, Winthrop's theory 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 alleged exacerbated damages that resulted from Pickens' conduct. Winthrop failed to provide the jury with the evidence it needed to make an appropriate determination with reasonable certainty or accuracy as to what damages Pickens caused, 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* Appx. p. 349, lines 21-23; p. 807, lines 22-24) and Pickens' behavior caused the fire to spread (Appx. p. 814, line 6 – p. 815, line 4; p. 826, 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 repairs to Winthrop's property in the absence of Pickens' breach of duty. This hole in the evidentiary record renders the verdict fatally flawed, as the jury 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.

VII. WINTHROP SHOULD NOT BE ALLOWED TO ESCAPE FROM ITS OWN NEGLIGENCE.

Winthrop asserted breach of contract and negligence claims. 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 statute or regulation. Winthrop acknowledged as much during its closing argument, stating: "There is no dispute that the contract required Pickens to follow code." (Appx. p. 879, lines 22-24; p. 880, lines 5-6 (stating the contract required Pickens to "comply with all applicable laws.")).

Pickens asserted the affirmative defense of comparative negligence. (*See* Appx. pp. 117-122). 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 comprised 40% of the total fault for its damages. (Appx. p. 944, line 3 – p. 945, line 5).

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.")).

Because the parties' 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. This unjust result should be reversed by the Court.

CONCLUSION

For the reasons stated above, this Court should grant Pickens' Petition and issue its writ of certiorari in this case.

Respectfully submitted,

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November 21, 2016.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
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S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Appellate Case No. 2014-000821

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

v.

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

PROOF OF SERVICE

I hereby certify I served the Petition for Writ of Certiorari upon the Respondent, by depositing a copy in the United States Mail, postage prepaid, on November 21, 2016, addressed to its attorneys of record, Zachary M. Jett, Esquire and Peter M. Vogt, Esquire, at Butler Weihmuller Katz Craig, LLP, 11605 North Community House Road, Suite 150, Charlotte, North Carolina 28277.

I hereby further certify I served the Petition for Writ of Certiorari upon the Clerk of the South Carolina Court of Appeals by placing a copy in the United States mail, postage prepaid, to The Honorable Jenny Abbott Kitchings, Clerk of the South Carolina Court of Appeals, P.O. Box 11629, Columbia, South Carolina 29211, on November 21, 2016.

Victoria Moody – Paralegal